THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

1.1 Case no: 423/05
1.2 REPORTABLE

In the appeal between:

HOWICK DISTRICT LANDOWNERS ASSOCIATION Appellant

and

UMNGENI MUNICIPALITY First Respondent

MEC FOR TRADITIONAL AND LOCAL GOVERNMENT AFFAIRS, KwaZulu-Natal Second Respondent

MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT Third Respondent

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Before:	Zulman JA, Cameron JA, Lewis JA, Maya JA and Theron AJA
Heard:	Thursday 31 August 2006
Judgment:	Thursday 21 September 2006

Local government – interpretation of municipality's resolutions – not to be read incoherently – legislative instruments expressly connected to be read together – authority municipality intended to invoke clear – no need to mention source of authority – Municipal valuation rolls – municipality

exercising power under Local Government Transition Act 209 of 1993 – publication procedures set out in provincial ordinances not applicable

Neutral citation: Howick District Landowners Association v uMngeni Municipality [2006] SCA 107 (RSA)

JUDGMENT

CAMERON JA:

[1] The appellant is an association of about 150 property owners (the landowners) whose land previously fell outside any municipal rating jurisdiction and who hitherto have not been required to pay rates. In the High Court in Pietermaritzburg they brought an application to declare invalid a rates assessment for the year 1 July 2004 to 30 June 2005. The assessment was issued by the first respondent municipality (the council), which the landowners cited together with the provincial executive member charged with local government (second respondent) and the national Minister for Provincial and Local Government (third respondent). (The second and third respondents did not participate in the proceedings.) Hugo J dismissed the application. The landowners appeal with his leave.[1]

[1] Under an interim order Hugo J granted pending the appeal, the council is levying rates in accordance with a tender it made to the landowners during the litigation.

[2] The appellants describe themselves as ‘rural landowners’ and as ‘owners of farm properties’ with ‘farming interests’, but the council jibs at the impression of bucolic simplicity this evokes: it says the properties include holiday homes, hotels, bed-and-breakfasts, restaurants, guest farms, golf courses and sectional title developments that have escaped rating only because of out-dated municipal boundaries. The contesting characterisations reflect the parties’ differing positions on the justice of the rates the council seeks to impose.

[3] The dispute occurs against a dense legislative setting that entwines a pre-constitutional provincial ordinance, the legislation straddling the transition to the Constitution, and the set of statutes Parliament enacted between 1998 and 2004 to restructure local government. The council is a local municipality established under the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act). It operates in terms of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). Its power to impose rates derives as a direct source of original legislative capacity[2] from the Constitution.[3] Historically municipalities in the province derived their rating powers from the Local Authorities

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[2] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) 374 (CC) paras 31-38 (interim Constitution); *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) paras 53-60 (final Constitution); *Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA) para 10.

[3] Constitution Section 229, ‘Municipal fiscal powers and functions’ amongst others empowers a municipality subject to some of its other sub-sections to impose ‘rates on property’.

Ordinance, 25 of 1974 (Natal) (the Ordinance). Before the present council was established, the landowners' properties were not rateable under the Ordinance since they did not constitute 'immovable property' within a borough.[4] The comprehensive restructuring of local government initiated by the Structures Act created inclusive municipal areas, with the result that the landowners now fall within the council's jurisdiction.

[4] During the transitional period, the council's rating power was sourced also in the Local Government Transition Act 209 of 1993 (the LGTA), which was largely repealed by the Structures Act, the Systems Act and the Local Government: Municipal Finance Management Act 56 of 2003 (the Finance Management Act). Section 10G(7)(a)(i) of the LGTA gave the council power to 'levy and recover property rates in respect of immovable property' within its area of jurisdiction in terms of a 'common rating system'. It is the powers under this provision that are at issue in the appeal.

[5] In 2004, Parliament enacted the final piece of legislation in the set of statutes that gave effect to local government reform, the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act).

[4]Local Authorities Ordinance 25 of 1974 s 148: 'Subject to the provisions hereinafter enacted, the council shall have power once in every financial year to assess and levy a general rate upon all immovable property within the Borough.'

The Constitution gave Parliament power to regulate by statute a municipality's constitutional authority to impose property rates.[5] It was common cause that the Rates Act is such legislation. The statute was assented to on 11 May 2004 and was brought into operation on 2 July 2005. It makes express provision for a category of 'newly rateable properties', on which rates were not levied before. It requires that rates on these properties must be phased in over three financial years (s 21(1)(a)) and provides for rebates for bona fide farmers on agricultural properties (s 15(2)(f)). The statute also regulates the transition between its commencement (with repeal of the relevant provisions of the Ordinance) and the eventual implementation of the rating system it embodies (s 88ff).

[6] The issue in this case is whether the council had the power to impose rates on the previously unrated properties before the Rates Act came into effect, and, if so, whether it exercised that power properly. It was expected and indeed announced that the Rates Act would be brought into operation on the same day as the Finance Management Act. But this did not happen. While most of the provisions of the latter statute took effect on 1 July 2004, the Rates Act was brought into effect only on

[5]Section 229(2)(b) provides that the power of a municipality to impose rates on property 'may be regulated by national legislation'.

2 July 2005,[6] with application from the municipal financial year 2006/2007.

[7] Even before the expected date of promulgation, the council acted to rate the landowners' properties. It issued notices, purportedly in terms of the Ordinance, the Systems Act and the LGTA, and at its meeting of 9 June 2004, it adopted a resolution introducing the rates assessments. In litigation that preceded the current joust, the landowners challenged these notices. The matter came before Swain J. On 7 December 2004 he declared the first notices invalid in respect of previously unrated properties on two grounds: (i) there was no preceding valuation and publication; (ii) the rates system created (which differentiated between properties larger than and smaller than 20 hectares, with differential caps) was arbitrary and unjust.

[8] The council did not contest the decision of Swain J. Instead, at a meeting on 10 December 2004 it sought to rectify the errors he detected. By now, it had prepared a valuation roll. This was finalised on 30 September 2004. The meeting proceeded to replace the invalidated rates system with one imposing 2.3 cents in the Rand on the land value only. The council then issued the assessments now

[6] Government Gazette 27720 of 29 June 2005.

contested. Hugo J held them to be valid. His conclusions are challenged on appeal.

[9] The landowners' main argument was based on s 179 of the Finance Management Act. This repealed s 10G of the LGTA, but provided that that section's principal provisions would remain in force 'until the legislation envisaged in section 229(2)(b) of the Constitution is enacted'.[7] Before both Swain J and Hugo J and in this court, the landowners contended that the legislation in question (the Rates Act) was 'enacted' in terms of s 179 as soon as it received assent and was published on 11 May 2004 – and not only on the date it was brought into operation on 2 July 2005: with the result that when the council met in December 2004, s 10G had already been repealed. Both Swain J and Hugo J rejected this argument on its premises. They held that the Rates Act was 'enacted' only when it was brought into operation, and that s 10G remained in force until then.

[10] In this court it transpired that the argument proceeded from the mistaken premise that s 179 was in operation when the council met in December 2004. This was not so.[8] Most of the provisions of the

[7]Local Government: Municipal Finance Management Act 56 of 2003, s 179(2): 'Despite the repeal of section 10G of the Local Government Transition Act, 1993 (Act 209 of 1993), by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is enacted.'

[8]The correct position is set out in *Rates Action Group v City of Cape Town* 2006 (1) SA 498 (SCA) para 12. The decision in the court below in that matter contains a comprehensive exposition of the legislative

Finance Management Act were brought into operation on 1 July 2004,[9] but the repealing provision took effect only on 1 July 2005.[10] So when the council passed the resolutions now contested, s 10G was still in force. It is therefore not necessary to decide whether the Rates Act was 'enacted' before it was brought into operation. It remains to consider only the landowners' subsidiary arguments.

[11] To address the defects Swain J identified, the council adopted the following procedure. First, it resolved to advertise the valuation roll finalised on 30 September in respect of the previously unrated properties. Next, it resolved on a rate of 2.3 cents in the Rand for the properties in question, effective from 1 January 2005. Then it adopted a resolution that amended the earlier resolution by deleting and replacing two paragraphs of the notice annexed to it. These amendments replaced in the earlier notice (a) the reference to s 75A(3)(b) of the Municipal Systems Act with a reference to s 10G(7) of the LGTA; and (b) the invalidated rates with the new rates.

[12] Pursuant to these resolutions, the council on 15 December 2004 published three notices. They were (a) a notice of preparation of a

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scheme of the local government reforms: 2004 (5) SA 545 (C).

[9] In terms of s 180(1) of the Finance Management Act, the Act takes effect on a date determined by notice in the Government Gazette. In terms of subsection (2), 'Different dates may in terms of subsection (1) be determined for different provisions of the Act'.

[10] GN 772, Government Gazette 26510, dated 25 June 2004.

valuation roll in terms of s 158 of the Ordinance; (b) a notice of assessment of rates for 2004/2005 year in terms of s 10G(7) of the LGTA at 2.3c in the Rand of the land value only for previously unrated properties – this notice also withdrew the previous notices and invited objections; and (c) a notice of a draft rates policy in terms of s 4(2)(b) of the Rates Act. It was common cause that this last notice was ineffectual since the Rates Act was not yet in operation. The question is the effect of the first two.

First attack: non-withdrawal of invalid notices and reference to wrong statutory provision

[13] The landowners relied on various flaws in the procedure the council adopted. First, they pointed out that the council failed to resolve to withdraw the invalid notices. The subsequent notice as published does withdraw them, but (they contend) this was without express council mandate. Second, though the resolution of 10 December amended the earlier resolution,[11] its operative part applied only to the notice: the resolution itself remained unamended, with its reference to s 75A(3)(b)

[11] The council minutes read that it was –
'RESOLVED
1. That paragraph 3 of the resolution passed on 09 June 2004 be amended in the following respects:
1.1 The first paragraph of Annexure C/21 [ie, the notice annexed to the minutes of 9 June] is deleted and replaced …;
1.2 That para 3.1 of Annexure C/21 is deleted and replaced …'.

of the Municipal Systems Act – which does not deal with the levying of rates at all. The resolution was therefore ineffective because the earlier resolution invoked the wrong statute and the wrong section. The council decision, they contended, is accordingly null and void – and with it the notice, even though that does refer to the correct statutory provision.

[14] Developing this argument, counsel for the landowners argued that the resolution of 10 December had to be granted its full importance as a legislative act: and the law requires such resolutions to be 'fully correct'. The uncorrected defect in the 9 June resolution therefore doomed the efficacy of the later resolution. The constitutional framework, counsel urged, requires a municipality to legislate correctly if it is to levy rates.

[15] There are two difficulties with this argument. The first is the matter of approach to what the council set about at its meeting of 10 December. The question is what meaning can properly be gleaned from the council's acts on that day. The landowners' argument treats the council's acts as though they constitute a jumble, each bit of which must be separately parsed, even if that leads to incoherence. That cannot be correct. The criterion of intelligibility, which governs all communication, requires that the council's connected acts be read cohesively, to draw

fairly from them the meaning sought to be conveyed. In particular, it requires that the legislative instruments interconnected by the express terms of the council resolution – the previous resolution and the attached notice – be read together.

[16] By this yardstick, there is little doubt what the council set out to do, and what it achieved. The disputed resolution expressly amended the previous resolution. It did so by referring to a specific paragraph of it, and to the annexed notice that paragraph mentions. Though it is possible to cavil at the wording, the unmistakable intent conveyed is that both resolution and annexure were to be amended. This follows from the very problem the landowners invoke – for to read the notice as amended, without a correlative amendment to the resolution, introduces an incoherence that was clearly not contemplated. That the operative part of the amendment refers only to the notice makes no difference when the resolution, the previous resolution and the notice are read together. The resolution must in my view be read as replacing the reference to s 75A in the previous resolution with a reference to s 10G(7). The argument that the council invoked the wrong provision is therefore without basis.

[17] The argument that the invalid notices were not expressly withdrawn has even less purchase. Swain J declared those notices invalid only to the extent that they dealt with previously unrated properties. They otherwise survived. The December amendments addressed the invalidity. The amendments plainly entailed the withdrawal of the previous notices to the extent of their invalidity. The implication was so unavoidable as to make an explicit mandate superfluous.

[18] But the landowners' argument faces a second obstacle. Even if, technically, the reference to the wrong provision stood unamended, the authority the council intended to invoke was plain. The minutes record that the council's chief financial officer informed the meeting that, in terms of the judgment of Swain J, 'the Municipality is entitled to levy and recover rates in the [newly rated] areas in terms of the Ordinance [or] the LGTA on condition that the right process and procedures are followed'. This reflected the judgment. There was no mention of the Systems Act, since by then it was clear that it had no application.

[19] Under the doctrine in *Latib's* case,[12] where an empowering statute does not require that the provision in terms of which a power is exercised be expressly specified, the decision-maker need not mention it. Provided moreover that the enabling statute grants the power sought

[12] *Latib v The Administrator, Transvaal* 1969 (3) SA 186 (T) at 190-1.

to be exercised, the fact that the decision-maker mentions the wrong provision does not invalidate the legislative or administrative act.

[20] The landowners argued that there is 'considerable doubt' about the validity of *Latib* in the light of the constitutional dispensation and in particular its emphasis on the principle of legality. As authority they referred to the decision of the CC in *Minister of Education v Harris*.[13] But this seems to me to misinterpret both the doctrine and the decision. *Latib* does not license unauthorised legislative or administrative acts. It licenses acts when authority for them exists, and when the failure expressly or accurately to invoke their source is immaterial to their due exercise. As Baxter puts it:

> 'If the authority is stated incorrectly, the action is not thereby invalidated so long as authority for the action *does* exist and the conditions for its exercise have been observed.'[14]

[21] The principle applied in *Latib* grew from long-standing authority. In *MacRobert v Pretoria Municipal Council*,[15] the facts of which bear resemblance to the present case, the municipality gave notice and issued by-laws under a provision that did not afford the requisite power. It later re-issued the notice, referring to both the incorrect and the

[13] 2001 (4) SA 1297 (CC).
[14] Lawrence Baxter *Administrative Law* (1984) p 366.
[15] 1910 TS 931 at 940-1 (per de Villiers JP); at 945-6 (per Wessels J).

correct power, but without re-issuing the by-laws. The court upheld the issue of the by-laws under the first notice. The reference to the wrong source of power was irrelevant, since it merely reflected a mistaken opinion on the part of the municipality:

> 'The validity of the bye-laws does not depend on the opinion of the municipality. It does not depend upon what they state is the law by virtue of which the bye-law is promulgated. It depends upon whether there exists a law which allows them to promulgate the bye-law; and if there is such a law, and they have promulgated the bye-law in accordance with the law, there can be very little doubt that the bye-law is legal, whatever may be the opinion of the municipality with regard to the law under which they have acted.'[16]

[22] The doctrine does not validate action taken in deliberate reliance on a provision that does not authorise it, even where another provision exists that may warrant it: *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms) Bpk*.[17] Nor can an original, general power to act cure an invalid exercise of a specific power: *Gerber v MEC for Development Planning and Local Government, Gauteng*.[18] In *Harris*, as in *Quid Pro Quo*, there was no question of a mere administrative error or oversight: the decision-maker deliberately chose to act in terms

[16] *MacRobert v Pretoria Municipal Council* 1910 TS 931 at 945-6 per Wessels J.
[17] 1977 (4) SA 829 (A) at 841A-G.
[18] 2003 (2) 344 (SCA) para 34.

of a provision that did not authorise what was sought to be done.[19] In dealing with an argument based on *Latib*, the CC pointed out that its applicability 'must depend on the particular facts of each case, especially whether the functionary consciously elected to rely on the statutory provision subsequently found to be wanting'.[20] Applying *Quid Pro Quo*, the CC held that it was not open to the decision-maker now to rely on a different provision to validate what had been invalidly done under the provision invoked: the otherwise invalid notice could not be rescued by reference to powers the decision-maker might possibly have had but failed to exercise.[21] I do not read *Harris* as putting *Latib* in doubt, but as confirming the proper scope of its application.

[23] In the present case, taking the landowners' argument at its strongest, the reference in the unamended resolution to s 75A(3) of the Systems Act was the result of a simple slip-up. The municipality's intent to refer to and invoke s 10G(7) of the LGTA was incontrovertible. Section 10G(7)(a)(i) authorises a council by resolution to levy and recover property rates in respect of immovable property in its area of jurisdiction. The reference to the power invoked can therefore afford the landowners no ground for complaint.

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[19] 2001 (4) SA 1297 (CC) paras 13-18.
[20] 2001 (4) SA 1297 (CC) para 17.
[21] 2001 (4) SA 1297 (CC) paras 18, per Sachs J on behalf of the Court.

Second attack: late publication of valuation roll

[24] The valuation roll was finalised after the judgment of Swain J and published only in January. During his reply, counsel for the landowners submitted in apparent after-thought that the roll was invalid for want of compliance with s 105 of the Ordinance, which by implication requires a valuation roll prepared in terms of s 155 or s 158 of the Ordinance to be published 'not later than the thirtieth day of June' preceding the rating year.

[25] In their founding papers, the landowners complained that the council had 'concocted its own system which does not accord with either the Ordinance or the LGTA'. They then alluded to the provisions of the Ordinance governing valuation rolls, including s 105. However, the argument about the publication of the valuation roll was apparently not advanced before Hugo J, who held simply that there was no justification for the landowners' objections, and that their complaint that the procedures of the Ordinance had been disregarded had not been properly evidenced in the affidavits.

[26] The council's answering affidavit objected to the absence of detail in the landowners' complaints, but disputed in any event that the valuation

roll was invalid. In doing so, it invoked only the LGTA: 'The valuation system followed by the Municipality meets the requirements of the LGTA. If the Municipality imported more features into the process in favour of the ratepayers, that cannot be a basis for complaint.' The council further took issue with the landowners' general complaint that all the provisions of the Ordinance had to be complied with or that the Ordinance governed the valuation process, and stated that 'the valuation process was fair and that there was and is sufficient opportunity for any aggrieved party to challenge the valuation'.

[27] The notice assessing the rates refers only to s 10G(7)(c) of the LGTA, and not to the Ordinance. The council therefore invoked a power to impose rates derived from the LGTA alone. In terms of s 10G(6) of that statute, a council must ensure that –

'(a) properties within its area of jurisdiction are valued or measured at intervals prescribed by law;

(b) a single valuation roll of all properties so valued or measured is compiled and is open for public inspection; and

(c) all procedures prescribed by law regarding the valuation or measurement of the properties are complied with'.

[28] The reason the landowners did not previously suggest that the Ordinance governed the valuation process is because their contention has consistently been that the Ordinance does not apply at all. As appears from the judgment of Swain J, they contended that the council had no power under the Ordinance to rate them, since that power was limited to 'immovable property within the borough'. Swain J, however, rejected this argument, holding that the council had power under both the LGTA and the Ordinance to impose rates upon the properties in question.

[29] In my view the landowners' contention that the rating power under the Ordinance applies only to those properties falling within the jurisdiction of boroughs as defined under the Ordinance is correct. This emerges from the definitions contained in the Ordinance, which define a 'borough' as 'a borough within the operation of this Ordinance'. It is common cause that the council was not a 'borough' within the Ordinance's operation, and that before the Systems Act created municipal authorities with encompassing jurisdictions, the landowners' properties fell outside the boroughs so defined.

[30] The landowners further maintained that their properties would become rateable only when the Rates Act came into force. That

contention was rightly rejected by both Swain J and Hugo J: the council's rating power, derived from the LGTA, is self-standing and extends to all properties within its jurisdiction. Since the power in question does not derive from the Ordinance, I am of the view that the council in exercising it is not obliged to follow the prescripts of the Ordinance, which have no application to the newly rateable properties.

[31] It follows, in my view, that the time periods prescribed in the Ordinance were applicable only to rates assessments of properties falling within a borough as defined 'within the operation' of the Ordinance, and that where the council relied on the powers conferred on it under the LGTA to rate newly rateable properties, the Ordinance did not apply. As counsel for the landowners conceded, the LGTA does not impose any specific requirement as to when the valuation roll must be drawn up. It follows that the complaint that the rates were imposed in the middle of the year, with effect from the beginning of the financial year, can also not prevail, since nothing in the LGTA precludes this.

[32] It follows that 'procedures prescribed by law' under the LGTA did not include the time periods and prescriptions contained in the Ordinance, and that the complaints regarding the publication of the valuation roll are misconceived. Although notice of the preparation of the valuation

roll was given separately, purportedly under s 158 of the Ordinance, the council (according to the affidavit of its municipal manager) regarded that as supererogatory. This in my view was correct.

[33] This conclusion is strengthened by s 93(9) of the Structures Act. This provides that:

> 'Until the legislation envisaged in section 229 (2) (b) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), is enacted, a municipality may use the valuations appearing on a provisional valuation roll or an additional valuation roll when imposing property rates.'

The impact of this provision seems to me to be two-fold: First, it appears to have been enacted for the express purpose of freeing municipalities from the constraints of the provisions of the Ordinance. Second, it seems to entail that valuation rolls in addition to those prepared under the Ordinance (in other words, 'provisional' or 'additional' rolls) may be used. This is a plain indication that, pending the enactment of the Rates Act, the time periods specified in the Ordinance for ordinary rolls were not intended to apply to municipalities when not exercising powers conferred by the Ordinance.

[34] The landowners' other complaints were even more faintly pressed on appeal, and rightly so. The rating system of 2.3 cents in the Rand on

the land value may create anomalies, as any rating system must, but is not irrational; on the contrary, it appears to provide a just and rational basis for introducing the new rates.

[35] The appeal must accordingly be dismissed with costs.

E CAMERON
JUDGE OF APPEAL

CONCUR:
ZULMAN JA
LEWIS JA
MAYA JA
THERON AJA