IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISON, PORT ELIZABETH

CASE NO: 1099/2013
Date heard: 7 May 2015
Date delivered: 28 July 2015

REPORTABLE

In the matter between

GILLYFROST 54 (PTY) LTD **Plaintiff / Respondent**

And

NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY **Defendant / Excipient**

JUDGMENT

GOOSEN, J.

[1] This is an exception to the plaintiff's particulars of claim. I shall, for convenience, refer to the parties as plaintiff and defendant respectively. The plaintiff claims a declaratory order the effect of which is to declare invalid the respondent's levying of property rates on the plaintiff's properties. It does so on the basis that the defendant has acted in breach of provisions of the legislation which is applicable. The defendant's exception is to the effect that the plaintiff's formulated cause of action circumvents procedures and remedies which are provided in the legislation and which are purpose built for the situation.

[2] The plaintiff is a private company which is engaged in farming activities which include fruit and crop production. It is the registered owner of certain immovable property situated in the area of jurisdiction of the defendant. Transfer of ownership of these properties to the plaintiff was effected on 9 May 2007. A dispute has arisen between the plaintiff and the defendant regarding the property rates levied by the defendant in respect of the plaintiff's properties. In consequence of this the plaintiff instituted action in which it claims, in the main, an order declaring that the rates that the defendant has levied and seeks to enforce (for the financial periods 2008/2009 to 2012/2013) are invalid. In the alternative the plaintiff seeks an order directing the defendant to rectify its municipal accounts and to "desist from seeking to enforce the incorrectly levied rates" against the plaintiff.

[3] The particulars of claim allege that the properties have at all relevant times been used exclusively for agricultural purposes. It is alleged that the properties constitute "agricultural land" within the meaning of that term in the Subdivision of Agricultural Land Act 70 of 1990 (hereinafter the "Subdivision Act"), and that the properties are also zoned "Agricultural Zone 1" in terms of the Land Use Planning Ordinance 15 of 1985 (hereinafter "LUPO").

[4] In paragraph 10 of the particulars of claim the following is alleged:

> 10. In light of the formal legal status of the properties; it's zoning; it's official, permitted use and its actual (agricultural) usage, as described above, the properties should at all times relevant to this action have been rated as being "farm properties used for agricultural purposes", as envisaged by section 8 (2) (d) of the Municipal Property Rates Act, being "agricultural land", zoned as "Agricultural Zone 1" and used as such in accordance with its permitted usage.

[5] The central allegations relevant to the plaintiff's claims are set out in paragraph 12 of the particulars of claim. That paragraph reads as follows:

> 12.1 During the periods as specified in paragraph 13 below, the Defendant levied property rates, which were invalid, alternatively incorrect, on one or more of the following grounds:

a) Rates were premised upon an erroneous and invalid ratings factor, which the Plaintiff at this stage assumes was ascribed to a bona fide human error committed by municipal officials;
b) Alternatively to (a): such rates were premised on an erroneous categorisation of the nature of the permitted use of the property by municipal officials;
c) Further alternatively to (a) and (b): such rates were premised upon the erroneous categorisation of the actual use of the property by external valuers appointed by the Defendant, or by municipal employees;
d) Such rates were premised upon purported valuations which had not been arrived at in accordance with generally recognised valuation practices, methods and standards and the provisions of the Act, as required by section 45 (1) of the Municipal Property Rates Act;
e) Such rates exceeded the permissible rate ratios under section 19 (1) (b) of the Municipal Property Rates Act read with the regulations which determine rate ratios (inter-alia, as from 27 March 2009, the regulations published in notice number 363 of 27 March 2009, which appeared in Government Gazette number 32061);
f) Such rates were imposed, without the requirements of section 49 – particularly section 49 (1) (c) of the Municipal Property Rates Act – having been complied with in the manner and within the time limits as prescribed by the said section.

12.2 Instead of rating all the properties concerned as constituting agricultural land which had been zoned as such by the Defendant itself, namely as "Agricultural Zone 1" properties, or as being "farm properties used for agricultural purposes" (as envisaged by section 8(2)(d)(i) of the Municipal Property Rates Act), the employees of the Defendant, acting in the course and scope of the employment of such, applied an incorrect factor, or rate ratio, namely the factor or ratio applicable to vacant land.

[6] The period referred to in paragraph 12.1 of the particulars of claim covers the financial year 2008/2009 through to 2012/2013. The particulars further contain a tender of payment of "the correct rates actually due" by the plaintiff.

[7] The defendant filed an exception to the particulars of claim on several grounds. It is alleged that the particulars fail to aver facts necessary to sustain a cause of action and that the particulars of claim are vague and embarrassing. In respect of the first basis of exception the defendant avers:

(a) That the plaintiff does not allege that the legislative act of the defendant's council in adopting its rates policy was contrary to law, nor set out facts to support such contention;
(b) That each of the grounds set out in paragraph 12 of the particulars is an act or omission of officials of the defendant which the plaintiff has not sought to review and set aside;
(c) That its challenge to the acts or omissions in paragraph 12 of the particulars of claim is collateral to the main relief sought;
(d) That it has not averred facts to support the review and setting aside of the said acts or omissions;
(e) that the levying of the rates in question occurred in excess of 180 days prior to the institution of action and that the plaintiff has not averred facts to support a contention that the period has been extended or that it is in the interests of justice to extend the period; and
(f) The plaintiff has not averred that it has exhausted internal remedies available to correct the acts or omissions set out in paragraph 12 of the particulars of claim.

[8] In respect of the second basis of the exception, namely that the particulars of claim are vague and embarrassing, it is alleged that the several grounds set out in paragraph 12 are ambiguous and that no sensible meaning may be attached thereto. It is also alleged that the allegations are capable of more than one meaning and that they constitute averments to which the defendant is unable to plead other than on the basis of a bare and bald denial.

[9] The purpose of an exception is either to dispose of the case or a portion of it in an expeditious and inexpensive manner or to protect a litigant against embarrassment which causes serious prejudice (Herbstein & van Winsen The Civil Practice of the High Courts of South Africa 5th ed. Vol. 1, p 632; Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553F). In the case of an

exception to particulars of claim or declaration on the basis that it does not disclose a cause of action, the exception serves to avoid the leading of unnecessary evidence (Barclays National Bank *supra* at 553G-H). The factual averments are, for purposes of determining the exception, accepted as correct unless they are so improbable that they cannot be accepted (Voget and others v Kleynhans 2003 (2) SA 148 (C) at 151H).

[10] In relation to an exception that the pleading does not disclose facts which establish a cause of action, the excipient must persuade the court that upon every reasonable interpretation of the averments, no cause of action is rather than may be established thereby (Francis v Sharp and others 2004 (3) SA 230 (C) at 237G; Vermeulen v Goose Valley Investments (Pty) Ltd 2001 (3) SA 986 (SCA) at 997B). In relation to an exception on the ground that a pleading is vague and embarrassing it is necessary to establish firstly that the averments are vague and secondly, that the vagueness causes embarrassment which results in prejudice to the excipient (Trope v South African Reserve Bank 1992 (3) SA 208 (T); Jowell v Bramwell-Jones 1998 (1) SA 836 (W) at 899ff).

[11] The essential argument advanced by the defendant is that the grounds upon which the plaintiff founds its claim for invalidity of the rates levied constitute administrative action taken by officials of the defendant. Such administrative action remains valid until it is set aside by a court on review. Since the administrative acts have not been set aside no cause of action is established for the relief sought by the plaintiff. At best, so it is contended, the plaintiff is relying upon a “collateral challenge” to the validity of these acts in circumstances in which it is not permitted to do so.

[12] The defendant countered this argument by asserting that the setting of rates and the determination of categories of rateable property constitutes legislative action on the part of the defendant. Plaintiff argued that its particulars of claim when

read as whole found a cause of action based on the defendant's breach of the principle of legality justifying a declaration that the rates levied by it are invalid.

[13] It was not in dispute between the parties that the setting of rates on property and the determination of categories of property to which rates apply is a power exercised by a municipality that derives directly from the Constitution (s 229 of the Constitution; cf. also City of Cape Town v Robertson 2005 (2) SA 323 (CC); Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC)). The exercise of that power, namely the imposition of rates and levies, does not constitute administrative action (see Fedsure *supra* at par 45; Kungwini Local Municipality v Silver Lakes Home Owners Association 2008 (6) SA 187 (SCA); City of Tshwane v Marius Blom and G C Germishuisen 2014 (1) SA 341 (SCA)).

[14] However, what was at issue in the argument before this court was whether the conduct of the defendant's employees, upon which the plaintiff relies to found its claim for invalidity, fell within the ambit of the exercise of legislative authority by the defendant's council or whether it constituted administrative action. If, as the excipient argued, those acts constituted administrative action, then absent an averment that such action has been set aside, the plaintiff would have failed to allege facts which establish a cause of action for the main relief sought.

[15] In order to decide the principal issues raised in the exception it is necessary to set out in some detail the Constitutional and legislative framework applicable to the levying of property rates by a municipality.

[16] Section 151(2) of the Constitution vests the executive and legislative authority of a municipality in its municipal council. Subsection (3) provides that a municipality has the right to govern the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution. These

provisions reflect the autonomous nature of the local sphere of government (cf. Fedsure and Robertson (*supra*)).

[17] Section 229 of the Constitution confers upon a municipality the power to impose rates on property and surcharges or fees for services provided by or on behalf of the municipality. This power is regulated by national legislation, more particularly the Local Government: Municipal Property Rates Act 6 of 2004 (referred to hereinafter as "the Rates Act"). Section 2 of the Rates Act provides as follows:

> (1) A metropolitan or local municipality may levy a rate on property in its area.
> (2) …
> (3) A municipality must exercise its power to levy a rate on property subject to –
> (a) Section 229 and any other applicable provisions of the Constitution;
> (b) The provisions of this Act; and
> (c) The rates policy it must adopt in terms of section 3.

[18] A "rate" is defined to mean a rate on property as envisaged by s 229(1) (a) of the Constitution. Section 11 of the Rates Act stipulates that :

> (1) A rate levied by a municipality on property must be an amount in the Rand –
> (a) On the market value of the property;
> (b) ….

[19] As indicated s 3 of the Rates Act obliges a municipality to adopt a rates policy. Sub-section (2) states that:

> (2) A rates policy adopted in terms of subsection (1) takes effect on the effective date of the first valuation roll prepared by the municipality in terms of this Act, and must accompany the municipality's budget for the financial year concerned when the budget is tabled in the municipal council in terms of section 16 (2) of the Municipal Finance Management Act.

[20] The content of the rates policy is regulated by ss (3). It is not necessary for present purposes to set out all of the requirements stipulated in the subsection. It suffices to note that a rates policy may make provision for determining criteria to be applied if the municipality levies different rates for different categories of property. It also provides for the determination of different categories of property or the setting of criteria for such determination.

[21] Part 2 of Chapter 2 of the Rates Act deals with the process by which rates are levied. In terms of s 7 a municipality is obliged, subject to certain exclusions and exemptions provided for in ss (2) (which are not relevant for present purposes), to levy rates on all rateable property in its area. Section 8 makes provision for levying differential rates based upon categories of rateable property determined in accordance with criteria provided for in the municipality's rates policy. Section 11, as already indicated, provides for the calculation of the amount due for rates based, inter alia, on the market value of the property. Sections 12, 13 and 14 are of particular relevance. They provide as follows:

> 12 (1) When levying rates, a municipality must levy the rate for a financial year. A rate lapses at the end of the financial year for which was levied.
>
> (2) The levying of rates must form part of a municipality's annual budget process as set out in Chapter 4 of the Municipal Finance Management Act. A municipality must annually at the time of its budget process review the amount in the Rand of its current rates in line with its annual budget for the next financial year.
>
> (3) A rate levied for a financial year may be increased during the financial year only as provided for in section 28 (6) of the Municipal Finance Management Act.
>
> 13 (1) A rate becomes payable –
>
> (a) as from the start of a financial year; or
>
> (b) if the municipality's annual budget is not approved by the start of the financial year, as from such later date when the municipality's annual budget, including a resolution levying rates, is approved by the provincial executive in terms of section 26 of the Municipal Finance Management Act.
>
> (2) …..
>
> 14 (1) A rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.
>
> (2) A resolution levying rates in a municipality must be promulgated by publishing the resolution in the Provincial Gazette.
>
> (3) Whenever a municipality passes a resolution in terms of subsection (1), the municipal manager must, without delay –
>
> (a) conspicuously display the resolution for a period of at least 30 days –
>
> (i) at the municipality's head and satellite offices and libraries; and

> (ii) if the municipality has an official website or a website available to it as envisaged in section 21B of the Municipal Systems Act, on that website; and
>
> (b) advertise in the media a notice stating that –
>
> (i) a resolution levying a rate on property has been passed by the council; and
>
> (ii) the resolution is available at the municipality's head and satellite offices and libraries for public inspection during office hours and, if the municipality has an official website or a website available to it, that the resolution is also available on that website.

[22] A reading of these provisions indicates that a rate is levied by the adoption, by a municipal council, of a resolution imposing a rate in the Rand on the market value of property situated within its area of jurisdiction. In Fedsure (*supra* at paragraph [45]) the Constitutional Court said, in relation to the exercise of this power, that:

> It does not seem to us that such action of the municipal legislatures, in resolving to set the rates, to levy the contribution and to pay a subsidy out of public funds can be classed as administrative action...

[23] Central to the recovery of the rates levied by the municipality is the process of preparing a valuation roll.

[24] Chapter 4 of the Rates Act deals with the valuation of rateable property within the area of a municipality. Section 30(1) imposes upon a municipality intending to levy a rate on rateable property the obligation to cause a general valuation to be made of all properties within the area of the municipality and to prepare a valuation roll. Section 31 requires that the municipality determines a date of valuation and, furthermore, that the general valuation must reflect the market value of the properties in accordance with market conditions as applied as at the date of valuation.

[25] The procedure by which the general valuation is undertaken and the valuation roll prepared is governed by the provisions of Chapters 4, 5, 6 and 7 of the Rates Act. It is not necessary to set out the relevant provisions in detail. It suffices to

state that the preparation of a valuation roll involves the appointment by the municipality of a municipal valuer (either a qualified employee of the municipality or a valuer in private practice) whose task it is to value all property situated in the municipal area; prepare a valuation roll; consider objections to such valuation roll and to attend meetings of the Valuation Appeal Board. In preparing the valuation roll the municipal valuer determines the category into which property is to be placed as provided by the rates policy adopted by the municipality (s 48(2)(b) of the Rates Act).

[26] Provision is made for publication of the valuation roll; for objections to be considered by persons affected thereby and, where appropriate, for an appeal against the decision of the municipal valuer to the Valuation Appeals Board.

[27] Section 49 deals with public notice of the valuation roll prepared by the municipal valuer. It requires the valuer to submit to the municipal manager a certified valuation roll. The municipal manager is obliged, within 21 days of receipt of the roll, to publish a notice in the Provincial Gazette stating that the roll is open for inspection for a specified period and that every person who wishes to lodge an objection thereto may do so within the stated period. The municipal manager is also required to serve by ordinary mail on the owner of every property, a copy of the notice and an extract of the roll pertaining to that owner. The section also requires publication on the official website of the municipality and dissemination of the notice to the local community.

[28] Section 50(1) provides, inter alia, that any person may lodge an objection with the municipal manager in respect of any matter reflected in, or omitted from, the roll. The objection must be in relation to a specific individual property (s 50(2)).The municipal manager is obliged to submit the objection within 14 days after the end of the period referred to in the notice in terms of s 49 to the municipal valuer and he or she is obliged to consider and decide upon the objection promptly in terms of s 51 of the Rates Act. Further provision is made

for compulsory review of decisions by the municipal valuer; notification of the outcome of objections and a right of appeal to the Valuations Appeal Board.

[29] It is appropriate to note that in terms of s 50(6) the lodging of an objection does not defer liability for payment of rates beyond the date determined for payment. In the light of this provision s 55 deals with adjustments to the valuation made pursuant to the objection process. Where such adjustment affects the amount due for the rates payable on a property the municipal manager is required to calculate the amount actually paid since the effective date and the amount payable in terms of the adjustments made and to recover from or repay to the person liable, the difference in the amounts together with interest (s 55(2) (a) and (b)).

[30] The role of the municipality in the preparation of a valuation roll, having regard to the scheme of the legislation, is limited to the following functions:

30.1. The appointment of a municipal valuer in terms of section 33(1);
30.2. The designation of municipal officials to assist the municipal valuer in terms of s 34;
30.3. The designation of municipal officials to act as data-collectors in terms of s 35; and
30.4. The publication of the valuation roll by the municipal valuer in terms of s 49;
30.5. The receipt of objections and dispatch thereof to the municipal valuer in terms of s 50;
30.6. The implementation of adjustments to the roll as they affect the amount due for payment of rates in terms of s 55.

[31] In City of Johannesburg v Chairman, Valuation Appeal Board and another 2014 (4) SA 10 (SCA) Leach JA (at paragraphs 28 and 29) described the functions of the municipal valuer and the powers of the municipality in relation thereto as follows:

> [28] The object of all this is clear. The legislation envisages that the valuation of rateable property is not only to be done by an impartial person, but that it be seen to be so done. Thus the appointment of an independent valuer, together with the right of objection against such valuer's compilation of the valuation roll and the right of appeal to the valuation appeal board against any decision made by the municipal valuer in respect of an objection, provides a bulwark between the interests of the municipality on the one hand and the owner of the rateable property on the other. It results in the municipality being able to levy rates against the value of the property only where the valuation had been done impartially and after the voice of the taxpayer has been heard.
>
> [29] Now it may be so, as the appellant argued, that s 48 of the Act does not specifically direct the municipal valuer to mention any apportionment of value between different categories of use, but all this would be rendered nugatory if, after the valuation roll has been prepared,, the municipal council could, off its own bat, so to speak, determine into which of the different rateable categories the property is being used and then itself apportion market value. Indeed it would be absurd to interpret that section in such a way. To do so would result not only in a municipality being able to largely turn its back on the specialized expertise in valuation that the Act has so carefully bestowed upon municipal valuers, but municipal councilors, who are specifically disqualified from being municipal valuers by s 39 of the Act, would be the persons vested with the authority to apportion market value. This could never have been intended, and really merely has to be stated to be rejected.

[32] The importance of this lies therein that the functions assigned to municipal valuers in the compilation of a valuation roll cannot be construed as a power falling within the purview of the legislative functions of a municipality. It also points to the fact that the decisions giving rise to the compilation of the valuation roll are not decisions of the municipality or its municipal council.

[33] As to the content of the valuation roll, s 48 (2) sets out the particulars that must be recorded in respect of each property as at the date of the valuation. These include a description of the property; the category determined in terms of s 8 in which the property falls; the physical address; the extent of the property; the market value of the property; the name of the owner and any other prescribed details.

[34] With this statutory framework in mind I turn now to consider the basis upon which the defendant excepts to the particulars of claim.

[35] The essential argument raised by the defendant is that the grounds relied upon to claim invalidity of the rates imposed upon the plaintiff's properties, constitute administrative action rather than legislative action. These grounds relate to the process by which the applicable rate was fixed, rather than the adoption or imposition of rates. On this basis it is submitted that the plaintiff has failed to plead a cause of action in the absence of alleging grounds upon which the relevant administrative action may be reviewed and set aside in terms of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter "the PAJA"). The plaintiff counters this by arguing that the conduct complained of does not amount to administrative action and that it constitutes a legislative act to which the provisions of the PAJA do not apply. The plaintiff also argues that it is entitled, on the basis of the principle of legality, to found its cause of action upon the assertion that the defendant has failed, generally, to comply with the procedural and substantive requirements for validly imposing rates on the plaintiff's properties.

[36] In argument it was submitted on behalf of the plaintiff that its particulars of claim specifically allege that the plaintiff's properties were wrongly categorized as vacant land rather than as agricultural land. The determination of the category in which the properties fall, it was submitted, is a function of the municipality in terms of s 8 of the Rates Act. Such determination, it was submitted, is not an administrative act presupposing compliance with the *audi alteram partem* principle or with the requirements of substantive or procedural fairness. Reliance was placed on the judgment in City of Tshwane v Marius Blom & G C Germishuizen Inc and another 2014 (1) SA 330 (SCA) at paragraph [19] where Zondo AJA said:

> I reject the respondent's contention that the appellant breached the *audi alteram partem* principle when it determined that the property's use falls under a 'non-

> permitted use' category, without any prior reference to the respondents. There was no obligation on the appellant to do so other than through the process described below. The municipality's power to impose taxes is an original power which stems from the Constitution in terms of s 229(1) (a). It is a legislative act. As such, it is not an administrative action subject to administrative law. That being the case, the setting of rates and determination of categories of rateable property under s 8 of the Rates Act cannot be challenged, as counsel for the respondents seemed to suggest in his argument, simply on the ground that it is unfair.
> (Footnotes omitted, emphasis added)

[37] Based on this the plaintiff's counsel submitted that not only can the setting of rates not be challenged as administrative action, but the incorrect categorization of the nature of the use of the property or of the actual use of the property is not reviewable under PAJA. If it is to be challenged, so the argument went, it must be challenged as being a legislative act evaluated against the principle of legality. On this basis it was submitted that the defendant's contention that the particulars of claim do not disclose a cause of action is without merit.

[38] The argument however is founded upon a misconception of the legislative framework in terms of which property rates are levied and upon a misreading of City of Tshwane.

[39] The issue which fell to be decided in that matter was whether s 8 of the Rates Act was to be interpreted as precluding a municipality from determining categories of rateable property in its rates policy other than or in addition to those enumerated in s 8(2). The court came to the conclusion that it is competent for a municipality to add to the list of categories in s 8 (2) by creating categories – in that case that of "non-permitted use" – to suit its policy requirements or objectives (City of Tshwane at par [23]).

[40] The rationale for so finding is set out in paragraph [18] where the court said:

> Section 8 (2) lists a number of categories of rateable property that may attract different rates. These categories are optional. The municipality may adopt all of them, drop some or include new categories, depending on the nature of the

> objectives its rates policy seeks to achieve. The municipality has a choice. Rates policies entail, by definition, policy choices which lie at the core of municipal autonomy, and as long as the rates policy treats ratepayers equitably and is consistent with the provisions of the Constitution and the Rates Act, there can be no basis for questioning the choices it makes with regard to properties that may be differentially rated with respect to different categories of property.

[41] The passage upon which the plaintiff placed reliance does not, on close analysis, support the argument advanced. Whilst it is undoubtedly so that the adoption of a rates policy, in which categories of rateable property are determined, forms an integral component of the legislative act of levying rates, the categorization of a specific property does not. As the underlined portion in paragraph 19 of the judgment (quoted above) makes clear, the categorization of a specific property occurs once the rates policy is adopted. The process by which that occurs is dealt with in paragraph [21] where Zondo AJA said:

> Once the determination of different categories of rateable property in terms of s 8 is completed the valuation process begins. The valuation is done by a municipal valuer who is designated by the municipality in terms of s 33 of the Rates Act. The valuer must, inter alia, value all properties and prepare a valuation roll of all the properties in the municipality. After the compilation of the valuation roll, it is open for objections by the public and the municipality. A property owner may then object, within a stipulated period, to the valuation or categorization. If his or her objection is not dealt with to his or her satisfaction he or she may then appeal to a valuation appeal board whose decision is final and binding on the municipality. (Footnotes omitted; Emphasis added)

[42] And further at paragraph [22]:

> The respondents should have used the legal mechanisms provided for in the Act if they wished to challenge the correctness of the property categorization and rate determined.

[43] It is clear from these passages that a distinction is drawn between the legislative process of levying a rate and the separate process by which the amount due by the taxpayer is determined. This latter process involves, as the legislative framework clearly provides, a valuation process conducted by an independent valuer in which the municipality *qua* municipality plays only a specified and limited role. In City of Johannesburg (supra at para [28] and [29]) it was found

that it is the municipal valuer's function and not that of the municipality to determine in which rateable property category specific property falls and to record such categorization in the valuation roll. As noted by Leach JA the entire legislative scheme of providing for an impartial process would be rendered nugatory if the municipality could "off its own bat" allocate a specific property to a particular category of rateable property.

[44] Reference was also made, in argument, to Kungwini Local Municipality v Silver Lakes Home Owners Association 2008 (6) SA 187 (SCA) at paragraph [14] where the court said:

> In a post-constitutional South Africa, the power of a municipality to impose a rate on property is derived from the Constitution itself: the Constitutional Court has described it as an 'original power' and has held that the exercise of this original constitutional power constitutes a legislative – rather than an administrative – act. The principle of legality, an incident of the rule of law, dictates that in levying, recovering and increasing property rates, a municipality must follow the procedure prescribed by the applicable national and provincial legislation in this regard.

[45] The passage says no more than that the principle of legality is, as was specifically held in Fedsure (*supra* at par [56]), a fundamental principle which requires that the exercise of public power is only valid where it is lawful, and that local authorities are bound thereby. It does not describe the nature of the power exercised at the various statutorily defined stages of the process.

[46] The plaintiff's cause of action is founded upon four distinct but interrelated allegations, namely (a) that the plaintiff's properties were incorrectly categorized as "vacant land" and accordingly that the incorrect rate was applied to the said properties; (b) that the rate levied on the plaintiff's properties is based on a rate ratio applied in breach of s 19 of the Rates Act; (c) that the properties were not valued in accordance with the provisions of s 45 of the Rates Act and (d) that the rate was 'imposed' without notice to the plaintiff as required by s 49 of the Rates

Act. Based on these allegations it is submitted that the levying of rates upon the plaintiff's properties is in breach of the principle of legality and accordingly invalid.

[47] I have already dealt hereinabove with the role and functions of the municipal valuer and with the nature of the power exercised by the valuer. If, as the authorities suggest, the valuation of property and the allocation of specific property to a category of rateable property determined by the municipality are statutory functions fulfilled by a municipal valuer appointed as impartial public functionary, then grounds (a) and (c) above involve administrative action which is not ascribable to the municipality as defendant in this matter. Grounds (b) and (d) referred to above also involve administrative for the reasons which follow.

[48] There can in my view be no doubt that the power exercised by a municipal valuer in fulfilling his or her functions as defined by the Rates Act is administrative in nature and that the decisions taken by him or her constitute administrative action within the meaning of the term in s 1 of the PAJA.

[49] The principle is well established that even an unlawful administrative act is capable of producing legally valid consequences for as long as that unlawful administrative act has not been set side (see Oudekraal Estates (Pty) Ltd v City of Cape Town and others 2004 (6) SA 222 (SCA) at par [26], [31]; see also MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute 2014 (3) SA 481 (CC) at par [90]).

[50] In this instance the plaintiff seeks a declaratory order that 'the rates which the Defendant has levied and seeks to enforce in respect of the properties in respect of the periods…are invalid". The basis upon which such declaration of invalidity is sought is alleged unlawful administrative action on the part of the municipal valuer.

[51] It should be clear, from the provisions of the Rates Act set out above, that a municipality does not levy a rate on a specified property. It levies a rate in the sense of creating an obligation upon property owners as taxpayers to pay an

amount in the Rand on the market value of property. The calculation of the amount due is therefore dependent upon the rate applied to property which is allocated to a particular category of rateable property. The amount that is due to the municipality is dependent upon administrative decisions taken in relation to the preparation and compilation of a certified valuation roll. In the absence of proceedings to challenge the lawfulness of those underlying administrative decisions the legal consequences which flow from the exercise of the municipality's power to levy a rate on property, namely that the calculated rate becomes payable in terms of s 13(1) as from the start of the financial year, cannot, on that basis be challenged.

[52] It was argued that the plaintiff is not entitled in its action for a declaratory order to raise a "collateral" challenge to the lawfulness or validity of the underlying administrative actions. The plaintiff initially adopted the stance that its challenge was not a collateral challenge to the validity of the underlying administrative actions. This no doubt was founded on its view that all of the elements of the process of levying and recovering rates on property constituted legislative acts. As the argument progressed however counsel for the plaintiff left open the question as to whether its challenge was indeed a "collateral" one.

[53] In Oudekraal Estates (supra at par [32]) the court set out the essential principle applicable to what is termed a 'collateral' challenge (i.e. a challenge to the validity of the administrative act that is raised in proceedings that are not designed directly to impeach the validity of the administrative act – see fn 22 at p.244), as follows:

> But just as some consequences might be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question. When construed against the background of principles underlying the rule of law a statute will generally not be interpreted to mean that a subject is compelled to perform or refrain from performing an act in the absence of a lawful basis for that compulsion. It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an

> unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify its conduct by raising what has come to be known as a 'defensive' or a 'collateral' challenge to the validity of the administrative act.

[54] In this instance, although there is a statutory liability to pay the rates levied in respect of which the parties are in dispute there is nothing to suggest that the defendant has initiated proceedings to compel the plaintiff to make payment of the amounts that it contends is due to it. To the contrary, it appears from the particulars of claim that the defendant has been informed of the disputed amounts in terms of s 102 of the Municipal Systems Act 32 of 2000. That section provides that:

> (1) A municipality may –
> (a) Consolidate any separate accounts of persons liable for payments to the municipality;
> (b) Credit a payment by such person against any account of that person; and
> (c) Implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such person.
> (2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection concerning any specific amount claimed by the municipality from that person.

[55] Having regard to the fact that notice of the disputed amounts has been given to the defendant it appears that the defendant may be precluded from initiating enforcement mechanisms provided for in its debt collection and credit control policies. In any event it appears that no such steps have been initiated.

[56] In the present proceedings the challenge to the validity of the underlying conduct (although not framed as a challenge to underlying administrative conduct) is raised directly and is not, in my view, in substance a defensive or collateral challenge (cf. in this regard Kouga Municipality v Bellingan and others 2012 (2) SA 95 (SCA) where declaratory relief was sought collateral to a criminal charge based on breach of a by-law).

[57] In the light of this different considerations apply in evaluating whether a cause of action has been established. As was noted in Oudekraal (at par [36]) where a challenge to the validity of administrative action is properly raised collaterally, a court has no discretion to allow or disallow the raising of that defence. Where however the challenge is raised directly in judicial review proceedings the court has a discretion whether to grant or to withhold the remedy. The court went on to say that:

> Each remedy thus has its separate application to its appropriate circumstances and they ought not to be seen as interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid.

[58] The importance of this lies in the fact that proceedings for judicial review of administrative action are to be founded on the provisions of PAJA and the cause of action is, generally, to be pleaded in accordance with the provisions of PAJA. In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others 2004 (4) SA 490 (CC) it was stated unequivocally (at par [22]) that a court's power to review administrative action no longer flows directly from the common law but from the Constitution and PAJA. At paragraph [25] the court stated that "(T)he cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past". At paragraph [27] the court pointed to the requirement that litigants who seek to review administrative action must identify clearly the facts upon which the cause of action is based and the legal basis of the cause of action.

[59] In respect of the alleged incorrect categorization of the plaintiff's properties and the alleged failure to comply with generally accepted standards of valuation that has plainly not been done. In any event, in relation to this alleged unlawful conduct the plaintiff has misidentified the functionary in whom the public power vests.

[60] The plaintiff's claim is also based on the allegation that the defendant has failed to comply with s 19 (1) of the Rates Act. The section occurs within that portion of Chapter 2 which deals with limitations on the levying of rates. The relevant portion of the section provides as follows:

> (1) A municipality may not levy –
> (a) ….
> (b) A rate on a category of non-residential properties that exceeds a prescribed ratio to the rate on residential properties determined in terms of section 11 (1) (a): Provided that different ratios may be set in respect of different categories of non-residential properties.
> (c) Rates which unreasonably discriminate between categories of non-residential properties; or
> (d) …
> (2) The ratio referred to in subsection (1) (b) may only be prescribed with the concurrence of the Minister of Finance.

[61] During argument reference was made to Government Notice R363 published on 27 March 2009 which took effect on 1 July 2009, in which rate ratios of residential property to two other categories of property, namely agricultural property and public service infrastructure property, are published. The published ratio is 1:0.25.

[62] Plaintiff's allegation, as set out in the particulars of claim, is that the rates applied exceeded the permissible rate ratios and that the rates applied to the plaintiff's properties were not applied in an evenhanded and consistent basis. The regulation does not deal with a rate ratio in respect of "vacant land" which is the category, provided for in the defendant's rates policy in which the plaintiff's properties were categorized. The factual basis upon which the plaintiff contends for breach of the prescribed ratio is that the properties concerned were not dealt with as agricultural property. This much is apparent from schedules prepared by a valuer appointed by the plaintiff which are annexed to the particulars of claim. The schedules seek to demonstrate the effect of the application of the rate for 'vacant land' as opposed to that for 'agricultural land'. These schedules are put

up to indicate the amount of the plaintiff's alleged liability to the defendant and to support its tender to make such payment.

[63] There are no allegations contained in the particulars of claim which seek to impugn the defendant's entitlement to levy a rate in respect of 'vacant land'. To the contrary, it was common cause that the defendant is entitled, in its rates policy, to make provision for such rate notwithstanding that s 8 (2) contains no reference to such a category. There are also no allegations which suggest that even if the rate for 'vacant land' was correctly applied that rate is impermissible in terms of s 19 (1). It is clear therefore that the plaintiff's reliance upon s 19 (1) is founded upon the allegation that the plaintiff's properties were "incorrectly" categorized and that the "incorrect" rate was applied. This conclusion is borne out by the terms in which the plaintiff pleaded its demand to the defendant (in paragraph 15 of the particulars of claim) where it is stated that the defendant was requested to "rectify the incorrect ratings". It is also borne out by the terms in which the alternative relief is formulated in the particulars of claim. In this regard the plaintiff seeks:-

> An order directing the defendant to rectify its municipal accounts in respect of the properties in order to reflect the correct rates in respect of the properties for the periods concerned and to forthwith desist from seeking to enforce the incorrectly levied rates as against the plaintiff.

[64] It is apposite to point out that in terms of s 55 of the Rates Act the "correction" of amounts due by a taxpayer occurs on the basis of adjustments that are made to the valuation roll. Such adjustments include the categorization of the property (see s 48 (2) (b)) and are made by the municipal valuer (City of Johannesburg (*supra*)). In the light of this the plaintiff's reliance upon s 19 (1) must be evaluated on the same basis as its allegations concerning the incorrect categorization of the properties and the failure to value them in accordance with generally accepted standards.

[65] I turn now to the argument concerning s 49 of the Rates Act. The factual allegation made by the plaintiff, which is to be accepted, is that the plaintiff did not receive any notice “that the properties were to be valued (or rated) on any basis other than as described in [paragraphs] 5, 6, 7 and 10 above”. These paragraphs all refer to the property being zoned as and used for agricultural purposes. It is then pleaded that the rates were imposed “without the requirements of section 49 - particularly section 49 (1) (c) … having been complied with in the manner and within the time limits as prescribed by the said section”.

[66] It was submitted that this alleged non-compliance establishes a breach of the principle of legality and, accordingly, for purposes of the exception, that the plaintiff’s particulars disclose a cause of action.

[67] The plaintiff argued that the process of levying rates is a single composite process and that it does not consist of separate components in which the nature of the power exercised differs. The whole of the process constitutes legislative action and, therefore, the only basis upon which the plaintiff may challenge it is on the basis of asserting the principle of legality as a fundamental element of the rule of law. I disagree. The analysis of the relevant provisions of the legislation and the various authorities which have commented thereon indicate that the legislative act is confined to the conduct of a municipal council in adopting its rates policy and, by resolution, levying or imposing an obligation to pay rates upon owners of property in its area. The necessarily interrelated process of valuation of properties and the compilation of a valuation roll which culminates in a defined liability for payment of rates does not fall within the ambit of legislative conduct. As was noted in Minister of Education v Beauvallon Secondary School [2015] 1All SA 542 (SCA) at par 11,

> Moreover, a procedural requirement affording affected parties a hearing before a decision is taken (the purpose of which is of course to ensure that there has been a full and proper appraisal of the relevant facts and circumstances, including

possible alternatives to the proposed action) is the hallmark of administrative action.

[68] The procedure by which a valuation roll is prepared involves such procedural requirements. Section 49 facilitates this by making provision for effective notice to property owners.

[69] It was argued by the defendant that the plaintiff's particulars do not allege facts to support the setting aside of the alleged unlawful administrative conduct complained of. In particular it was argued that the plaintiff has failed to make averments which would bring its claim within the ambit of the provisions of PAJA. In this regard it was pointed out that the plaintiff's claim relates to rates levied by the defendant from 2007 until the financial year commencing on 1 July 2012. The alleged unlawful conduct therefore falls outside of the period of 180 days within which proceedings for review must be brought in terms of s 7 (1) of PAJA. It was submitted that the plaintiff has not alleged facts to support a contention that it would be in the interests of justice to permit the extension of the period, in terms of s 9 of PAJA.

[70] In any event the "procedural" challenge is inextricably linked to the general contention by the plaintiff that the properties were incorrectly categorized and that the rate levied is incorrect and requires adjustment.

[71] In my view, where a party seeks to impugn administrative conduct it is required to formulate its cause of action in appropriate terms having regard to the principles applicable to judicial review of administrative action and, in particular PAJA which was specifically enacted to give effect to the rights enshrined in s 33 of the Constitution. A party cannot avoid doing so by seeking to rely upon a general assertion that the conduct is void for lack of compliance with the principle of legality since that would in itself violate the principle of legality and the rule of law (see Bato Star (supra) at paras [22] – [25]; Minister of Health v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC) at par [96]; Mazibuko v City of

Johannesburg 2010 (4) SA 1 (CC) at par [73]; see also Kirland Investments (supra) at par [82]).

[72] Nor, in my view, is it appropriate to approach the question as to whether a cause of action has been set out, at the stage of an exception to the pleading, on the basis that substance rather than form ought to prevail. Such an approach would render nugatory the procedural right that a litigant enjoys to bring about a speedy resolution of a suit by availing him or herself of the remedy provided by Rule 23 of the Rules of Court. It is sufficient, in my view, if the test which is ordinarily applied at the stage of an exception, finds expression, namely – whether on every possible interpretation of the pleading no cause of action is made out.

[73] While there are a number of judgments of the Constitutional Court which appear to favour an approach in relation to enforcement of rights against public bodies which eschews formalism in favour of substance (cf. Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo 2010 (2) SA 415 (CC) at par [97]; KwaZulu Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu Natal & others 2013 (4) SA 262 (CC) ; Head, Department of Education v Welkom High School 2014 (2) SA 228 (CC) par 107 – 108 and par 130), there are other judgments where the court has insisted on compliance with forms and procedures (cf. Kirland Investments (*supra)*; Khumalo v Member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC)).

[74] In Kirland Investments Cameron J in the majority says the following in dealing with the process of revoking or setting aside an underlying administrative action (at par [82]):

> All this indicates that this court should not decide the validity of the approval. This would be in accordance with the principle of legality and also, if applicable, the provisions of PAJA. PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on dues

> process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on the sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.

[75] In the context of that matter, insistence on a formal counter-application would have brought into play the 180-day rule in PAJA and the considerations relevant to the delay in seeking to set aside administrative action. In the present matter a similar circumvention of procedural requirements is at issue.

[76] The passage in Kirland Investments points to what is significant in those cases where formalism has been eschewed, in particular in the KwaZulu Natal Joint Liaison matter, namely that the court was in each instance grappling with the formulation of an appropriate remedy in the context of its remedial powers as provided for in s 38 and s 172 of the Constitution. The tendency towards addressing the 'substance' of the dispute must accordingly be seen in that context. In none of the judgments was the view expressed that the court's earlier judgments which specifically deal with the formulation of causes of action for the review and setting aside of administrative action, are to be regarded as overruled. Exactly the opposite is to be gleaned from the judgment of Khampepe J in Minister of Defence and Military Veterans v Motau 2014 (8) BCLR 930 (CC).

[77] This court is not now concerned with its constitutional remedial powers. It is concerned with determining whether a cause of action has been properly and appropriately pleaded. It is therefore quintessentially concerned with consideration of those formal requirements that relate to the formulation of pleadings upon which the substantive dispute between the parties will ultimately be determined at trial. The purpose of an exception is to avoid the leading of unnecessary evidence. It is for this reason that a court must examine carefully whether a cause of action can be said to have been made out on the pleading. If not, then the exception must be upheld.

[78] I am satisfied that upon a consideration of the plaintiff's particulars of claim as a whole that the defendant's exception that it does not disclose a cause of action must be upheld. In the light of this finding it is not necessary to consider the alternative basis, namely that the particulars of claim are vague and embarrassing.

[79] I therefore make the following order:

(1) The defendant's exception to the plaintiff's amended particulars of claim is upheld.

(2) The plaintiff is afforded an opportunity, within 20 days of the date of this order, to amend its particulars of claim in terms of Rule 28 of the Rules of Court.

(3) The plaintiff is ordered pay the costs of the exception.

G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:	For the Plaintiff / Respondent Adv. M. Swanepoel SC Instructed by Van Rooyen and Efstratiou
	For the Defendant / Excipient Adv. J. G. Richards Instructed by Le Roux Incorporated