REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case Number : 526 / 05

In the matter between

CDA BOERDERY (EDMS) BPK	**FIRST APPELLANT**
WESTERN AREAS PROPERTY AND RESIDENT ASSOCIATION	**SECOND APPELLANT**

and

THE NELSON MANDELA METROPOLITAN MUNICIPALITY	**FIRST RESPONDENT**
THE SPEAKER OF THE NELSON MANDELA METROPOLITAN MUNICIPALITY	**SECOND RESPONDENT**
THE PREMIER OF THE EASTERN CAPE PROVINCE	**THIRD RESPONDENT**
THE MEC FOR HOUSING AND LOCAL GOVERNMENT FOR THE EASTERN CAPE	**FOURTH RESPONDENT**
THE DIRECTOR OF VALUATIONS	**FIFTH RESPONDENT**

Coram : **MPATI DP, CAMERON JA, MTHIYANE JA, CONRADIE JA et THERON AJA**

Date of hearing : **17 NOVEMBER 2006**

Date of delivery : **6 FEBRUARY 2007**

SUMMARY

Local government - rating of property by Municipality - ambit of s 10G(6), (6A) and (7) of Local Government Transition Act - consent of Premier to impose property rate above two cents in the Rand - whether this provision of Municipal Ordinance 20 of 1974 impliedly repealed – Order in para 52

Neutral citation: This judgment may be referred to as :
***CDA Boerdery (Edms) Bpk and Others v The Nelson Mandela Metropolitan Municipality and Others* [2007] SCA 1 (RSA)**

J U D G M E N T

MINORITY JUDGMENT OF CONRADIE JA

[1] The first appellant is a landowner and the second an association representing rural landowners. Each is aggrieved by the imposition by the local authority of assessment rates on immovable properties that were not rateable under the old dispensation when they fell within the jurisdiction of the since disestablished Western District Municipality. I shall call the first appellant and the members of the second appellant 'the landowners'.

[2] The first respondent is a metropolitan municipality (the Municipality). It is the new local authority within whose jurisdiction the landowners now fall. The other respondents are bodies and persons who have or were thought to have an interest in the proceedings. Apart from the second respondent who protested at her joinder, they played no active part in the proceedings.

[3] The litigation started with an interim application seeking an interdict against the Municipality to prevent it from prosecuting claims against the landowners for the recovery of rates and service charges it maintained were due. Interim relief was granted by consent pending the disposal of an application that

was to be instituted shortly afterwards. The main application claimed, first, an order declaring service charges on the landowners' properties to be unlawful. Second, an order was sought declaring the valuation of their properties to have been unlawful, and, finally, an order was claimed that the landowners were not liable for rates in respect of the financial years 2002 - 2003 and 2003 - 2004. By the time the application came to be heard by Froneman J in the South Eastern Cape Local Division, the landowners had abandoned their objection to the service charges. On the other issues the high court found in favour of the Municipality, dismissed the application and discharged the earlier interdict. It granted the landowners leave to appeal.

[4] When the transition to democracy came, local government had to be restructured. There were all manner of local authorities in existence at the time for various population groups that had been established under the old dispensation. Since the transformation was to be on a unified country-wide basis, national legislation was required to accomplish it. Over the coming years national legislation would gradually give local government a new face.

[5] The validity of pre-constitutional legislation, ‘old order legislation’ as it is called in item 2 of Schedule 6 to the Constitution, is declared to continue in force subject to amendment or repeal and, naturally, consistency with the Constitution. In some cases the old order legislation required adaptation. One

instance was the administration of the provinces of which there were now nine instead of four. Each of the new provinces would have to adopt, for its own area, provincial ordinances that had formerly applied over a wider area. So it was that the administration of the Municipal Ordinance 20 of 1974 was transferred to the Eastern Cape Province by proclamation 111 published in the Government gazette of 17 June 1994.

[6] The first statute in the series restructuring local government was the Local Government Transition Act 209 of 1993 (the Transition Act). It set up transitional councils for the so-called pre-interim and interim phases of the restructuring. For those local government bodies that would not in any event have been subject to provincial legislation it made special provision in sections 15 and 16. Section 15(4) extended 'the provisions of any law applying to local authorities in the province concerned' to any body constituted under the Black Local Authorities Act 102 of 1982; s 16(2) did the same with certain transitional councils established by proclamation. The legislative scheme is clear: existing provisions would be used until others could be enacted.

[7] Some three years after its commencement on 2 February 1994, the Transition Act was amended by the introduction in 1996 of a Part VIA (headed 'Interim Phase') in the statute. It comprised the new subsecs 10B - 10N of which

10G formed the most extensive component. The most important provisions, for present purposes, were contained in s 10G(6), (6A) and (7)(a) and (b):

'(6) A local council, metropolitan local council and rural council shall, subject to any other law, 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 properties are complied with:

Provided that if, in the case of any property or category of properties, it is not feasible to value or measure such property, the basis on which the property rates thereof shall be determined shall be as prescribed: Provided further that the provisions of this subsection shall be applicable to district councils in so far as such councils are responsible for the valuation or measurement of property within a remaining area or within the areas of jurisdiction of representative councils.

(6A) (*a*) Despite anything to the contrary in any other law, a municipality must value property for purposes of imposing rates on property in accordance with generally recognised valuation practices, methods and standards.

(*b*) For purposes of paragraph (*a*)—

(i) physical inspection of the property to be valued, is optional; and

(ii) in lieu of valuation by a valuer, or in addition thereto, comparative, analytical and other systems or techniques may be used, including—

(*aa*) aerial photography;

(*bb*) information technology;

(*cc*) computer applications and software; and

(*dd*) computer assisted mass appraisal systems or techniques.

(7) (*a*) (i) A local council, metropolitan local council and rural council may by resolution, levy and recover property rates in respect of immovable property in the area of jurisdiction of the council concerned: Provided that a common rating system as determined by the metropolitan council shall be applicable within the area of jurisdiction of that metropolitan council: Provided further that the council concerned shall in levying rates take into account the levy referred to in item 1 (*c*) of Schedule 2: Provided further that this subparagraph shall apply to a district council in so far as such council is responsible for the levying and recovery of property rates in respect of immovable property within a remaining area or in the area of jurisdiction of a representative council.

(ii) A municipality may by resolution supported by a majority of the members of the council levy and recover levies, fees, taxes and tariffs in respect of any function or service of the municipality.

(*b*) In determining property rates, levies, fees, taxes and tariffs (hereinafter referred to as charges) under paragraph (*a*), a municipality may —

(i) differentiate between different categories of users or property on such grounds as it may deem reasonable;

(ii) in respect of charges referred to in paragraph (*a*) (ii), from time to time by resolution amend or withdraw such determination and determine a date, not earlier than 30 days from the date of the resolution, on which such determination, amendment or withdrawal shall come into operation; and

(iii) recover any charges so determined or amended, including interest on any outstanding amount.'

[8] Until the introduction of s 10G(6), (6A) and (7) the Transition Act contained no rating provision. For the first three years after the implementation of the Transition Act local authorities must have exercised their rating powers in terms of old order provincial ordinances. In the case of the Eastern Cape Province, immovable property was rated under the authority of Part 2 of Chapter VIII of the Municipal Ordinance. The relevant provision in the Municipal Ordinance is s 82 which provides in subsec (1) that -

'(1) Every council shall:

(*a*) for every year make and levy on all rateable property within its municipal area a general rate not exceeding, except with the approval of the Administrator, two cents per rand…'

[9] The introduction of s10G(6), (6A) and (7) by Act 97 of 1996 with effect from 1 July 1996 may have had something to do with the imminent commencement of the new Constitution from 4 February 1997. Section 229 of the Constitution provides that -

> '(1) . . . a municipality may impose -
>
> (*a*) rates on property . . . ; and
>
> (*b*) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls . . .
>
> (2) The power of a municipality to impose rates on property . . . or other taxes, levies or duties -
>
> (*a*) . . .;
>
> (*b*) may be regulated by national legislation.'

[10] Item 26(1)(a) of the Constitution's sixth Schedule preserves the provisions of the Transition Act in force 'in respect of a Municipal Council until a Municipal Council replacing that Council has been declared elected as the result of the first general election of Municipal Councils after the commencement of the new Constitution.'[1]

[1] The first general municipal elections after the commencement of the Constitution were held on 5 December 2000.

[11] Section 229 is an empowering and not a charging section. National legislation was envisaged to regulate the considerable complexities involved in the rating of immovable property. The broad and general power afforded by s 229 accords with s 164 of the Constitution which provides: 'Any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation within the framework of national legislation.'

[12] Section 10G(6), (6A) and (7) on its own is, however, far from adequate in serving as an instrument for imposing rates. It prescribes that valuations are to be undertaken without stating how these are to be conducted. It states that rates on immovable property are to be imposed by resolution of a municipal council; it states that differentiation between categories of property is permissible but it omits the detail of how properties are to be rated or which properties are to be rated.[2] As was pointed out in *Gerber v Member of the Executive Council for Development Planning and Local Government, Gauteng*[3], s 229 of the Constitution uses the expression ‘rates’ in its ordinary sense of a tax assessed on the value of buildings and land and s 10(G)(7) must be taken to use the expression in the same sense.

[2] It for example does not provide which properties are not rateable. It does not state which properties are exempt from rates. Section 82(1)(a) of the Municipal Ordinance provides that rates are to be levied on rateable properties. The Municipality, by resolution imposed property rates on 'rateable property', a concept which is not employed by the Transition Act. It must have had regard to s 82(1)(a) of the Municipal Ordinance.
[3] 2003 (2) SA 344 (SCA) para 23.

[13] Traditionally, not all property within a municipality was regarded as rateable, or rather, it could escape being rated if it complied with certain criteria and the owner applied for an exemption from rates. There were many properties of this kind listed in s 81 of the Municipal Ordinance. These included immovable properties owned by religious bodies or used for public worship or hospitals or sports bodies or the Boy Scouts, the list is a long one. It was not suggested that the Municipality was not bound to consider exemptions in terms of s 81. The point is that s 10G(7) was not intended as a rating mechanism that was complete in itself and could be applied without reference to the provisions of the Municipal Ordinance.

[14] Section 10G(6) of the Transition Act which dealt with valuations, acknowledged the Municipal Ordinance by providing that a municipality should, subject to any other law, ensure that properties within its area were valued or measured at intervals prescribed by law. Moreover, ‘all procedures prescribed by law regarding the valuation or measurement of properties’ had to be complied with. In the case of the Eastern Cape this was the Valuation Ordinance of 1993 or the Valuation Ordinance of 1944. There was a dispute between the parties as to which of these laws applied but that is unimportant. The point is that s 10G(6) in express terms envisaged the incorporation of existing provincial laws into the Transition Act in the sense that they were to be taken into account in the rating scheme. Section 10G(7) does not have such an

express incorporation provision. It seems to me to have been a legislative oversight that must be adjusted by interpretation. Valuation of immovable property is an integral part of rating property: The imposition of a rate envisages a levy of so many cents in the Rand of the value of property. Rating without valuation is impossible.

[15] The Municipality, of course, realised the practical complexities of rating very well. The summonses to recover arrear rates and other charges that served as the trigger for the urgent application to interdict the Municipality, were drawn in the realisation that the landowners' immovable properties could not have been assessed on the strength of s 10G(6), (6A) and (7) alone. The formulation of the claims (only the rates claim is still relevant) relied, correctly in my view, on the provisions of s 82(1)(a) of the Municipal Ordinance: Claim 2 demanded payment of 'arrear general municipal rates levied in terms of sect 82 and payable in terms of sect 87 of the Municipal Ordinance 20 of 1974 for the year 2002/2003 the plaintiff having complied with all the provisions of the said Ordinance.'

[16] By resolution of the Municipal Council taken on 10 June 2002 the landowners' properties were assessed to tax for the financial year commencing 1 July 2002. The council's resolution read as follows:

'That the Council, in terms of Section 30(2) of the Local Structures Act No. 177 of 1998 (as amended) read with Section 10G(7)(a)(i) of the Local Government Transition Act, Second Amendment Act No. 97 of 1996, and by resolution taken by majority of its full number, levies the following general rate on all rateable property within the municipal area for the period 1 July 2002 to 30 June 2003:

Port Elizabeth Unit	5,5843 cents in the Rand
Uitenhage Unit	8,38 cents in the Rand
Despatch Unit	1,85 cents in the Rand

(c) That the Council, in terms of Section 30(2) of the Local Government : Municipal Structures Act No.. 117 of 1998 (as amended) read with Section 10G(7)(b)(i) of the Local Government Transition Act, Second Amendment Act No. 97 of 1996, and by resolution taken by majority of its full number, grants the following rebates for the period 1 July 2002 to 30 June 2003: . . .

. . . .

. . . .

Erstwhile Western District Municipal areas

Properties in the erstwhile WDM areas now valued and rated for the first time:

A rebate of 67% of the general rate on all rateable properties, resulting in the following rates being levied on the following categories of properties:

All rateable properties rates being 2,3713cents in the Rand.'

[17] The Municipality's contention is that the assessment rates of which the landowners complain were validly imposed under the authority conferred on it

'. . . pursuant to Section 229(2)(a) of the Constitution and Section 10G(6) of the Local Government Transition Act No 209 of 1993. Said charges were in all instances lawfully raised.'

The reference to s 10G(6) of the Transition Act is wrong. There is no reason to suppose that the proposed resolution was adopted in any but the terms suggested by the executive mayor, that is to say, in terms and in reliance on s 10G(7) of the Transition Act.

[18] At the time the rates were imposed the Municipality had become a fully-fledged Municipality under the provisions of s 12 of the Municipal Structures Act 117 of 1993 (the Structures Act) which obliged the MEC for local government in a province, by notice in the Provincial Gazette, to establish a municipality in each municipal area demarcated by the Demarcation Board in the province in terms of the Local Government: Municipal Demarcation Act 27 of 1998. The necessary proclamation by the MEC establishing the Municipality was published on 2 December 2001. From that date it was, therefore, no longer an interim structure. The provisions of the transition Act nevertheless continued to apply to it until 2 December 2000 when the first general municipal elections after the Constitution were held.[4]

[4] Item 26(1)(a) of the Constitution provides that the provisions of the Transition Act would remain in force until the first election of a municipal council after the commencement of the Constitution.

[19] Once, however, the Municipality was governed by a council duly elected as a result of the first general election after the Constitution, it could no longer lawfully levy assessment rates on landowners within its jurisdiction in terms of s 10G(7)(a)(i). The section under which the Municipality was now entitled to levy rates was s 93(4) of the Structures Act[5] which reads as follows:

'(4) Despite anything to the contrary in any other law and as from the date on which a municipal council has been declared elected as contemplated in item 26(1)(*a*) of Schedule 6 to the Constitution —

(*a*) section 10G of the Local Government Transition Act, 1993 (Act 209 of 1993), read with the necessary changes, apply to such a municipality; and

(*b*) any regulation made under section 12 of the Local Government Transition Act, 1993 (Act 209 of 1993), and which relates to section 10G of that Act, read with the necessary changes, apply to such a municipality.'

[20] Section 93(4) is framed in such a way that it incorporates the duly modified provisions of s 10G(6), (6A) and (7) of the Transition Act, but it is s 93(4) of the Structures Act that henceforth conferred the power to tax on a duly elected municipality council. I need say no more about it; the point was not raised on the papers or argued before us on appeal. The point was evidently not argued in *Howick District Landowners Association v uMngeni Municipality* [2006] SCA 107 (RSA) either for it is not discussed in the judgment.

[5] The Structures Act came into force on 1 February 1999.

[21] The high court found that the requirement of permission by the Premier was incompatible with the original powers enjoyed by the new order municipalities. The learned judge formulated his reasons as follows:

'Die vereiste van toestemming kom nie in die tersaaklike bepalings van die Grondwet of die Oorgangswet voor nie. Die begrensing van nuwe munisipale owerhede se belastingsbevoegdheid in die Grondwet of die Oorgangswet sluit nie beperkings, of gegradeerde beperkings, op die belastingkoers self in nie. In die konteks van die vorige bedeling, naamlik dié van gedelegeerde wetgewingsbevoegdhede van plaaslike regeringsinstansies, was sulke beperkings en toesig deur hoër regeringsvlakke verstaanbaar en noodsaaklik, maar in die nuwe plaaslike regeringsbestel van *oorspronklike* wetgewingsbevoegdhede is daar geen grondwetlike of wetgewende noodsaak daarvoor nie. Ek kan geen rede vind waarom die bepalings van vorige provinsiale wetgewing in die vorm van die Munisipale Ordonnansie voorrang moet geniet bo latere grondwetlike en nasionale wetgewende bepalings wat op die oog af volledig met die onderwerp handel nie.'

[22] Before us the Municipality, in supporting the findings of the learned judge *a quo*, argued that s 82(1) 'offends the scheme of authority sanctioned inter alia by s 229 of the Constitution and the provisions of the Local Government Transition Act' and should be treated as *pro non scripto* or as impliedly repealed by the later legislation.'

[23] I am unable to agree with these contentions. The argument places greater emphasis on the concept of 'original powers' than appears to me to be

warranted. The Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*[6] decided no more than that a local authority in resolving to impose rates exercised an original and not a delegated power with the consequence that its action was not subject to administrative law review. It seems to me that the Municipal Ordinance read with whatever Valuation Ordinance was applicable, formed a coherent construct for the imposition of rates which had stood the test of time. This legislation was employed for the first three years of the transition, and it does not seem to me reasonable to suppose that the Transition Act intended to abolish their relevant provisions in favour of an incomplete and therefore unworkable system of rating. Counsel for the Municipality did not support that outcome. What he did contend was that once municipalities had been given constitutionally derived power to impose such rates as were authorised by national legislation, the Premier no longer had the power to decide whether rates might exceed two cents in the Rand. It is only this one power of the Premier that was supposed to have been lost in the transition. Apart from this competence the Premier had several other powers that were necessary or desirable to the orderly rating of properties. It was not suggested that they should also be treated as *pro non scripto*.

[6] 1999 (1) SA 374 (CC).

[24] It is more consonant with the gradual and sometimes painful development of new municipal structures to regard Part 2 of Chapter VIII of the Municipal Ordinance, including the requirement of the Premier's approval of a rates level above two cents in the Rand, as complementary to the rating provisions of the Transition Act. The alternative would be to treat the requirement of the Premier's consent as having been impliedly repealed. Implied repeal is not lightly inferred, and here it seems to me that the necessities of practical administration argue strongly against it.

[25] If the Premier’s power of approval in s 82(1)(a) of the Municipal Ordinance were indeed impliedly repealed by the Transition Act (read with the Constitution) it would mean that from the date of the introduction of s 10G into the Transition Act in 1996, there would have been no limitation on the power of a municipality to levy property rates. This situation would have persisted for almost a decade until the legislature in 2005, through the Local Government: Municipal Property Rates Act 6 of 2004 granted the Minister more extensive control over municipal rating powers than s 82(a)(i) of the Municipal Ordinance had given to the Premier, a sure indication that municipalities were never intended to have unrestricted rating powers.[7] The mechanism of property valuations by independent experts is a mechanism to control a local authority's power to tax its residents; but if it were empowered to impose unlimited rates on

[7] The Local Government: Municipal Property Rates Act 6 of 2004 was brought into force on 2 July 2005.

those valuations, all control would be lost. I do not subscribe to the notion that the lawgiver envisaged that the original power of local authorities to levy rates was, since the introduction of s 10G(6), (6A) and (7), untrammelled by any restrictions other than those set out in 229(2)(a) of the Constitution.

[26] When s 10G was with effect from 1 July 2005 repealed by the Local Government: Municipal Finance Management Act 56 of 2003 the provisions of subsecs (6), (6A) and (7) of s 10G (the rating provisions) were kept in force until the legislation envisaged by s 229(2)(b) of the Constitution would be enacted. It is significant that Part 2 of Chapter VIII of the Municipal Ordinance was also not repealed at that time. These two complementary pieces of legislation, once they had served their purpose, were repealed together by s 95 of the Local Government: Municipal Property Rates Act 6 of 2004 which made comprehensive provision for the valuation and rating of immovable property by municipalities.

[27] The position taken by the appellants in *Howick District Landowners Association v uMngeni Municipality*[8] was that the Local Authorities Ordinance (Natal) 25 of 1974 did not apply to the immovable properties sought to be rated since they were not located within a ‘borough’. This court found that the contention was correct and that the Ordinance did not apply. Although the court

[8] [2006] SCA 107 (RSA).

a quo in that matter seems to have held that rating could proceed under the Natal Ordinance and under the Transition Act - that the two measures were, in other words, complementary - this finding was not open to the court on appeal. It therefore held that the properties could have been rated under s 10G(7)(a)(i) of the Transition Act without reference to the Ordinance but did not say how this might have been done.

[28] In the present case the appellants argue the contrary, namely that all the provisions of Part 2 of Chapter VIII of the Municipal Ordinance 20 found application. As has been noted above, the counter-argument by the Municipality is that although the rating provisions of the Municipal Ordinance did find application, the Premier no longer had any say over the level of rates imposed. Although, from a theoretical perspective, there may be something to be said for this argument, I think that the practical effects of it would be so unpalatable that they could not have been intended by the legislature. The legislature must be taken to have incorporated all the rating provisions of the Municipal Ordinance in s 10G(7) of the Transition Act (as indeed it did in s 10G(6)) so as to establish a workable interim rating system.

[29] It is trite law that statutes imposing a burden on the subject are construed in such a way that the subject is least burdened. Revenue statutes fall into this category. The rating provisions in the Transition Act were revenue measures. If

there is the least doubt about their interpretation, it should be resolved by holding that the Premier's consent to the imposition of a rate greater than two cents in the Rand on the ratepayers' properties ought to have been sought by the Municipality.

[30] Since preparing this judgment I have had the benefit of considering the views of Cameron JA. I agree with most of what he says. The left-over provision in the Municipal Ordinance for obtaining the Premier's consent did not fit tidily into the new local government structure. However, I shrink from the boldness of the leap from untidiness to implied repeal. I would prefer to find the legislative intention in what the legislature decrees. I do not consider that a statutory provision loses its force simply because its derivation can be said to be suspect. Our disagreement, it seems to me, involves no more than this: In the process of constructing the new edifice and before it could stand on its own, some of the essential transition measures (among them the Premier's consent provision) were legislatively imperfect. They were makeshifts, intended to remain in force, messy as they were, until they were repealed by the Act that completed the design of the new structure, the Local Government: Municipal Property Rates Act. But before the structure was finished, all the provinces in the new South Africa were, temporarily, intended to make do with what they had inherited from the provinces in the old South Africa. The enhanced status of municipalities in the new dispensation was not accompanied by an advance in

administrative or financial acumen that might lead one to think that the Premier's control over the rating powers of municipalities was considered not to be necessary for the transition period. In view of this I am inclined to think that the omission of a limiting provision in s 10G(7) signifies no more than that the lawgiver felt secure in the knowledge that the Municipal Ordinance (which, we must not forget, was specifically introduced into the laws of the Eastern Cape) took care of the situation.

[31] In view of my conclusion, it is not necessary to consider the appellants' other objections to the rates. The order I would suggest is that the appeal be upheld with costs and the judgment of the high court altered accordingly.

J H CONRADIE
JUDGE OF APPEAL

MAJORITY JUDGMENT OF CAMERON JA:

[32] I am indebted to my colleague Conradie JA for his judgment which sets out the main statutory provisions and the parties' contentions; but I am unable to agree with his conclusion that the appellant landowners' appeal must succeed. Our main point of difference is whether the Cape Municipal Ordinance 20 of 1974 obliged the respondent municipality to obtain the Premier's approval for

the new rates it sought to impose on the landowners. Conradie JA considers that it did. I respectfully differ. I endorse the reasoning and conclusion of Froneman J in the court below. The old-order subordination of the local authority's power to levy rates of more than 2 cents in the Rand to the Administrator's[9] [Premier's] approval was impliedly repealed when the Constitution took effect. It did not survive the transition. The municipality was therefore free of any obligation to obtain that approval, and the rates are valid.

[33] In my respectful view my colleague's approach does not afford sufficient credence to the independent status and power the new constitutional order accorded to municipalities. Under the pre-constitutional dispensation, municipalities owed their existence to and derived their powers from provincial ordinances.[10] Those ordinances were passed by provincial legislatures which themselves had limited law-making authority, conferred on them and circumscribed by Parliamentary legislation. Parliament's law-making power was untrammelled,[11] and it could determine how much legislative power provinces exercised. The provinces in turn could largely determine the powers and capacities of local authorities.[12] Municipalities were therefore at the bottom

[9]Municipal Ordinance 20 of 1974 (Cape) s 82(1): 'Every council shall – (a) for every financial year make and levy on all rateable property within its municipal area a general rate not exceeding, except with the approval of the Administrator, two cents per rand …'.

[10]The South Africa Act of 1909 (a statute of the British Parliament, 9 Edw c 9), which created the Union of South Africa, entrusted 'municipal institutions, divisional councils and other local institutions of similar nature' to provincial councils: see Johan Meyer 'Local Government' in the first edition of WA Joubert (ed) *The Law of South Africa* (1981) (LAWSA) vol 15 para 301.

[11]Subject only to extremely limited 'entrenched provisions' that are not relevant here.

[12] Section 84(1)(f)(i) of the Republic of South Africa Constitution Act 32 of 1961 in terms similar to the South Africa Act gave provincial councils power to make ordinances in relation to 'municipal institutions, divisional councils and other local institutions of a similar nature'.

of a hierarchy of law-making power: constitutionally unrecognised and unprotected, they were by their very nature 'subordinate members of the government vested with prescribed, controlled governmental powers'.[13]

[34] The requirement to which Conradie JA would subject the municipality's rating power emanated from this general conception of municipal power. And the Administrator's role in approving or disapproving rates must be understood in that specific pre-constitutional setting. The Administrator was the presidentially-appointed chief governmental executive in the province.[14] He (and it was always a he) convened and prorogued the provincial council and participated in its proceedings.[15] Most pertinently, in terms of various provincial ordinances in the Cape and other provinces he had 'wide-ranging powers' over local authorities,[16] including powers of control, investigation and intervention over local government administration.[17] To a significant extent, he policed the municipalities and functioned as their overseer.

[35] The provision, embedded as it was in a 1974 Ordinance, when the 1961 Constitution was in force, thus subjected rates assessments over two cents in the Rand to the province's chief executive official, who functioned in a legislature from which the local authority derived its powers, and to which it was entirely

[13] LAWSA (1 ed, 1981) vol 15 para 303.
[14]Republic of South Africa Constitution Act 32 of 1961, s 66.
[15]See Republic of South Africa Constitution Act 32 of 1961, sections 72 and 78.
[16]G Carpenter 'Provincial Government' *LAWSA* vol 21 para 249 and para 252(d), (f) and (i).
[17]*LAWSA* vol 15 paras 514-518.

subordinate. The approval requirement was a specific product of the old-order constitutional scheme, tailored to its hierarchy and matched to the Administrator's supervisory control over municipalities and his executive role in relation to them.

[36] None of this, or barely any of it, accords with the new constitutional dispensation. It is correct, as the landowners emphasised in argument, that the new Constitution gives provincial government powers in relation to local government. Provincial legislation must determine the different types of municipality to be established in the province, and it is the responsibility of each provincial government to establish municipalities in accordance with national legislation.[18] Provincial government must also, by legislative or other measures, provide 'for the monitoring and support of local government in the province'.[19] Subject to the obligation of national and provincial government not to compromise or impede a municipality's ability or right to exercise its powers or perform its functions,[20] a municipal by-law that conflicts with national or provincial legislation is invalid.[21] And where a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, a provincial executive may take appropriate steps to intervene.[22]

[18]Constitution s 155(5).
[19]Constitution s 155(6)(a).
[20]Constitution s 151(4).
[21]Constitution s 156(3).
[22]Constitution s 139(1).

[37] But these provisions do not change the fact that the new constitutional order conferred a radically enhanced status on municipalities. Under the interim Constitution, each level of government (national, provincial and local) derived its powers direct from the Constitution (though local government's powers were subject to definition and regulation by either the national or provincial governments). The constitutional status of local government was therefore 'materially different' from the pre-constitutional era.[23]

[38] The advent of the final Constitution has taken us even further from the constitutional structure in which the Ordinance was embedded. The new Constitution has enhanced, rather than diminished, the status of local government. As under the interim Constitution, municipalities are no longer merely creatures of statute that enjoy only delegated or subordinate legislative power derived exclusively from ordinances or parliamentary legislation. The Constitution has moved away from a hierarchical division of governmental power in favour of a new vision, in which local government is interdependent, and (subject to permissible constitutional constraints) inviolable and has latitude to define and express its unique character.[24]

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[23]*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 35-38.
[24]*City of Cape Town v Robertson* 2005 (2) SA 323 (CC) paras 58-60, endorsing the coordinate statements in *Fedsure*.

[39] Can the Ordinance's requirement that the Administrator (now the Premier) must approve rates over 2 cents in the Rand survive this radically different and enhanced realisation of local government powers? In my view, the answer must be No. Under the old dispensation, it was both natural and appropriate that central government's superior position over municipalities, and the province's role as the source of local government's power, should find expression in the power of government's chief provincial executive official, the Administrator, to approve rates.

[40] Under the Constitution both the province generally and the Premier specifically have an entirely different role in relation to local authorities. Though provincial government has important functions in relation to municipalities, its role is constitutionally described and circumscribed. Nothing in the Constitution suggests that the Premier of a province enjoys special supervisory powers over the exercise of local government functions, or special duties in relation to the determination of rates.

[41] This case does not require us to decide whether a statute of Parliament, enacted under power expressly conferred by the Constitution,[25] can permissibly require that the Premier should approve municipal rates. And the conclusion that the obligation under the Ordinance to obtain the Administrator's approval

[25] Constitution s 229(2)(b) – the power of a municipality to impose rates on property 'may be regulated by national legislation'.

was impliedly repealed does not pre-judge the different question whether the enactment of such a requirement within the new constitutional framework would be constitutionally valid. The question before us is much narrower: it is whether a requirement to approve rates that was embedded in a dispensation fundamentally different in the position and powers it accorded local authorities has survived the constitutional transition. It is in answering that narrow question that the conspicuous absence of any special supervisory role for the Premier under the new Constitution takes on a special significance.[26]

[42] It is also telling that the curbs on municipalities' rating powers that Parliament has enacted in the Local Government: Municipal Property Rates Act[27] bear no relation at all to the Ordinance's requirement that the Administrator must approve that is sought to be enforced in this case.

[43] A further indication that the approval requirement in s 82(1)(a) of the Ordinance was impliedly repealed is that s 10G(6) of the Local Government Transition Act 209 of 1993 (the LGTA) requires that municipalities perform valuations of properties 'subject to any other law'.[28] By contrast, s 10G(7),

[26] An absence noted by Froneman J in para 11 of the judgment appealed from, and quoted by Conradie JA in par 21 of his judgment.

[27] Act 6 of 2004, s 16 (which confers limited and carefully defined powers of supervision and limitation regarding rates on the Cabinet member responsible for local government).

[28] Section 10G(6) was at issue in *Howick District Landowners Association v uMngeni Municipality* [2006] SCA 107 (RSA) and in *City of Cape Town v Robertson* 2005 (2) SA 323 (CC). As Conradie JA points out in para 27 of his judgment, the appellant landowners in *Howick* expressly contended that the Natal Ordinance there in issue did not apply at all. In the light of the particular definitions in the Natal Ordinance (which defined rateable property as being property within a 'borough', whereas the newly rated properties were by common cause outside any 'borough'), this Court held that the landowners' contention was correct and that the Natal Ordinance was entirely inapplicable. Contrast the position in *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) para

which empowers municipalities to levy and recover property rates, has no parallel allusion to 'any other law'. This suggests that s 10G(7) confers a free-standing rate-levying competence on municipalities. I therefore respectfully differ from the suggestion in the judgment of my colleague Conradie JA (para 14) that the omission in s 10G(7) to subordinate the rate-levying power to requirements in 'any other law' is a legislative oversight that we must adjust by interpretation. In my view, it is doubtful whether the Ordinance is applicable to s 10G(7) at all, and this strengthens the conclusion that that portion of the Ordinance was impliedly repealed when the constitutional order was established. (As Conradie JA points out in para 17 of his judgment, nothing turns on the municipality's incorrect allusion in its affidavits to s 10G(6) of the LGTA – the provision it invoked in approving the rates was in fact s 10G(7).)

[44] I therefore conclude that the pre-constitutional requirement that the Administrator approve rates above 2 cents in the Rand was impliedly repealed when the constitutional order was established and that it was thus inoperative when s 10G of the LGTA was enacted after the interim Constitution took effect (and when s 10G was re-enacted after the Constitution took effect).[29] There is in my respectful view a clear repugnancy between the scheme of the pre-

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44, where the Constitutional Court held that in the legislative setting of the Western Cape province a 1993 valuation ordinance constituted 'any other law' subject to which valuations had to be performed. In contrast to *Howick*, the municipality here makes common cause with the landowners that the Cape Ordinance does in general apply, though it contends that the approval requirement in s 82(1)(a) has suffered implied repeal.

[29]The statutory genesis is set out in paras 7 and 19-20 of the judgment of Conradie JA, though I cannot endorse the significance he attaches in paras 19-20 to the re-enactment of s 10G of the LGTA in s 93(4) of the Structures Act: in my view s 93(4) extended the life and force of s 10G, without substituting itself for that provision.

constitutional distribution of power, which gave rise to the requirement of the Administrator's approval, and the scheme under the Constitution. That repugnancy must lead to the conclusion that the requirement was abolished when the relevant provisions of the LGTA were inserted in 1996.[30]

The landowners' other challenges to the new rates

[45] The landowners complained that the rates sought to be levied violated s 229(2)(a) of the Constitution, which prohibits the exercise of the municipal rating power 'in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour'. Froneman J[31] expressed reservations about whether this requirement was justiciable: first, because the primary remedy for any alleged breach of s 229(2)(a) lay in the hands of national and provincial government, and not in aggrieved litigants taking direct recourse to the courts; and, second, because the courts are not best placed to decide the questions of economic policy at issue in the provision. But he found in any event that the court could not decide the issue because the landowners had failed to join the relevant organs of national government as parties to the litigation. He also observed that the landowners had failed to specify which of their rights the alleged breach of s 229(2)(a) had violated.

[30]Only the approval requirement in s 82(1)(a) of the Ordinance was in issue before us, and I consider it unnecessary (in contrast to Conradie JA in para 23 of his judgment) to express any view on any other provisions of the Ordinance relating to the Premier.
[31]Judgment a quo para 12.

[46] In the papers the landowners made some allusion in this context to arbitrary deprivation of property in violation of s 25 of the Bill of Rights. But in argument before us, counsel for the landowners expressly abandoned reliance on this alleged violation. Instead, the landowners claimed that the expert evidence they included in their affidavits – which the municipality did not counter with opposing expertise – established that the rates sought to be imposed violated s 229(2)(a) and that this entitled them to impugn the rates. I share Froneman J's reservations about the justiciability of s 229(2)(a), but like him I find it unnecessary to express any final view on this issue. This is because of the palpable non-joinder. It would be quite wrong to decide that municipal rates 'materially and unreasonably' prejudice 'national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour' without hearing national government’s view on the issue. That alone makes it impossible in this litigation to uphold the landowners' complaint.

[47] The landowners objected also that the rates, as sought to be imposed, were arbitrary because the Municipality stated that it arrived at the general rate by ascertaining the total funds required, then dividing this figure by the total valuation of properties within all areas sought to be rated ([total funds required] ÷ [total valuation] = [general rate]). But, the landowners say, what the

Municipality in fact did was to levy rates of 7% and higher in their areas, while in others the rates were much lower. In some areas, for instance, only the land valuations were taken into account – without improvements – thus resulting in much lower rates, of between 2.096% and 3.666%. This, they contended, constituted arbitrary conduct.

[48] The Municipality however explained that it inherited a differential system of rates from its previous local authority components, and that, in introducing the rates for the first time, it was constrained to make use of previous interim valuations. The rates admittedly do differentiate between landowners, to the benefit of some. But the municipality's explanation in my view establishes that the new rates are not arbitrary. On the contrary, despite the benefit some landowners reap from the continuing use of old interim valuations, it was perfectly rational for the municipality to use those valuations in introducing the rates.

[49] And as Froneman J pointed out, s 10G(7)(b)(i) of the LGTA licenses differentiation between different categories of property on such grounds as a municipality may deem reasonable. In my view it is impossible to conclude that the municipality's approach, which for the reasons proffered gave some landowners temporary relief from the full 7c rate, while exacting it of the appellants, was not reasonable.

[50] Froneman J also found that the complaint of discrimination was insufficiently evidenced in the landowners' founding papers since the probability existed that the properties the landowners were comparing in fact had different uses. These conclusions seem to me to be clearly correct. In my view the complaint of arbitrary and discriminatory conduct on the part of the Municipality cannot be sustained.

[51] Finally, the landowners complained that, in conflict with the notification requirements set out in the Valuation Ordinance 26 of 1944 the Municipality had failed to inform them of the rates change. But the Municipality asserted in its answering affidavit that it had validly despatched notices to all affected ratepayers, and undertaken publication in accordance with all requirements. In argument counsel for the landowners conceded that only CDA Boerdery, the first appellant, had established that it had not received proper notice. I agree with counsel for the municipality that the purpose of section 56 of the Valuation Ordinance 26 of 1944 – which sets out the notice requirements – was to ensure that persons affected by a valuation and possible rates assessment are afforded adequate opportunity to object to such valuation and to have such objection adjudicated by the valuation court. It is common cause that all the appellants, including CDA Boerdery, availed themselves of this opportunity and indeed appeared at the Valuation Court. There is no suggestion on the papers that CDA

Boerdery was not aware of the new valuations and rates assessments. The proviso to s 56 (inserted by s 4 of Ordinance 13 of 1945) in any event states that 'non-receipt of such a notice shall not invalidate the valuation roll or the proceedings of the valuation court.' It was not in dispute before us that CDA Boerdery participated in the proceedings of the valuation court. In my view its non-receipt of the required notice did not invalidate the new valuation requirement in respect of it.

Order

[52] The appeal is therefore dismissed with costs.

E CAMERON
JUDGE OF APPEAL

CONCUR:

MPATI DP
MTHIYANE JA
THERON AJA