REPUBLIC OF SOUTH AFRICA

Case no: 328/97

In the matter between

FEDSURE LIFE ASSURANCE LIMITED	First Appellant
HOLDING 24 STRATHAVON (PTY) LIMITED	Second Appellant
JDB BELEGGINGS (EDMS) BEPERK	Third Appellant
LIBERTY LIFE ASSOCIATION OF AFRICA LIMITED	Fourth Appellant
MOMENTUM PROPERTY INVESTMENTS (PTY) LIMITED	Fifth Appellant
100 GRAYSTON DRIVE PROPERTY (PTY) LIMITED	Sixth Appellant
RIVONIA ANNEX (PTY) LIMITED .	Seventh Appellant
RYCKLOF BELEGGINGS (PTY) LIMITED	Eighth Appellant
TERAMA (PTY) LTD	Ninth Appellant
CLEARSTREAM PROPERTIES (PTY) LIMITED	Tenth Appellant

and

GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL	First Respondent
EASTERN METROPOLITAN SUBSTRUCTURE	Second Respondent
NORTHERN METROPOLITAN SUBSTRUCTURE	Third Respondent
WESTERN METROPOLITAN SUBSTRUCTURE	Fourth Respondent
SOUTHERN METROPOLITAN SUBSTRUCTURE	Fifth Respondent

Coram: Mahomed CJ, Van Heerden DCJ, Olivier JA, Zulman JA et Melunsky AJA

Date of Hearing: 2 March 1998

Date of Judgment: 23 March 1998

JUDGMENT

MAHOMED CJ

The Local Government Transition Act No 209 of 1993 (the "LOT") created machinery for the fundamental restructuring of local government in South Africa. Pursuant to section 10 of this Act the Premier- in- Executive Council for the Province of Gauteng issued Proclamation No 24 of 1994 which had the effect of dissolving a number of city councils within the area of Johannesburg, Soweto and Sandton and establishing in their place an overarching local authority called the Greater Johannesburg Transitional Metropolitan Council (the "JTMC"), which is the first respondent in this appeal. This Proclamation also created seven substructures within the JTMC which were subsequently reduced to four by Proclamation 42 of 1995, dated 1 September 1995. These four substructures are the Eastern Metropolitan Substructure (the "EMSS"), the Northern Metropolitan Substructure (the "NMSS"), the Western Metropolitan Substructure (the "WMSS"), and the Southern Metropolitan Substructure (the "SMSS"). These substructures are respectively the second, third, fourth and fifth respondents in this appeal.

The appellants are all ratepayers within the area of jurisdiction of the EMSS . They sought orders in the court a quo setting aside various resolutions adopted by the JTMC and the EMSS in June 1996, and further orders declaring that these resolutions were unlawful. In terms of these resolutions a general rate of 6,45 cents in the rand was imposed on ratepayers owning land and rights in land throughout the area of the JTMC. That formula was designed to enable the areas within the JTMC as a whole to balance their income against expenditure, but the effect of the impugned resolutions would have been to yield an excess of income over expenditure within the areas of the EMSS and the NMSS. That excess was to be utilised by the JTMC, the SMSS and the WMSS, to compensate for deficits between their own expenditure and income. The intention of the impugned resolutions was to generate a surplus of R 438 330 000 from the EMSS, and R

4 223 000 from the NMSS. Both these surpluses were to be diverted to compensate for budgetary deficits of R 162 482 000, R187 945 000, and R 92 126 000 within the JTMC, the SMSS and the WMSS respectively. This result was to be achieved by resolutions from the JTMC imposing levies on the EMSS and the NMSS, resolutions from the EMSS and the NMSS undertaking to pay such levies and resolutions of the JTMC directing the diversion of such levies in the form of subsidies to the WMSS and the SMSS, and to the JTMC itself

Counsel for the appellants sought to attack the resolutions which authorised these arrangements on the following grounds:

a. It was contended that the resolutions of the JTMC pursuant to these arrangements imposing levies on the EMSS and the NMSS were ultra vires the powers of the JTMC in terms of section 23(c) of Annexure A to Proclamation 35 of 1995, which defined the powers of the JTMC and which was issued by the Premier in terms of the LOT. In support of this submission it was pointed out that section 23(c) of Annexure A to this Proclamation only permitted the JTMC to levy and claim "an equitable contribution from any transitional metropolitan substructure based on the gross (or) rates income" of such substructure, and it was argued that the levies imposed on the EMSS and the NMSS did not satisfy these requirements.

b. It was further contended that the impugned resolutions were also ultra vires section 178(2) of the interim Constitution, Act 200 of 1993 (the "interim Constitution") which provided that a local government could only levy and recover such property rates as were necessary to exercise its powers and perform

its functions, and which was subject to the further proviso that such rates had to be based on a "uniform structure for its area of jurisdiction". It was argued that the levies imposed by the JTMC on the EMSS and the NMSS were not necessary for the JTMC to exercise its powers and perform its functions, and that the levies sought to be imposed on these substructures were in any event not "based on a uniform structure for its area of jurisdiction."

c. The third attack was based on the provisions of section 58 of the Local Government Ordinance 17 of 1939 (the "LGO") which provided that before the expiry of any financial year, the Finance Committee of the relevant local authority was required to draw up and present to the relevant Council a detailed estimate of the revenue and expenditure for the Council for the next financial year, and that no expenditure could be incurred by the Council otherwise than in accordance with such an estimate which had been approved by the Council itself. It was argued that the relevant organs of the JTMC and the EMSS had failed to comply with these requirements of section 58 of the LGO before agreeing to incur the expenditure they had approved.

Counsel for the respondents contended in limine that none of the applicants had any locus standi to attack the impugned resolutions.

It was contended on behalf of the respondents that the appellants did not have an interest in the relief prayed for, sufficient to give them locus standi to attack the impugned resolutions of the

JTMC and the EMSS. The appellants countered this challenge by relying on the judgment of this Court in the case of Jacobs en 'n Ander v Waks en Ander 1992 (1) SA 521 (A). This was a case

in which a white resident, ratepayer and director of a hardware shop in Carltonville, a black resident in an area just outside of the municipal boundaries of Carltonville, and a South African of Indian descent who managed a clothing shop within that town, sought to attack the decision of the City Council of Carltonville setting aside certain parks for the exclusive use of whites. The applicants alleged that the decision of the City Council had provoked a black consumer boycott of businesses in Carltonville which had adversely affected their interests. Botha JA dismissed this attack on the locus stande of each of these applicants. He held that what a litigant in the position of the applicants was required to show was that his interest in the relief sought was direct, that it was not abstract or academic, and that it was present and not hypothetical. This had to be determined by the circumstances of each case. He held that there was a relationship of trust between the municipality and its ratepayers and that this gave to the first applicant the locus stande to stop the municipality from spending moneys for the purpose of giving effect to what was alleged to be an unlawful decision; that the second applicant had an interest in the protection of his dignitas which was affected by the decision of the City Council and that for this reason he had locus standi to pursue the relief he claimed against the City Council; and that the third respondent similarly had locus standi because of his interest in the protection of his own dignitas and because of his interest in the clothing business which had also been adversely affected by the actions of the City Council. In coming to these conclusions Botha JA also referred to a long line of cases in which it was held that a municipal ratepayer had locus standi to attack the unlawful use of municipal funds by a municipal authority, and he referred in this regard to various passages in the judgments of Innes CJ, Wessels J and Bristowe J in the case of Dalrymple and Others v Colonial Treasurer 1910 TS 372.

Although counsel for the respondents referred us to cases in which it was held that a taxpayer has no no locus standi to review a decision of the State to utilise fiscal revenue for some particular expenditure (Bagnall v the Colonial Government (1907) 24 SC 470; and Dalrymle's case, supra) they were eventually constrained to concede that each of the appellants did indeed have locus standi to pursue the relief they claimed in the present matter, if the case of Jacobs en 'n Ander v Waks en Andere, supra was of application. Counsel sought, however, to distinguish Waks' case and the case of Dalrymple which it followed on the grounds that the local authority in those cases was a "creature of statute" and that all the respondents in the present case were local authorities created by the Constitution. In my view this is an unsound distinction. In the first " place the respondents are not created by the Constitution but by section 8 of the LGT Act. All that section 174 of the interim Constitution and section 151 of the new Constitution did was to create the machinery for the establishment of local authorities through legislation. In principle, this is no different from the Republic of South Africa Constitution Act 32 of 1961 which similarly provided that Provincial Councils would make ordinances to establish municipal institutions. Secondly, the proper enquiry is not whether the relevant local authority is one which is created by the Constitution or some other enabling Act, but what the nature of that authority - however created - is, and what its duty is in relation to its ratepayers and residents. It is the latter enquiry which influenced Botha JA in Waks' case to hold that the Carltonville City Council was in a position of trust in relation to ratepayers' funds and that for this reason a ratepayer had locus standi to review what was claimed to be an unlawful expenditure of such funds by the Council. I see no grounds on which it can be contended that the position of the appellants in this case is different. There is clearly an important element of trust in the relationship between the second, third, fourth and fifth respondents, on the one hand, and their ratepayers on the other. These ratepayers have a sufficient interest in seeking to impugn those decisions of the appellants

impacting on the utilisation of ratepayers' funds which they contend were unlawful.

Counsel for the respondents contended that even if this was so, it would at worst for the respondents, give to the appellants locus standi only to attack the impugned resolutions of the EMSS, but it did not give to them any locus standi to attack the impugned resolutions of the JTMC because none of the appellants paid any rates directly to the JTMC at all. This argument appears to me to be misconceived. If the appellants were to succeed in setting aside any resolutions of the EMSS the effect would be to deprive the EMSS of its capacity to divert any surplus funds to the JTMC. This would directly effect the interests of the JTMC itself and its right to require such diversion in the first place. For that reason the appellants all have locus standi to join the JTMC in these proceedings and to seek an order against the JTMC setting aside its own resolution to impose levies on the EMSS in whose area the appellants were all ratepayers.

It was common cause between counsel who appeared for the parties before us that in taking each of the impugned resolutions the relevant respondent had performed an administrative act and what was sought to be attacked by the appellants were therefore the administrative acts performed by the JTMC and the EMSS and the NMSS. It was also common cause that both at the time when the impugned resolutions were adopted by the relevant respondents and at the time when the proceedings in the court a quo were instituted, the interim Constitution was of operation and that some time prior to the date when judgment was given by Goldstein J in the court a quo the interim Constitution was superceded by the new Constitution, Act No 108 of 1996 (the "new Constitution").

In terms of section 17 of Schedule 6 to the new Constitution, however, "(a)ll proceedings which were pending before a Court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise." Unless, therefore, the interests of justice require otherwise, the jurisdiction of this Court to adjudicate on any challenge based on the lawfulness or unlawfulness of administrative actions performed by any of the respondents must be determined in terms of the interim Constitution and not the new Constitution. (S v Pennington and Another 1997 (4) SA 1076 (CC) at 1089B - 1091E (paragraphs [29] - [36]); Sanderson v Attorney-General,Eatern Cape 1997 (12) BCLR 1675 (CC) at 1681F - 1682C (paragraphs [16] - [17]); Harksen v Lane NO and Others 1998 (1) SA 300 (CC) at 308D-G (paragraphs [5] - [6])).

The first question which therefore arises is whether this Court has any jurisdiction in terms of the interim Constitution to adjudicate on the challenge made by the appellants to the impugned resolutions. In my view it does not because section 101(5) of the interim Constitution expressly provides that the Appellate Division "shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court" and the Constitutional Court in terms of section 98(2) of the interim Constitution is empowered with jurisdiction over all matters relating to the interpretation, protection and enforcement of the provisions of the interim Constitution, including any alleged violation of any fundamental right entrenched in Chapter 3. Among the fundamental rights entrenched in Chapter 3 is the right to administrative justice, which includes the right of every person in terms of section 24 to:

> "a lawful administrative action where any of his or hers rights or interests is affected or threatened ...

d administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

It would therefore appear to follow that in terms of the interim Constitution any attack on any administrative action on the ground that such administrative action was not lawful fell within the jurisdiction of the Constitutional Court and for that reason outside the jurisdiction of the Appellate " Division because of the express provisions of section 101(5) of the interim Constitution.

It could conceivably be argued that the interim Constitution did not exclude the jurisdiction of the Appellate Division to adjudicate on the cogency of any attack on administrative actions where such attacks are based on common law grounds, and that the Appellate Division continues to enjoy some kind of parallel jurisdiction with the Constitutional Court where the relevant attack is founded on common law grounds. I have some doubt as to whether this would be a sound argument. But in any event this would also involve an interpretation of the relevant provisions of the interim Constitution. This falls within the jurisdiction of the Constitutional Court and for that reason outside the jurisdiction of the Appellate Division in terms of the provisions of section 101(5). This was indeed the approach which commended itself to this Court in the case of Rudolph and Another 1996 (2) SA 886 (A) at 891B-C in which this Court accordingly referred the matter to the Constitutional Court for adjudication.[1]

[1] In the subsequent hearing of Rudolph's case in the Constitutional Court, that Court held that the relevant provisions of the interim Constitution were of no application to administrative actions which had taken place before the interim Constitution became of operation (Rudolph and Another v Commissioner for Inland Revenue and Others 1996 (4) SA 552 (CC)), but that view does not impact upon the conclusions arrived at by this Court on the issue of its jurisdiction in terms of the interim Constitution.

When the matter was argued in this Court we therefore put this difficulty to counsel and inquired whether we had any jurisdiction to adjudicate upon the different attacks made by the appellants on the administrative actions of the relevant respondents. All the counsel involved were constrained to concede that if the interim Constitution was of application it precluded us from exercising any such jurisdiction.

Counsel for the appellants contended however that on a proper interpretation of section 17 of Schedule 6 to the new Constitution that part of the interim Constitution which excluded the jurisdiction of the Appellate Division to adjudicate upon matters which fell within the jurisdiction of the Constitutional Court, did not apply to proceedings initiated in this Court after the commencement of the new Constitution. It was contended that in terms of section 168 of the new Constitution the jurisdiction of this Court to decide appeals in constitutional matters was not excluded and that section 17 of Schedule 6 does not detract from that jurisdiction.

On this argument section 17 would have to be given a restrictive application in respect of matters which were pending when the new Constitution took effect: the interim Constitution would be of application in regard to substantive issues but not in respect of issues pertaining to the jurisdiction of this Court. Counsel for the appellants conceded that such a restrictive interpretation of section 17 was only justified if there was some ambiguity in the language of the section which permitted such a course. They contended, however, that such ambiguity was to be found in the expression "a court". It was submitted that this left uncertain whether the lawmaker intended only to refer to the court of first instance in which the matter was heard or whether it also intended to include a court such as this Court hearing an appeal. I am unable to discern any such ambiguity.

In its context it is clear that in all pending proceedings before any court the matter "must be disposed of as if the new Constitution had not been enacted". That conclusion in fortified by the words "disposed of*. This is intended to make it clear that if there are pending proceedings they must be dealt with to their final end and determination as if the new Constitution had not been enacted (save in the exceptional circumstance where the interests of justice otherwise require). Moreover this direction is to apply to "all proceedings". These are words of the widest amplitude. The intention is clear. All pending proceedings before any court must be disposed of as if the new Constitution had not been enacted, save in the exceptional case where the interests of justice otherwise require. There is no room in the language of the section for giving to the interim Constitution only a limping applicability: operative when substantive provisions are in issue but inoperative when jurisdictional issues are involved.

Counsel for the appellants sought to escape from the clear consequences of section 17 of Schedule 6 to the new Constitution by pointing out that section 16(1) of the same Schedule provided that every court existing when the new Constitution took effect only continued to function and exercise jurisdiction if it was consistent with the new Constitution. I am unable to appreciate how this can assist the appellants' argument. If section 17 is interpreted to make the whole of the interim Constitution of application to pending proceedings, this would not be inconsistent with the new Constitution simply because section 17 itself is part of that very Constitution. It would simply mean that in pending proceedings the jurisdiction of the court is to be determined as if the new Constitution had not been enacted, but in other proceedings the jurisdiction of any court would be determined with reference to the relevant provisions of the new Constitution.

Faced with all these difficulties, counsel for the appellants was eventually driven to contend in the alternative that the interim Constitution should not be applied because the "interests of justice require otherwise" in terms of section 17. This is an exception to the ordinary operation of the section. It is for the party invoking the exception to justify its application. The interests of justice must "require" otherwise. In view of the importance of the issues sought to be determined and the amount of money in dispute, counsel was unable to contend that there was any probability of finality in the litigation if this Court assumed its jurisdiction to determine the disputed issues in terms of the new Constitution. The probabilities are that the matter would thereafter have to proceed in the Constitutional Court in any event. There is therefore no compelling interest of justice for this Court to assume this jurisdiction which the lawgiver sought to exclude save in, exceptional circumstances. Counsel for the appellants argued in effect that "the interests of justice required otherwise" simply because this Court had jurisdiction under the new Constitution to adjudicate upon constitutional issues. This cannot be the correct approach. If it was correct the Court would have to exercise jurisdiction in all proceedings which were pending when the new Constitution took effect. If this is what the lawgiver had intended it could easily have said so. It deliberately refrained from doing so. What it directed was that pending proceedings must be disposed of as if the new Constitution had not been enacted unless, in the particular circumstances of a particular case, the interests of justice required otherwise. I am not satisfied that any such special circumstances in the present case exist. It accordingly follows that this Court must dispose of this appeal as if the new Constitution had not been enacted, and as if its jurisdiction to adjudicate upon constitutional matters is excluded by virtue of the relevant provisions of the interim Constitution to which I have previously referred. The merits of this appeal cannot therefore be considered by this Court.

It is, however, clearly in the interests of justice that the dispute between the parties must be | resolved by a court of competent jurisdiction. The issues involved are issues of considerable public importance and the quantum of moneys in dispute are equally substantial. The matter must for these reasons be referred to the Constitutional Court for adjudication upon the following issues:

a. Whether or not the administrative actions constituted by the resolutions identified and impugned in the Notice of Motion were consistent with the interim Constitution, and

b. If they were, whether or not the interim Constitution preserved for the predecessor of the Supreme Court of Appeal any residual or concurrent jurisdiction to adjudicate upon any attack made by the appellants on the administrative actions referred to in subparagraph (a) above on the grounds that such administrative actions fell to be set aside, reviewed or corrected at common law.

Costs

At the request of the parties before us this appeal was set down for four days but was concluded on the very first day because of the problems which the Court raised about its jurisdiction to deal with the merits of the attack made by the appellants on the impugned resolutions. If the respondents had themselves raised the above jurisdictional objection to the right of this Court to adjudicate upon all the attacks made by the appellants, the appellants would ordinarily have been liable for the costs occasioned by their insistence in ventilating these issues before this Court. But that was not the attitude which the respondents adopted. They were themselves party to the application before Goldstein J for leave to appeal to this Court, and they sought to advance

argument on the merits both in their heads of argument and in oral submissions before this Court until they were constrained to concede that the case of Rudolph, supra presented an insuperable objection to the jurisdiction of this Court to adjudicate on the merits of the dispute. Both parties have, therefore, been equally responsible for creating the situation in which substantial costs have been wasted. It is true that the relevant respondents have failed in their objection to the locus standi of the appellants, but against that the appellants have also failed to persuade the Court that justice required this Court to assume jurisdiction to determine the merits in terms of section 17 of Schedule 6 to the new Constitution, In the result, the fairest order would be for each party to bear is own costs in the abortive proceedings of this Court.

Goldstein J ordered the second, third, fourth and fifth appellants to pay the costs of the respondents in the court a quo. Since this Court has not made any decision on the merits of the application made by the appellants in the court a quo the correct order would be to reserve the costs of the application in the court a quo for decision by the Constitutional Court in the proceedings which must now be referred to it. The dispute between the parties raised in consequence of the merits of the attacks on the impugned resolutions is of sufficient public importance and complexity to justify the attention of the Constitutional Court. It is therefore clear that it is in the interests of justice that these issues be referred to the Constitutional Court.

Order

1. In terms of section 102(6) of the interim Constitution, the Republic of South Africa Act No 200 of 1993 this matter is referred to the Constitutional Court of South Africa to decide:

a. Whether or not the administrative actions constituted by the resolutions identified and impugned in the Notice of Motion were consistent with the interim Constitution, and

b. If they were, whether or not the interim Constitution preserved for the predecessor of the Supreme Court of Appeal any residual or concurrent jurisdiction to adjudicate upon any attack made by the appellants on the administrative actions referred to in subparagraph (a) above on the grounds that such administrative actions fell to be set aside, reviewed or corrected at common law.

2. Each party is to bear its own portion of the wasted costs occasioned by the hearing before this Court on the 2nd March 1998.

3. The costs of the proceedings in the court a quo are reserved for decision by the Constitutional Court in the proceedings referred to in para 1 above.

Mahomed CJ

Van Heerden DCJ
Olivier JA
Zulman JA -Concur
Melunsky AJA