



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **9058/2023P**

In the matter between:

**SOUTH AFRICAN PROPERTY OWNERS ASSOCIATION NPC  
APPLICANT**

and

**ETHEKWINI MUNICIPALITY** **FIRST RESPONDENT**  
**MUNICIPAL MANAGER: ETHEKWINI MUNICIPALITY** **SECOND**  
**RESPONDENT**  
**CHIEF FINANCIAL OFFICER/DEPUTY CITY MANAGER:** **THIRD**  
**RESPONDENT**  
**ETHEKWINI MUNICIPALITY**

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**Coram:** Mossop J  
**Heard:** 29 August 2023  
**Delivered:** 15 September 2023

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**ORDER**

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The following order is granted:

1. Condonation is granted for the late delivery of the respondents' notice of appearance to defend and answering affidavit and the respondents shall pay the applicant's costs in opposing the condonation application jointly and severally, the one paying the others to be absolved.
2. The relief claimed in Part A of the notice of motion is dismissed with costs, such to include the costs of two counsel where so employed.

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## JUDGMENT

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### **Mossop J:**

[1] The applicant is the South African Property Owners Association, a not-for-profit company. The first respondent is the eThekweni Municipality and the second and third respondents are its functionaries. At the hearing of this matter, Mr Stockwell SC appeared, together with Mr Wijnbeek, for the applicant and Mr Pammenter SC, together with Ms Shazi, appeared for the three respondents. All counsel are thanked for the assistance that they have rendered to the court.

[2] The notice of motion is divided into a Part A and a Part B. It is necessary to set out the relief claimed in both parts. Part A claims an interdict against the respondents in the following terms:

'2. That, pending finalisation of the relief sought under Part B, the Respondents be interdicted and restrained from:

2.1 Implementing the decision of the First Respondent's Council to fix the rate randage payable in respect of vacant land in respect of the 2023/2024 financial year ('the 2023 Decision');

2.2 Enforcement action and/or collection of unpaid rates on vacant land within the jurisdiction of the First Respondent, on any rates exceeding the rates amount that was in place on 30 June 2022 in respect of any land.

3. The costs of this Part A of the application are reserved for determination in Part B of the application.'

[3] Part B seeks an order in the following terms:

‘1. Calling upon the Respondents to show cause why the order sought in Part A of this application must not be made final, and confirming, to the extent necessary the order sought in Part A and/or granting any such relief on a final basis;

2. To the extent that the Court in the litigation between Calgro M3<sup>1</sup> and First Respondent,

Case number D12358/22, has not already set aside the decision of the First Respondent’s council to increase the rate randage in respect of vacant land from 5,8966 cents in the Rand to 11,7932 cents in the Rand (“the 2022 decision”), to review and set aside the 2022 Decision and to declare same to be inconsistent with the Constitution of the Republic of South Africa, 1996, as well as the applicable legislation, and therefore invalid;

3. Reviewing and setting aside the 2023 Decision and declaring same to be inconsistent with the Constitution of the Republic of South Africa, 1996, as well as the applicable legislation, and therefore invalid;

4. Directing the Respondents, absent a complete consultative process to allow for a valid decision on the input Randage rates to be used for the 2024/2025 budget process, to resort to the rates Randage for vacant land in eThekweni Metropolitan Municipality applied prior [sic] the 2022-decision and to apply an increase for the years of 2022/2023 and 2023/24 in accordance with the official annual inflation rate as published by the South African Reserve Bank;

5. In the alternative to prayer 5 above [sic], directing the Respondents to apply the rates Randage recorded in the 2021/22 budget of 0,58966 for vacant land within the First Respondent, similarly for the financial year of 2023/24 and to use such Randage as input to the budget for 2024/25 pf which process commences in September 2023.

6. Directing the Applicant’s cost of suit be paid by such of the Respondents as may oppose the relief sought, jointly and severally, on the scale as between attorney and client, including the costs of two counsel where so employed.’

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<sup>1</sup> An entity known as Calgro M3 has instituted application proceedings against the first respondent on largely the same grounds as are raised in this application and apparently also seeks the setting aside of the 2022 decision. Calgro M3’s matter bears case number 12358/2022 and is still pending. Thus, the decision to increase the rate randage by one hundred percent, as referred to in Part B of the notice of motion, has not been changed as a consequence of any decision taken in the Calgro M3 matter. The Calgro M3 matter is a persistent presence in this application.

[4] I am required only to consider the relief claimed in Part A of the notice of motion.

[5] But first, an observation and then a preliminary issue. It is unfortunately necessary to record that on 20 July 2023, the learned judge who initially dealt with this matter when it first came before this court, determined that this application was 'semi-urgent' and condoned the non-compliance by the applicant with the provisions of the Uniform Rules of Court regarding forms and service. This was recorded in the order that he granted. Despite this finding and the fact, also recorded in his order, that the parties had already delivered their respective heads of argument, the learned judge did not continue and hear the application and determine Part A. Instead, he adjourned the matter to my roll. It is not immediately clear to me why the application was not heard given the finding of semi-urgency that the learned judge made. In my view, consequent upon the determination made regarding urgency, it ought to have been dealt with. The decision of the learned judge places me in a difficult position as I may have taken a different stance on the question of urgency had I been permitted to determine that issue along with the relief that I am now required to determine. I mention in this regard that this application was launched on 19 June 2023, just over a year after the decision was taken in respect of which objection is presently made in this application. From this it may be deduced why I have severe reservations about the urgency of the matter. But I am constrained by the decision of the learned judge.

[6] As regards the preliminary issue to which I previously referred, the applicant seeks to prevent the receipt by the court of the respondents' notice of appearance to defend and answering affidavit, both of which were delivered outside the time limits unilaterally imposed by the applicant by virtue of the alleged urgency of the matter. The applicant stipulated in its notice of motion that the appearance to defend had to be delivered by 23 June 2023 and that the answering affidavit had to be

delivered by 7 July 2023. The notice of appearance to defend is dated 18 July 2023 and the answering affidavit was delivered on 11 July 2023. Mr Pammenter correctly indicated that the answering affidavit had been delivered but two days late.<sup>2</sup> The respondents have delivered an application for condonation for the late delivery of both documents. Notwithstanding the late delivery of the answering affidavit, by the time that Part A was argued before me, the applicant had replied to it<sup>3</sup> and the replying affidavit formed part of the indexed papers.

[7] The respondents have provided an explanation for the late delivery of the notice of intention to defend. The first respondent apparently instructed its attorneys on 19 June 2023. Unfortunately, the senior partner of the firm of attorneys instructed, Mr Maseko, had been killed in a motor vehicle accident on 9 June 2023. As a consequence, the senior attorneys of the firm decamped to Eswatini for his funeral over the week of 19 to 23 June 2023, leaving a candidate attorney to man the offices. The candidate attorney received the instruction to act in this matter when it was given by the first respondent and was instructed to deliver a notice of intention to defend. Due to a mistake, he did not do so. In my view, he may be forgiven for that mistake: he was, admittedly, left unsupervised by the absence of the senior attorneys.

[8] Coetzee J in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and another (t/a Makin's Furniture Manufacturers)*<sup>4</sup> remarked that:

'Urgency involves mainly the abridgement of times prescribed by the Rules and, secondarily, the departure from established filing and sitting times of the Court.'

These words are apposite given the fact that while the respondents have given an explanation regarding the failure to timeously deliver the notice of intention to defend, they have not said much about the late delivery of the answering affidavit. Admittedly, the times prescribed by the Uniform Rules were abridged by the applicant, but as Coetzee J stated, this is what happens in urgent or semi-urgent applications. In fact, nothing is said by the

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<sup>2</sup> 7 July 2023 was a Friday and consequently 8 and 9 July 2023 were a Saturday and a Sunday respectively. The affidavit was, thus, delivered two court days out of time.

<sup>3</sup> On 17 July 2023.

<sup>4</sup> *Luna Meubel Vervaardigers (Edms) Bpk v Makin and another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 136H. See also the comments made by Sutherland J *South African Airways SOC v BDFM Publishers (Pty) Ltd and others* 2016 (2) SA 561 (GJ).

respondents on this issue other than to submit that a litigant in this division is not required, in terms of the prevailing practice directives, to seek condonation for the late filing of an affidavit in urgent proceedings. It is so that the practice directives do not deal specifically with this issue. But it seems to me that when time limits are truncated by an applicant in an application styled as being urgent or semi-urgent, as in this case, then it is a bold litigant who ignores the time limits imposed by that applicant. And it is an even bolder litigant who does not see the propriety, or need, to ask for condonation when the imposed time frames are not adhered to.

[9] But, at the end of the day, the court has a discretion when considering the issue of condonation.<sup>5</sup> Recognising this discretion and given that the answering affidavit was delivered a mere two days late and also considering the potential consequences of the order sought in Part A, I choose to exercise that discretion in favour of the respondents, despite the dismal explanation for its lethargy in delivering its answering affidavit. I am satisfied that no prejudice has been occasioned thereby to the applicant. I accordingly grant the condonation sought but the respondents will have to pay the costs of the applicant's opposition to their condonation application.

[10] At the heart of the dispute between the parties is a decision taken by the first respondent's council to increase the rate randage in respect of vacant land within its area of influence by one hundred percent (the impugned decision). This decision was taken in 2022 and initially applied to the 2022/2023 financial year. The interim relief claimed in Part A does not relate directly to the impugned decision: what is sought to be interdicted is the decision relating to the rate randage imposed on vacant land taken in respect of the 2023/2024 financial year. Why this is sought to be interdicted will be considered shortly. The applicant claims that the impugned decision was unlawful and unconstitutional. In addition, to the extent that the first respondent may seek to enforce the collection of unpaid rates, the applicant seeks the further relief that the first respondent may only collect outstanding rates on vacant land that did not exceed the rate randage in place as at 30 June 2022. It seeks the relief in Part A pending the finalisation of Part B of this application. The

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<sup>5</sup> *South African Breweries Ltd v Rygerpark Props (Pty) Ltd and others* 1992 (3) SA 829 (W).

respondents deny that the impugned decision was unlawful or unconstitutional and oppose the granting of the interim interdict.

[11] The requirements for an interim interdict are well-known and need not be repeated. The requirements have been canvassed in granular detail in both the affidavits and heads of argument of the respective parties.

[12] Interdicts are granted based upon the existence of a right or rights which are sufficient to sustain a cause of action.<sup>6</sup> An applicant must, at the lowest level, establish a *prima facie* right that may be open to doubt that is being infringed or which it anticipates will be infringed imminently. The onus of establishing the existence of the *prima facie* right rests upon the party claiming the interdict.<sup>7</sup> If the applicant cannot establish a *prima facie* right, the application must fail.<sup>8</sup>

[13] In *Simon NO v Air Operations of Europe AB and others*,<sup>9</sup> the Supreme Court of Appeal set out the test for considering whether a *prima facie* right has been established as follows:

'The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed.'

[14] With that test in mind, I turn now to consider the facts alleged by the applicant.

[15] The applicant states that its vision is to be a nationally accepted and internationally recognised landowners' association, having been established in 1966, and posits itself as the representative voice of this

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<sup>6</sup> *Albert v Windsor Hotel (East London) (Pty) Ltd (in liquidation)* 1963 (2) SA 237 (E) at 240E-241G.

<sup>7</sup> *Molteno Brothers and others v South African Railways and others* 1936 AD 321 at 333.

<sup>8</sup> *Horn v Great Force Investments 25 (Pty) Ltd and another* [2015] ZANCHC 7 para 20.

<sup>9</sup> *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA) at 228G-H.

country's commercial and industrial landowners. It claims that its membership comprises more than 90 percent of the commercial land industry in this country. It has members within the first respondent's area, who own vacant land and who have felt the lash of the impugned decision. Rather than a multiplicity of owners of vacant land who are members of the applicant each bringing an application against the respondents for the relief claimed in this application, the applicant brings such an application on their behalf. It concedes, however, that there are owners of vacant land within the first respondent's area who are not its members but asserts that in bringing this application, it acts in their interests as well.

[16] The applicant makes the case in its founding affidavit that the rates payable by ratepayers are subject to the influence of three variables, namely the rand value ascribed to land, the ratio at which rates are imposed and the actual cents in the Rand imposed in relation to the rand value of the land (the rate randage). In addition, the applicant submits that the first respondent must take cognisance of the contents of the annual Municipal Budget Circular (the circular) issued by the National Treasury when considering an increase in the rate randage. The applicant specifically refers to the circular issued by the National Treasury on 6 December 2021, which advised as follows:

'The Consumer Price Index (CPI) inflation is forecast to be within the lower limit of the 2.6 per cent target band; therefore municipalities are required to justify all increases in excess of the projected inflation target for 2022/23 in their budget narratives and pay careful attention to tariff increases across all consumer groups.'

[17] The applicant provides an analysis that commences with the decision taken by the first respondent for the 2021/2022 financial year regarding the rate randage applicable to vacant land. It was fixed at the amount of 5,8966 cents in the Rand. The first respondent's medium-term revenue and expenditure framework document, referred to by the



applicant in its founding affidavit, projected the anticipated increases in, inter alia, the rate randage for three successive financial years. It projected that for the 2022/2023 financial year, the rate randage in respect of vacant land would increase from the rate of 5,8966 cents to 6,1915 cents in the Rand and then to 6,501 cents in the Rand during the 2023/2024 financial year.

[18] However, that sequence of prophesised increases did not eventuate. Contrary to the projected amounts referred to in the first respondent's medium-term revenue and expenditure framework document, when the 2022/2023 municipal budget was approved, the impugned decision was taken and the rate randage payable in respect of vacant land was increased by 100 percent: it escalated from 5,8966 cents to 11,7932 cents in the Rand. This increase was approved by the council of the first respondent on 7 June 2022 and became effective on 1 July 2022.

[19] In pressing its case, the applicant alleges that the rate randage charged in respect of vacant land by the first respondent is significantly higher than rates charged by other metropolitan municipalities in South Africa. Examples are provided of the rates charged by the municipalities of Cape Town, Mangaung, Tshwane, Nelson Mandela Bay and Johannesburg. Assuming a property value of R1 million, after the impugned decision was taken, eThekwini would now charge rates of approximately R118 000 per annum on that land, whereas Tshwane would only charge approximately R39 000 per annum and Cape Town would charge rates of approximately R13 000 per annum, to mention but three municipalities.

[20] The applicant contends that this obvious disparity is prejudicial to its members in eThekwini and is unsustainable. Such a decision also dampens property values and curtails development and growth because investors will regard the eThekwini area as being less likely to generate acceptable returns on investment.

[21] The applicant sets out in the founding affidavit the requirements contained in the Local Government: Municipal Finance Management Act 56 of 2003 in some detail. It also considers what the provisions of the Local Government: Municipal Property Rates Act 6 of 2004 demand, and reference is made to correspondence that it and an entity known as the KZN Growth Coalition (KZNGC) addressed to the first respondent over the period August to September 2022. One of the issues that was taken up in this correspondence was that the doubling of the rates in respect of vacant land had not been referenced in the 2022/2023 Integrated Development Plan. In further correspondence, the KZNGC also raised the issue that there had been a failure to properly consult landowners and consequently landowners were unable to object to the taking of the impugned decision or to the budget of which it formed a part.

[22] The applicant further submitted that:

‘... the draft budgets made available for public comment was not transparent, and the substantial increase in the rate randage on vacant properties were not easily apparent.’

[23] According to the applicant, the first respondent then resolved to establish what it called the ‘war room’, being a committee brought into life to engage with the applicant, KZNGC and others on the issue of the increase. It held its first meeting on 10 February 2023. The first respondent broadly undertook to consider the representations made to it about the municipal budget. Further meetings were held, and the first respondent undertook to address the issue of the impugned decision in the 2023/2024 budget.<sup>10</sup> It also indicated that because litigation had been commenced against it by Calgro M3, to which reference was made earlier in this judgment, there would be no further engagement with the applicant and the KZNGC. Further correspondence was, however, entered

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<sup>10</sup> This appears to have been done. The draft budget for the 2023/2024 financial year proposed that the rate randage for vacant land be reduced by 15 percent from 11.7932 cents in the Rand to 10.0242 cents in the Rand. After public hearings, it was reduced by a further 15 percent to 8.3355 cents in the Rand.

into but produced nothing that satisfied the applicant and thus this application was born.

[24] To these allegations, the respondents have initially challenged the locus standi of the applicant to bring and move this application. They allege that the applicant is an organisation of landowners and not a landowner itself and it therefore has no direct and substantial interest in the matter. It therefore lacks any basis in terms of common law to bring this application. The rights that are ostensibly being protected by the bringing of the application are those of the individual members of the applicant and are not rights that have been created by virtue of their membership of the applicant.

[25] Section 38 of the Constitution reads as follows:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.’

[26] The respondents submit that it follows that if this section is to be invoked, the right sought to be enforced by a group or an association must arise out of the Bill of Rights. They submit that the rights that the applicant seeks to enforce do not have the Bill of Rights as their origin.

[27] As authority for a different point, the respondents referred me to *South African Property Owners Association v Johannesburg Metropolitan*

*Municipality and others.*<sup>11</sup> The matter may indirectly be of significance to the issue of locus standi because in it, the South African Property Owners Association (SAPOA) successfully appealed a decision of a lower court to the Supreme Court of Appeal. The matter was not entirely dissimilar to the one before me, but the facts need not be considered in any detail for present purposes. The significance of the matter is that at no stage in the reported judgment does a challenge to SAPOA's legal standing arise. It appears that it was not identified as an issue in the matter. Indeed, the Supreme Court of Appeal referenced the fact that while the applicant represented 90 per cent of commercial landowners, it was not the representative of all such owners,<sup>12</sup> much as has been stated by the applicant in this matter. This, however, proved no obstacle to SAPOA's entitlement to claim the relief that it sought on appeal and it succeeded in that appeal.

[28] There is no way of knowing from the reported judgment of that case whether the legal standing of the applicant was an issue that had been raised in that matter. Certainly, there is no mention of it in the judgment. It is, I suppose, conceivable that none of the parties considered the point, hence the Supreme Court of Appeal made no mention of it in the judgment. However, the respondents in this application have considered it. They view it as an insurmountable obstacle to ultimate success. They may be correct in what they assert. It does appear that no rights emanating from the Bill of Rights arise in this matter. If that is so, then the applicant's locus standi may be subject to question. That, however, will only be decided later on in the life of this matter. But it is a consideration that must be weighed up when considering whether the applicant is entitled to the relief that it seeks in Part A.

[29] The respondents then go on to address the issue of the review sought in Part B. I again caution myself that I am not required to determine that issue. But the relief sought in Part B may have same

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<sup>11</sup> *South African Property Owners Association v Johannesburg Metropolitan Municipality and others* [2012] ZASCA 157; 2013 (1) SA 420 (SCA); 2013 (1) BCLR 87 (SCA); [2013] 1 All SA 151 (SCA) (hereafter referred to as *South African Property Owners Association*).

<sup>12</sup> *Ibid* para 70.

relevance to the interim relief sought in Part A. In *Economic Freedom Fighters v Gordhan and others*,<sup>13</sup> the Constitutional Court held that:

‘... before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict. The rationale is that an interdict which prevents a functionary from exercising public power conferred on it impacts on the separation of powers and should therefore only be granted in exceptional circumstances.’

[30] The applicant states in its founding affidavit that the decision to adopt a budget and to take the impugned decision is administrative action and may thus be reviewed in terms of the Promotion of Administrative Justice Act 3 of 2000. The respondents dispute this. In the alternative, the applicant submits that these decisions are reviewable in terms of the principle of legality. However, in argument, Mr Stockwell agreed with Mr Pammenter that the impugned decision was not administrative action. Thus, the relief sought in Part B of the notice of motion could only be challenged on the principle of legality. In my view, that was a sensible concession. The calculation and imposition of rates is not administrative action.<sup>14</sup> In *South African Property Owners Association*, the Supreme Court of Appeal stated that:

‘As the imposition of rates is not administrative action, SAPOA did not seek to review and set aside the Council’s budget or the decision to levy an additional 18% rate on business properties in terms of the Promotion of Administrative Justice Act 3 of 2000.’<sup>15</sup> (Footnote omitted.)

[31] In *Kungwini Local Municipality v Silver Lakes Home Owners Association*,<sup>16</sup> Van Heerden JA stated that:

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<sup>13</sup> *Economic Freedom Fighters v Gordhan and others* [2020] ZACC 10; 2020 (6) SA 325 (CC) para 42.

<sup>14</sup> *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* [1998] ZACC 17; 1999 (1) SA 374 (CC) para 45.

<sup>15</sup> *South African Property Owners Association* para 5.

<sup>16</sup> *Kungwini Local Municipality v Silver Lakes Home Owners Association and another* [2008] ZASCA 83; 2008 (6) SA 187 (SCA); [2008] 4 All SA 314 (SCA).

'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 or provincial legislation in this regard.'<sup>17</sup> (Footnotes omitted.)

[32] The respondents contend, furthermore, that the impugned decision forms part of the overall adoption of the first respondent's annual budget in 2022 and that the applicant cannot simply seek the setting aside of a portion of that budget. A similar argument is advanced in respect of the 2023/2024 budget. That the rate randage forms an integral part of the entire budget was acknowledged by the Supreme Court of Appeal in *South African Property Owners Association*, where Southwood AJA, in the minority judgment insofar as the order to be granted on appeal was concerned, stated that:

'Furthermore, logic dictates that the approval of the budget must go hand in hand with the determination of the rates, as the revenue from rates is essential to fund the budgeted expenditure. The court a quo therefore wrongly concluded that the levying of rates is not an integral part of the budget process.'<sup>18</sup>

[33] Writing for the majority in the same matter, Navsa JA approved of the abovementioned extract from Southwood AJA's judgment and further stated that:

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

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<sup>17</sup> Ibid para 14.

<sup>18</sup> *South African Property Owners Association* para 32.

subsequent increase in rates would have owed its genesis to and been premised on the rate presently sought to be impugned.<sup>19</sup>

[34] In what way does the applicant submit that the principle of legality has been offended by the first respondent? It says very little in this regard. It claims that the doubling of the rates had not been referenced in the first respondent's Integrated Development Plan; that the draft budgets made available for public comment were not transparent and the substantial increases 'were not easily apparent'; and that there had been a failure to properly consult landowners and consequently they were unable to object to the taking of the impugned decision or to the budget of which it formed a part of.

[35] It does not seem to me that these complaints demonstrate a perversion of the principle of legality. The fact that information was allegedly 'not easily apparent' does not mean that the information was not disclosed or that it prevented submissions being made by the applicant on that issue. This is perhaps inadvertently accepted by the deponent to the applicant's founding affidavit in correspondence that he penned to a representative of Calgro M3 on 28 June 2022, when he stated the following:

'We made a submission to the City in January this year and informed them of our concerns with this increase.

The City went ahead regardless.

We have not at this stage considered any legal action on behalf of our members.

My experience with these matters is that a court would very rarely reverse a decision of this nature once budget has been approved.'

[36] The submission referenced in this extract was made in January 2022, which was prior to the impugned decision being taken. The deponent thus acknowledges that the applicant was aware of the proposed increase and had addressed its concerns to the first respondent. The fact that the first respondent did not accept that submission does not

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<sup>19</sup> Ibid para 71.

mean the first respondent acted unlawfully: it simply means that it was not persuaded by the applicant to change the rate randage. This, it appears to me, is not contrary to law nor does it offend against the principle of legality. That principle merely holds that the first respondent's decision had to be taken in accordance with the law, failing which it was invalid to the extent that it was inconsistent with the law. There is no imperative that the first respondent should engage and consult and ultimately agree with representations received by it.

[37] The respondents have steadfastly asserted that all budgetary processes had been complied with by the first respondent and that it has acted lawfully. The respondents assert, in response to the applicant's contention that the National Treasury's circular has not been adhered to, that it has complied with its terms. The circular did not prohibit above inflation increases but provided that where that did occur it would have to be justified. It states that the National Treasury has endorsed the first respondent's budgets for the 2022/2023 and 2023/2024 financial years as being: 'balanced and fully funded.'

[38] While the impugned decision relates to the increase applicable for the 2022/2023 financial year, the interdict in Part A of the notice of motion relates to the rate randage applicable for the 2023/2024 financial year. This appears to be an express recognition of the knock-on effect referred to by Navsa JA in *South African Property Owners Association*. The applicant wishes to prevent the implementation of a decision regarding the rate randage for the forthcoming financial year because the rate randage decreed for a past financial year was, in its opinion, excessively high. The applicant is thus trying to unscramble the already scrambled egg. However, notwithstanding that preference was afforded to this matter allowing for an early hearing, by the time that it was argued, the budget for the 2023/2024 financial year had become effective. To challenge the impugned decision, ultimately the budget for two financial years will have to be challenged and reversed. This will be a difficult thing



to achieve, a fact that Navsa JA acknowledged in *South African Property Owners Association*, as did the deponent to the applicant's founding affidavit in his correspondence to Calgro M3 on 28 June 2022, referenced earlier in this judgment.

[39] Insofar as the comparative analysis performed by the applicant of the rate randage charged by certain municipalities is concerned, it is undeniable that the figures vary greatly between municipalities and may initially generate a feeling of shock, particularly amongst owners of vacant land in eThekweni. I am, however, not entirely certain that these comparisons are helpful. I do not know how much vacant land exists in any of the cities in respect of which a comparison was drawn, let alone how much vacant land exists in eThekweni. Some cities may have an abundance of vacant land and can afford to charge lower rates because of that. Others may have less vacant land and therefore need to maximise the revenue that they can generate from that land. There are numerous other variables that may have contributed to the setting of the value of the rates by the municipalities referred to by the applicant.

[40] I am therefore unconvinced that the comparisons drawn by the applicant are valid. Presented as they have been, the comparisons drawn are based on a single component, namely the rate randage, being compared across various municipalities. In drawing those comparisons, the rate randage is viewed in isolation and not in the context of the overall municipal budget. It is not disputed that the rate randage charged by a municipality is an integral part of a much bigger budget. It follows that the rate randage imposed on vacant land located within the first respondent's area of influence may be very high but other rates or other imposts charged by it may be very low. Whether the rate randage charged in respect of vacant land is excessively and unnaturally high can, in my opinion, only be determined by reference to the provisions of the whole budget in its entirety. I do not have that information before me.

[41] After reflection, I am unpersuaded that the applicant has established a prima facie right and it seems likely to me that the applicant will have difficulty in succeeding in the forthcoming review proceedings. In my view the case made out by the applicant is tenuous insofar as an interim interdict is concerned: the prima facie right claimed is subject to an unacceptable degree of doubt. The application cannot therefore succeed.

[42] If I am incorrect in finding that a prima facie right has not been established, I briefly consider the other requirements that must be met for an interim interdict to be granted.

[43] I was advised from the bar by Mr Stockwell that the distinguishing feature between Calgro M3 and the applicant is that the applicant's members have continued to pay the rates in respect of which its members object, whereas Calgro M3 has not. The applicant's members have thus been compliant for over a year. It is difficult to discern irreparable harm eventuating in such circumstances. Irreparable harm is harm that cannot be reversed or undone.<sup>20</sup> If the review sought in Part B is ultimately successful, the applicant's members would notionally be entitled to claim a refund of the amounts that they dutifully paid whilst challenging the impugned decision.

[44] The interim interdict seeks to limit the ability of the first respondent to recover amounts not paid to it in respect of the budgets that have been in place in respect of the 2022/2023 and 2023/2024 financial years. This may have a significant effect on the first respondent's revenue stream and its ability to function. In my view, the balance of convenience accordingly favours the first respondent.

[45] Finally, the applicant has an alternative remedy available to it in the form of the review proceedings that it has already commenced. It, of

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<sup>20</sup> *Tshwane City v Afriforum and another* [2016] ZACC 19; 2016 (6) SA 279 (CC) para 55.

course, also has the option of suing for any damages that it may have suffered in the event of it succeeding in those review proceedings.

[46] After considering the facts and the competing submissions of counsel, I conclude that the relief sought in Part A of the notice of motion must fail. There is no reason why costs should not follow the result. Both parties were represented by senior and junior counsel and the costs order should reflect that fact.

[47] I accordingly grant the following order:

1. Condonation is granted for the late delivery of the respondents' notice of appearance to defend and answering affidavit and the respondents shall pay the applicant's costs in opposing the condonation application jointly and severally, the one paying the others to be absolved.
2. The relief claimed in Part A of the notice of motion is dismissed with costs, such to include the costs of two counsel where so employed.

A handwritten signature in black ink, appearing to read 'Mossop J', is written over a solid horizontal line.

**MOSSOP J**

**APPEARANCES**

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Date of argument : 29 August 2023

Date of Judgment : 15 September 2023