IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case number: 6000/2015

In the matter between:

THE BODY CORPORATE OF THE HYDROMED SECTIONAL TITLE SCHEME	1st Applicant
MEDICLINIC PROPERTIES (PTY) LTD	2nd Applicant
ERBN BESIGHEIDSTRUST AND TWENTY FIVE OTHERS as per annexure A to the Notice of Motion	3rd to 26th Applicants

and

S. O. DU PLESSIS N.O.	1st Respondent
THE VALUATION APPEAL BOARD OF MANGAUNG	2nd Respondent
MANGAUNG METROPOLITAN MUNICIPALITY	3rd Respondent

CORAM: DAFFUE, J *et* FISCHER, AJ

HEARD ON: 15 AUGUST 2016

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 3 NOVEMBER 2016

I INTRODUCTION

[1] This is a review application by several disgruntled property owners. The essence of the dispute between the parties is the valuation of certain properties situated in Bloemfontein within the borders of the Mangaung Metropolitan Municipality. The Local Government: Municipal Property Rates Act, 6 of 2004 ("the Rates Act"), and to a lesser extent the Sectional Titles Act, 95 of 1986 ("the Sectional Title Act") are central to the dispute.

II THE PARTIES

[2] First applicant is the Body Corporate of the Hydromed Sectional Title Scheme (SS36/1989). Second applicant is Mediclinic Properties (Pty) Ltd, a company with registered address at Strand Road, Stellenbosch, the owner of several sectional title units in the aforesaid sectional title scheme which units comprise the Mediclinic Hospital (formerly known as the Hydromed Hospital) in Bloemfontein and various offices and/or doctors' consulting rooms attached to the hospital.

[3] Third to twenty sixth applicants are all owners of units in the Hydromed Sectional Title Scheme which units comprise of offices and/or consulting rooms for medical practitioners.

[4] First respondent is Mr S. O. du Plessis NO in his capacity as the chairperson of the Valuation Appeal Board of the Mangaung Metropolitan Municipality ("the Appeal Board") which is cited as

second respondent. The Appeal Board was duly constituted in accordance with the provisions of chapter 7 of the Rates Act by the Mangaung Metropolitan Municipality ("the Municipality") which is cited as third respondent in the application.

III **JOINDER OF FURTHER PARTIES**

[5] Applicants' attorney, Mr J.P. Marais, who deposed to both the founding and replying affidavits on behalf of all the applicants, established a mistake in the list of applicants attached to the founding affidavit when applicants were called upon to reply to the answering affidavit. Mr Marais not only filed resolutions by the applicants as his authority to act for them was attacked, but also resolutions of six further owners of units in the Hydromed Sectional Title Scheme to which no reference was made in annexure "A" to the notice of motion. Contrary to accepted procedure, the attorney merely stated in paragraph 2 of the replying affidavit the following: "Application is hereby made for the joinder of these further applicants." There can be no doubt about identity as the resolutions indicate the respective names and unit numbers with sufficient clarity.

[6] At the hearing of the review application we were handed a notice of application in terms whereof these further owners sought to be joined as 27th to 32nd applicants respectively. Adv Moerane SC for respondents, appearing with Adv Manye, objected to the joinder of these owners merely on a procedural basis. He tried to convince us that it would be difficult for respondents to ascertain at that stage whether these applicants were indeed owners of the

units referred to in the notice of application and submitted that their clients might be prejudiced. When I indicated to him that respondents should have been well aware of the identity of these owners as their names and unit numbers appear from the annexures to the replying affidavit, he conceded that the opposition could not succeed. It is now necessary to consider the relief sought as we did not make any ruling during the hearing of the application. The particular six applicants for joinder have a direct and substantial interest in the outcome of the application, they having been properly identified at the stage when the replying affidavit was filed and there can be no prejudice to respondents if they are joined. They participated in the appeal hearing, represented by Mr Marais, and the Appeal Board made findings in respect of the value of their properties. Consequently they are joined as 27th to 32nd applicants respectively. The costs of the joinder application shall be paid by these applicants on an unopposed basis. It is necessary to record at this stage that applicants' legal representatives established duplications prior to the hearing insofar as 4th and 17th applicants are the same entities, 3rd and 22nd applicants the same and 18th and 25th applicants the same. Therefore 17th, 22nd and 25th applicants should fall out of the picture and it is so noted.

IV **RELIEF SOUGHT**

[7] Applicants seek the following relief and I quote *verbatim* from the notice of motion:

"1. An order reviewing and setting aside the Third Respondent's valuation roll of 2012 for implementation for the rating cycle commencing in 1 July 2013, insofar as it relates to the properties owned by the Applicants;

2. An order reviewing and setting aside the decision taken by the First Respondent on 26 June 2015 valuing, for purposes of the financial year commencing on 1 July 2013:

   a) The properties referred to as Units 21, 22, 27, 47, 49, 55, 64, 67, 76, 90, 91, 96, 98 and 100 (the unregistered units);

   b) The properties referred to as the "Friedlander Drawings" (the section 25 real right of extension) in the amount of R81 000 000;

3. An order declaring that the abovementioned valuations were not competent ALTERNATIVELY were *ultra vires* in terms of Act 6 of 2004;

4. An order substituting the valuations of 2(a) and 2(b) with a valuation of nil;

5. An order declaring that all of the abovementioned properties are not properties which are rateable in terms of Act 6 of 2004;

6. ALTERNATIVELY an order remitting the matter back to the First Respondent for reconsideration;

7. An order directing that such Respondents as may oppose this application be ordered to pay the Applicants' costs, jointly and severally, the one paying the other to be absolved."

[8] The application is opposed by all three respondents. Various disputes have been raised as indicated *infra,* but the ultimate and material dispute between the parties and the crux of the matter is in essence whether the municipal valuer could lawfully value unregistered sectional title units allowing the Municipality to levy rates on such unregistered units.

V BACKGROUND

[9] During 2012 third respondent acted in accordance with the Rates Act and appointed a valuer to value the rateable properties within its jurisdiction.

[10] During the general valuation process embarked upon the Mediclinic Hospital together with the offices and consulting rooms forming part of the hospital complex were valued as well whereupon a valuation roll was published by the Municipality in February/ March 2013.

[11] On 14 March 2013 the chairperson of first applicant lodged a written objection with the Municipality. The concern was that if the valuations were to be accepted and the rates formula remained the same, the annual property rates would increase by 589%. The Municipality was requested to furnish the method used to calculate the proposed new valuations, to supply the proposed formula to be used and finally to reconsider the valuations.

[12] On 2 October 2013 Opti Property Consultants ("Opti") responded for the first time. This letter was received by applicants' former attorneys a month later. The valuer appointed by the Municipality is a member of Opti. In terms hereof the following was conveyed to second applicant: "Notice is hereby given in terms of section 51/52/53 of the Municipal Property Rates Act No 6 of 2004 that the Municipal Valuer has considered this submission to objection (sic) on the subject properties and has considered the objection as follows: Decision: Municipal Valuer's

Decision: NO CHANGE." The second applicant was informed of its right of appeal.

[13] On 2 December 2013 applicants' attorney sent 118 notices, one in the name of every registered owner of each of the individual section title units in the aforesaid scheme to the Municipality, requesting the reasons for the aforesaid decision in terms of s 53(2) of the Rates Act. An important issue was raised at that stage already, namely that the Municipality was precluded from levying rates on units in a sectional title scheme unless such units were registered; also, that the valuer could not value unregistered sectional title units.

[14] For months nothing further transpired and on 15 May 2014 a letter was sent to the Municipality informing it that unless reasons were provided as requested, the High Court would be approached for appropriate relief. This probably caused the Municipality to inform applicants that the appeal hearing pertaining to the valuations had been scheduled for 23 June 2014 notwithstanding the fact that no appeal had been lodged at that time due to the failure to provide reasons.

[15] On 17 June 2014 applicants' attorney received an email from the municipal valuer, Mr Hartman of Opti, to which was attached his reasons dated 17 December 2013 which according to applicants were never received before then. It is unnecessary to deal with the valuer's reasons for the reasons that will appear *infra*.

[16] After much delay and uncertainty as to whether appeals had been lodged or not, the matter was eventually set down for hearing of the appeal by the Appeal Board on 6 February 2015. Applicants' attorney placed it on record at the appeal hearing that applicants would be taking part in the appeal process, but that they did not waive their rights to apply for review of the decision to be reached on the basis of several procedural irregularities. One procedural aspect relied upon is the failure by the municipal valuer to consider applicants' objections promptly as he was required to do in terms of s 51 of the Rates Act.

[17] A further point raised in this regard was the failure by the Municipality to follow a process of community participation before it adopted its Rates Policy. A major concern was raised in the founding affidavit that the municipal valuer and the municipality failed to provide individual reasons for the decisions reached in respect of the valuations of the individual sectional title units. I shall deal *infra* with other procedural aspects raised pertaining to the various sections of the Rates Act which were allegedly contravened.

[18] Notwithstanding all procedural defects that might have occurred, applicants' attorney eventually agreed with the members of the Appeal Board that all offices and/or consulting rooms, i.e. all units in the Hydromed Sectional Title Scheme, with the exclusion of the hospital (unit 88) might be valued at R20 000,00 per m^2, with the exclusion of unit 112 which should be valued at R15 000,00 per m^2. This is exactly what the Appeal Board did, which finding is directly in line with the suggestion of applicants' valuer, Mr Marais,

(not a relative of attorney Marais), who testified on behalf of the appellants at the appeal hearing. There is not a word in the founding or replying affidavit or in the heads of argument of applicants indicating that the finding of the Appeal Board in this regard is wrong. The matter was also not argued before us.

[19] Eventually, and after the leading of evidence of expert witnesses and days of arguments, applicants' attorney agreed that it would be fair and equitable to value the hospital on the basis of R1 million per bed. Therefore the valuation of R296 million in respect of unit 88, i.e. the Mediclinic Hospital, cannot be contested as this was agreed to by all parties, including applicants' attorney. Also, as is the case in respect of the individual units referred to *supra*, not a word was spoken to the effect that the valuation was based on wrong principles in either the founding, or the replying affidavit, or applicants' heads of argument, or during oral argument.

[20] The extra buildings, i.e. the extension to the Mediclinic Hospital built in accordance with sectional title plans and a s 25 of the Sectional Titles Act right of extension ceded to second applicant, consists of an eighty one bed hospital and two theatres. Again it was agreed at the appeal hearing by all concerned, including the applicants' attorney, that a valuation of R1 million per bed could be placed on these extensions and that the extensions could be valued at R81 million, it being the reasonable and fair valuation thereof. It is important to understand that the crux of the dispute between the parties is whether these extensions are rateable property in accordance with the provisions of the Rates Act, bearing in mind that the Hydromed Sectional Title Scheme as

registered in the Deeds Office does not provide for these extra buildings to form part of the sectional title scheme; consequently the units forming part of the extensions to the hospital complex are still unregistered sectional title units. This aspect needs full and proper consideration and I shall deal with it again once I have considered the authorities and legislation under the next heading.

VI LEGISLATION AND AUTHORITIES

[21] I indicated *supra* that the Rates Act is the most important Act to be considered in the adjudication of this application. To a lesser extent the Sectional Titles Act comes into play as well. I shall proceed to refer to important sections of the Rates Act in the next paragraphs where after s 25 of the Sectional Titles Act shall be quoted.

[22] From the onset it is important to note that a distinction should be made between the rating of property dealt with in chapter 2 of the Rates Act (ss 2 – 23) and the liability for rates as is evident from chapter 3 (ss 24 – 29) on the one hand and the valuation of rateable property, valuation criteria, valuation rolls, valuation appeal boards and the updating of valuation rolls contained in chapters 4 to 8 (ss 30 – 79) on the other hand.

[23] "Market value" is defined in s 1 "… in relation to a property, means the value of the property determined in accordance with section 46." The market value of a property is generally speaking and as stipulated in s 46(1) "… the amount the property would have realised if sold on the

date of valuation in the open market by a willing seller to a willing buyer." Insofar as respondents *inter alia* rely on s 46(2), it needs to be mentioned that in determining market value several factors mentioned in this sub-section must be considered for purposes of valuing the property. Sub-section 46(2)(b) refers to one such factor to wit: "the value of any immovable improvement on the property that was erected or is being used for a purpose which is inconsistent with or in contravention of the permitted use of the property, as if the improvement was erected or is being used for a lawful purpose."

[24] "Property" is defined in s 1 and means *inter alia* "(a) immovable property registered in the name of a person, including, in the case of a sectional title scheme, a sectional title unit registered in the name of a person"; and "(b) a right registered against immovable property in the name of a person, excluding a mortgage bond registered against the property."

[25] An owner in relation to immovable property (including in the case of a sectional title scheme a sectional unit registered in the name of a person), means the person in whose name ownership of the property is registered and owner in relation to the right referred to in paragraph (b) of the definition of property, i.e. a right registered against immovable property in the name of the person, means a person in whose name such right is registered. See also s 1.

[26] "Register" means *inter alia* for purposes of property relevant *in casu* "to record in a register in terms of the Deeds Registries Act, 47 of 1937" and "sectional title scheme" means "a scheme defined in section 1 of the Sectional Titles Act" while "sectional title unit" means "a unit defined in section 1 of the Sectional Titles Act."

[27] Section 2 empowers municipalities to levy rates on property in their areas while s 3 obliges them to adopt Rates Policies consistent with the Act on the levying of rates on rateable property within their areas. See s 3(1). In terms of s 10 a rate on property which is subject to a sectional title scheme must be levied on the individual sectional title units in the scheme and not on the property as a whole. This is in line with s 47 pertaining to valuation of property in sectional title schemes which stipulates that when valuing a property subject to a sectional title scheme, the valuer must determine the market value of each sectional title unit in the scheme in accordance with s 46.

[28] A municipality intending to levy a rate on property must cause a general valuation to be made of all properties within its jurisdiction and a valuation roll must be prepared for those properties. All rateable properties must be valued. See s 30. The general valuation must reflect the market value of properties determined in accordance with the market conditions which applied as at the date of valuation and any other applicable provisions of the Rates Act. See s 31(2).

[29] Section 48 stipulates that a municipality's valuation roll must list all properties in the municipality determined in terms of s 30(3) and the roll must reflect the particulars mentioned in s 48(2), *inter alia* the registered or other description of the property.

[30] The Rates Act provides for objection and appeal procedures in ss 50 and 54 respectively. An owner of property who has unsuccessfully lodged an objection with the municipal manager against any matter reflected or omitted from the valuation roll has a right of appeal to the Valuation Appeal Board.

[31] A municipality must cause a supplementary valuation roll to be made in respect of rateable property in certain prescribed circumstances, some of which may apply *in casu*, to wit rateable property either incorrectly omitted from the valuation roll, or included in a municipality after the last general valuation, or consolidated after such general valuation, or must be revaluated for any other exceptional reason. See s 78(1). Such a municipality will then be entitled, provided s 78 has been complied with fully, to claim rates levied on such property in accordance with s 78(4).

[32] Sectional title schemes may be extended in accordance with the provisions of Part V of the Sectional Titles Act. Section 25 is of particular importance *in casu* and I quote the more relevant sub-sections which read as follows:

> "25. **Extension of schemes by addition of sections and exclusive use areas or by addition of exclusive use areas only**
>
> (1) A developer may, subject to the provisions of section 4(2), in his or her application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11(2), the right to erect, complete or include from time to time, but within a period stipulated

in such condition or such extended period as may be agreed upon ……, for his or her personal account—

(a) a building or buildings;
(b) a horizontal extension of an existing building;
(c) a vertical extension of an existing building,

on a specified part of the common property, and to divide such building or buildings into a section or sections and common property and to confer the right of exclusive use over parts of such common property upon the owner or owners of one or more sections, or to delineate exclusive use areas on or in specified parts of the land and buildings in terms of section 5(3)(f) and to confer the right of exclusive use over such areas upon the owner or owners of one or more sections.
(2) …….
(3) ……..
(4) A right reserved in terms of subsection (1), vested in terms of subsection (6) or registered in terms of subsection (6A), and in respect of which a certificate of real right has been issued—

(a) shall for all purposes be deemed to be a right to immovable property which admits of being mortgaged; and

(b) may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right: …
(5A) If the right reserved in terms of subsection (1) is exercised, the developer or his/her successor in title shall immediately upon completion of the relevant unit apply for the registration of the relevant plan of extension and inclusion of such unit in the relevant sectional title register."

[33] In **Bel Porto School Governing Body and Others v Premier, Western Cape** 2002 (3) SA 265 (CC) Chaskalson CJ stated at para [89] for a decision to be justifiable, "…. it should be a rational decision taken lawfully and directed to a proper purpose." In **Minister of Home Affairs v Somali Association of South Africa** 2015 (3) SA 545 (SCA) at para [18] Ponnan JA, relying on **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) expressed himself as follows: "It is well established that an incident of legality is rational decision-making. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that decisions must be rationally related to the purpose for which the power was given." However, Nugent JA pointed out in **Minister of Home Affairs and Others v Scalabrini Centre** 2013 (6) SA 421 (SCA) at para [65]: "… an enquiry into rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. As appears from the passage above, rationality entails that the decision is founded upon reason - in contradistinction to one that is arbitrary - which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare."

[34] Applicants not only rely on **Kalil NO and others v Mangaung Metropolitan Municipality and others** 2014 (5) SA 123 (SCA), but submitted that the judgment is on all fours with the matter at hand. It was argued in support of the relief sought in prayer 1 of the notice of motion that the complete valuation roll of 2012 for implementation of the rating cycle that commenced on 1 July 2013 insofar as it relates to their properties should be reviewed

and set aside. In **Kalil** the appellants went on appeal after an unsuccessfully attempt in the Free State High Court to challenge the municipality's decision to increase rates on business properties so that these owners would in future pay 3.8 times as much as residential property owners. The matter to be considered was whether the 2013/2014 budget of the municipality could lawfully be adopted. This is co-incidentally precisely the same financial year from which the municipal rates in respect of increased valuations of property *in casu* would take effect. The High Court, in dismissing the application, found that there was proper public participation in accordance with the provisions of the Rates Act and that the proposed rate was not unlawful. On appeal the Supreme Court of Appeal rejected the court *a quo's* finding in respect of public participation in the following words at para [13]: "It ought to have found that there had not been proper public participation in the municipality's budgetary process, and granted appropriate relief." Notwithstanding this finding the Supreme Court of Appeal, having heard the appeal a year after the High Court order and nearly at the end of the 2013/2014 financial year, did not set aside the budget. It stated at para [27] that "the rate the municipality sought to impose in respect of business properties in its budget of 30 May 2013 has not been shown to have offended against the principle of legality" and concluded as follows at para [28]: "However, for the reasons already mentioned, it is by now too late for any meaningful declaratory relief to be granted to the appellants."

[35] Both counsel relied on **Atholl Developments (Pty) Ltd v Valuation Appeal Board, Johannesburg and another** 2014 (5) SA 485 (GJ) to bolster their arguments and it is necessary to refer to relevant passages. As mentioned in paras [13] and [43] of the

judgment a Valuation Appeal Board has wide powers as is apparent from s 57(a) read with s 75 of the Rates Act. It may consider the valuation of all property as defined in the Rates Act *de novo.* A function of the Valuation Appeal Board as stipulated in s 57(a) is to "…hear and decide appeals against the decisions of a municipal valuer concerning objections to matters reflected in, <u>or omitted from, the valuation roll.</u>" (emphasis added.)

[36] In <u>**Atholl Developments**</u> *supra* the municipal valuer valued two erven, unaware of the existence of 99-year leases with business rights to build and operate a hotel on the premises. His valuation, in line with municipal policy, was based on the combined value of the two erven and the improvements on them. A later valuation based on the rental income was obtained as well. The court found that the fact that the applicant owned the business rights, but not the erven themselves, was immaterial for purposes of determining the applicable rates. Therefore it found that it was up to the municipality to decide whether it wished to assign values to rights such as leases and impose rates on them, or value the property including improvements thereon and impose rates on the property as a whole regardless of whether rights in it had been dispensed with. According to the court the valuer committed no error in following the second method. On appeal the Valuation Appeal Board decided to follow the first method and focused on the leases. The court found that in doing so it did not commit a reviewable error of law; however the Board's criteria used for evaluation was criticised and consequently the matter was referred back to it for reconsideration. It is also important to mention that the municipality's Rates Policy did not provide for the

levying of rates on registered leases and the reader is referred to the comments of the learned judge in paras [43] to [49].

[37] As mentioned *supra* there is not a dispute in respect of the values arrived at by the Appeal Board. During the appeal process concessions were made by both sides in terms whereof lower values than initially estimated and determined by the municipal valuer were agreed upon. However, it is deemed apposite to refer to **City of Johannesburg Metropolitan Municipality v Chairman, Valuation Appeal Board and another** [2014] 2 All SA 363 (SCA). The court considered the functions and duties of a municipal valuer and *inter alia* expressed itself at para [24] in the following *dictum:* "Valuation is, accordingly, not an exact science. The market value of a property can only be estimated and not precisely determined, and a valuer is called on to exercise professional skill and expertise in a specialised field by expressing an opinion on the market value in monetary terms." *In casu* the court found at para [31] that it was the duty of the valuer to record in instances of multiple use of properties such fact and in "compiling the valuation roll to determine and record those uses and to apportion the market value of the property between them."

[38] The judgment of **South African Property Owners Association v Johannesburg Metroplitan Municipality and others** 2013 (1) SA 420 (SCA) **("SAPOA")** needs attention as well. This appeal was concerned with the levying of property rates of 1.54 cents in the Rand on business, commercial and industrial properties; an increase from 1.2 cents to 1.54 cents. On 26 March 2009 the municipality's council increased rates generally by 10% for the 2009/2010 financial year, but two months later it increased the

rates applicable to the above categories of properties by a further 18%. In para [65] Navsa JA, writing for the majority, agreed with the reasoning and conclusions of Southwood AJA (the minority judgment) "that the Council failed, in determining the rates for the 2009/2010 financial year and amending its budget, to comply with its statutory obligations in relation to community consultation and participation." Notwithstanding this, the court found in paras [70] and [71] that "the egg could not be unscrambled" insofar as two further budgetary periods, the legality of which had not been challenged, have come and gone in the meantime. The effect hereof was that the appellant's appeal succeeded, but instead of obtaining substantial relief (the setting aside of the rates and budget), it merely received a declaratory order.

]39] This court considered a review application pertaining to the tariff charges of Eskom and the approval of the Mangaung municipality's budget for the 2011/2012 financial year in **The Association of Body Corporates, owners and lessees of townhouses, flats and retirement villages and others v Centlec (Pty) Ltd and others,** Free State case no A334/2011, an unreported judgment dated 15 November 2013 by Daffue J with whom Kruger J concurred. The predicament facing applicants in similar situations are explained in paras [45] and [46] and I quote:
"[45] A delay has taken place and history cannot be undone. Two further tariff changes have taken place and two further budgets have been approved since the 2011/2012 financial year, to wit for the 2012/2013 and 2013/2014 financial years. The tariffs arrived at have been approved by NERSA as well. [46] Mr Danzfuss submitted that there might be numerous people who have not paid their electricity bills for that financial year and for whom it might be relevant to obtain relief. I find it inappropriate that anybody would not have paid his or

her electricity bills which should have been done more than 18 months ago and even before then. Insofar as it might be argued that people might be in a position to claim back monies paid in excess once the 2011/2012 tariffs have been declared invalid, this is again a matter where it would be impossible to unscramble the egg. It is water under the bridge and history cannot be turned around. Respondents' budgets were approved and expenditure incurred as a result thereof. It would cause havoc if relief is granted as requested. The **SA Property Owners' Association** judgment of the SCA is applicable *in casu* and lends support to my view in this regard. Refer to para [75] of the majority judgment by Navsa JA and the relief granted by the SCA in para [80]. The appellants in that case also had in mind the setting aside of municipal tariffs, but the court declined to assist them."

[40] In **City of Cape Town v Robertson** 2005 (2) SA 323 (CC) at para [56] the court confirmed that municipalities derived their powers directly from the *interim* Constitution. The empowering legislation is now s 229(1)(a) of the Constitution. These powers may be supplemented from time to time by the powers, functions and structures provided for in other legislation. In para [57] the court remarked as follows: "The Court (with reference to **Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others** 1999 (1) SA 374 (CC)) restated the principle of legality and, in particular, the rule that an entity can only act within the powers that are lawfully conferred upon it. In the context of local government, the Court stated that the powers of local government are conferred upon it either in terms of the Constitution or the laws of a competent authority."

[41] In **City of Tshwane v Marius Blom & GC Germishuizen Inc and another** 2014 (1) SA 341 (SCA) at para [19] the court determined

that the setting of rates and determination of rateable property in terms of s 8 of the Rates Act cannot be challenged simply on the ground of unfairness. It reiterated that the municipality's power to impose taxes is an original power which stems from s 229(1) (a) of the Constitution and the imposition of taxes is a legislative act. The court found at para [23] that the High Court erred in finding that the municipality's rates policy could not include a category such as 'non-permitted use' for the purpose of determining applicable rates. Therefore it was competent for the municipality to add to the list of categories in s 8(2) by creation of a category called 'non-permitted use' in the rates policy and to levy such property on a rate higher than the normal rate, effectively imposing a penalty on the 'non-permitted' user of the property.

VII EVALUATION OF THE EVIDENCE AND SUBMISSIONS

[42] Leaving aside for the moment the valuation and imposition of rates on the unregistered sectional title units which I called the crux of the matter *supra,* it needs to be considered whether applicants are entitled to the relief claimed in paragraph 1 of the notice of motion. The question to be asked is whether this court is entitled to, notwithstanding the agreement reached by the parties in respect of the valuations of the particular properties, set aside the valuation roll based on alleged procedural defects. If one considers the applicants' written heads of argument as well as the oral submissions to us, there is little doubt that counsel made scant submissions in this regard and concentrated his attack on the Appeal Board's decision pertaining to the rating of the unregistered sectional title units.

[43] Applicants strongly relied upon **Kalil** supra in support of the submission that the Municipality failed to ensure that there was proper public participation. In my view their stance is completely wrong and based on a misunderstanding of the judgment and the structure of the Rates Act. **Kalil** had nothing to do with valuation of rateable property, but with the increase of rates on business properties. I showed *supra* that if the Rates Act is considered there is a clear distinction between rating of property and the liability for rates on the one hand – chapters 2 and 3 – and valuation of property and what relates thereto – chapters 4 to 8. The dispute in **Kalil** was about rating and not valuation of properties. The same applies to the **SAPOA** judgment *supra* which is also distinguishable on the facts from the matter *in casu.* Applicants' counsel admitted that the matter *in casu* has a narrower focus than **SAPOA**, but notwithstanding that submitted "that the valuations process suffers the same and worse defects as those which marred the budgetary process in SAPOA and Kalil."

[44] Applicants not only complained about the failure to provide prompt reasons for the valuations to each individual owner as requested, but insisted that the irregularities actually started with the Municipal Manager's failure to comply with s 49. This section compels the Municipality to give public notice of valuation rolls in the media, informing the public that the roll is open for inspection and inviting every person who wishes to lodge an objection to do so. The substance of the notice must be disseminated to the local community and every owner of property listed in the valuation roll must receive by ordinary mail, or if appropriate, in accordance with s 115 of the Municipal Systems Act the

prescribed documentation, including an extract of the valuation roll pertaining to his/her property. Even though applicants insisted that there was no compliance with this section, their erstwhile attorneys reacted immediately and lodged their objections timeously as indicated *supra*. No doubt, they were well aware of the valuation process and the outcome thereof. The purpose of the section is to inform property owners and that purpose has been achieved.

[45] It was submitted that public participation was called for as that would have enabled applicants to bolster their objections by way of political or other support. If I understood the argument correctly, applicants believed that political parties and/or business people could be requested to support their cause in order to probably put pressure on the municipality to lower the valuations. Unfortunately, due to lack of proper public participation, so the argument ran, that did not materialise. The Rates Act provides for detailed processes pertaining to valuation, objections and appeals. Each individual dissatisfied property owner has distinct rights and it would be impermissible and even chaotic to allow dissatisfied property owners the right to attack valuations in the manner apparently suggested, instead of utilising the processes in the Rates Act which are in line with objection and appeals procedures in similar legislation applied in this country over many decades.

[46] I referred to the functions and duties of a municipal valuer with reference to **City of Johannesburg Metropolitan Municipality**

supra, showing that the valuer has to estimate the market value of a property, that valuation is not an exact science and that the valuer is merely expressing his opinion on the market value in monetary terms. Any property owner who is dissatisfied with the valuation of his/her property has the right to object and to appeal to the applicable Valuation Appeal Board. This is exactly what applicants did. They had a fair hearing and the Appeal Board reduced the valuations of the municipal valuer quite substantially and in accordance with amounts agreed upon by the parties. There is simply no logic in trying to persuade this court to set aside those valuations.

[47] It is difficult to follow why any of the alleged procedural irregularities prejudiced any rights of the applicants to such an extent that this court must set aside the valuation roll pertaining to their properties. It may be argued that the Municipality and its valuer approached the matter in a lackadaisical manner, that there should have been a prompt response when reasons were requested and that this did not happen. Correspondence was left unanswered and the Municipality can and must be blamed for being ineffective. The appeals could and should have been heard much earlier if the objections were considered timeously and reasons as requested provided promptly. No doubt, the communication between applicants' attorneys (two firms were instructed with Mr Marais succeeding the first firm) and the Municipality left a lot to be desired, but eventually a fair appeal hearing took place and appellants were allowed more than sufficient opportunity to present their case.

[48] Applicants' counsel submitted in conclusion that although respondents alleged that the appeal hearing cured all previous procedural defects, this court should show it displeasure by reviewing and setting aside the Valuation Board's decision, the result being that the valuations which existed previously be reinstated. This is an outrageous argument. We are at present in the year 2016 and it is time for a new cycle of general valuations, but applicants insist on being rated on the value of their properties of two rating cycles earlier. The relief sought in respect of all registered sectional title units of the respective applicants should be dismissed for the reasons advanced *supra.*

[49] I turn now to a more controversial issue. Different considerations apply to the treatment of the buildings erected in terms of the s 25 right of extension. The acting Municipal Manager made the following point in the answering affidavit: "It is contended that the property held under Section 25 Right of Extend (sic) only became known during the appeal process." This is indeed so. When cross-examined during the appeal hearing the municipal valuer had no idea of what s 25 rights of extension are. He eventually conceded that the s 25 right was not separately recorded in the valuation roll and also not separately valued.

[50] It is applicants' case that the valuation both before and after the realisation that there was a real right to extend in terms of s 25 cannot bear scrutiny. The original valuation ignored the real right as the buildings were valued as they stood notwithstanding the fact that a portion consisted of unregistered sectional title units. The Appeal Board replaced the valuer's valuation with its own

valuation based upon principles agreed upon in essence, but in acting as it did, contravened s 47 read with the definition of "property" and s 10 of the Rates Act. The municipal valuer was wrong when he testified that unregistered sectional title units could be valued and rates levied on such property. The chairperson apparently accepted his reasoning and found as follows: "Dit is nie nodig om eers as 'n Deeltiteleenheid eers (sic) geregistreer te word alvorens eiendomsbelasting gehef kan word nie." The Appeal Board found accordingly that all rateable property has to be valued in terms of s 47 and that unregistered properties fall within the definition of rateable property.

[51] In order to refresh the reader's memory it is important to emphasise that the Appeal Board went further and decided to place a nil value on the parking area situated on the remainder of erf 24888 (which was previously valued at R12.2 million), whilst the unregistered units measuring 7 226 square metres and regarded as part of the hospital complex, but which encroached on the remainder of erf 24888, were valued at R1 million per bed and thus R81 million, it having made provision for 81 beds. The Appeal Board made a serious mistake by deciding that the value of R12.2 million for the parking area on the remainder of erf 24888 should be replaced with the valuation of R81 million referred to *supra.* It summarily incorporated the remainder of erf 24888, which is registered in the Land Register, into the sectional title scheme which is *ultra vires* as correctly submitted on behalf of applicants. Notwithstanding this the Appeal Board found that portion 1 of erf 24888 on which the sectional title scheme was

developed could not be valued separately. Consequently it concluded that the total value of the Mediclinic hospital complex, i.e. unit 88 in the sectional title scheme and valued at R296 000 000, the unregistered units added to the hospital complex and valued at R81 million, as well as the value of all other registered units in the Hydromed sectional title complex (offices and consulting rooms) amounted to R533 545 000. In acting as such the Appeal Board showed a total lack of understanding of the concept of sectional title ownership and the rating of sectional title properties. The question to be answered is whether this was a rational decision taken lawfully and directed to a proper purpose.

[52] Notwithstanding the Appeal Board's wide powers it acted irrationally and contrary to the principle of legality. It failed to adhere to the requirements of the Rates Act and ignored s 25 of the Sectional Titles Act. The s 25 registered real right was not included in the Municipality's valuation roll and could not have been included later without following the process set out in s 78. It was not valued and cannot be rated for that reason.

[53] The Appeal Board did not value the s 25 real right of extension, but rather the actual buildings erected in accordance with this right. Initially it found that the value of the buildings in the amount of R81 million should be allocated to the remainder of erf 24888 notwithstanding the fact that a portion only of the buildings encroaches on this property. However, contrary to this finding it concluded that these buildings should be regarded as part and parcel of the hospital complex which is situated on the adjacent

property, to wit portion 1 of erf 24888. In doing so it ignored three facts: 1) the extra buildings do not form part of the registered sectional title complex in that they cannot be regarded as forming part of registered unit 88 – the hospital complex; 2) the extra buildings were built in accordance with approved building plans, but also in order to comply with sectional title plans still to be registered and consequently these unregistered units must still be registered in the Deeds Office to be regarded as property for purposes of the Rates Act; and 3) the extra buildings encroach on the remainder of erf 24888 whilst paragraph 3.22 (e) of the Rates Policy pertaining to encroachment was not considered at all.

[54] I need to mention the Municipality's policy in respect of encroachment briefly. Paragraph 3.22 of the Rates Policy stipulates that where improvements encroach over common boundaries of properties the Municipality's valuer will nominate one of the properties as the "parent" property. The other property/ies will be linked to the "parent" property in the valuation roll and will be referred to as "child/ren". Such economical unit will then be valued as a single property in conformity to the realities of the market. The total value will be split up for billing purposes in accordance with the formula contained in the particular paragraph. This is not what occurred here and it is not necessary to consider this any further.

[55] Mr Nel, a valuer by profession and member of the Appeal Board, and the municipal valuer, Mr Hartman, attested to confirmatory affidavits in support of respondents' opposition. Mr Nel is of the view that the "applicants' properties (registered units, the unregistered

units and registered real right) are included in the valuation roll and, therefore, in Part A of the property rates register." On his version the fact that the additional buildings have been erected and an extension of the sectional title scheme has taken place, allowed the Appeal Board to value these which valuation is in line with s 30. This he said notwithstanding the admission that on date of valuation "the extensions were not included in the sectional plans, however, these were buildings that existed and were occupied and operated as part of the Medi Clinic. It was therefore found that these buildings qualified as property and, therefore, as rateable property." Later on his said "They therefore did not need to be sectionalised in order to become rateable." On his version the extensions could be valued as rateable property, whether as part of the real right of extension, or as part of property, either the remainder of erf 24888 alternatively portion 1 of erf 24888. This submission is fallacious for several reasons already mentioned in this judgment and do not have to be repeated. Mr Hartman made similar comments in support of Mr Nel's version, but furthermore referred to the fact that the extensions encroach on the remainder of erf 24888. He concluded, relying on s 46(2)(b) and (c), that "the unregistered units are included in the valuation roll and are rated."

[56] Both Nel and Hartman rely on a report of Mr Burger, a professional land surveyor of Friedlander, Burger & Volkmann dated 14 November 2013. The report must be seen in proper context, an extract of which reads as follows: "The purpose of the visit was to establish what parts of the existing buildings have not been updated on the sectional title plans that have been approved by the Surveyor General. I have indicated the sections of the building not on Sectional Plans as hatched red area as indicated on the floor plan attached to the report. The remainder of erf 24888 Bloemfontein although registered in the name of the body

corporate must still be incorporated into the Sectional Scheme. The scheme will have to be amended in terms of section 25 of the Sectional Titles Act by the addition of an additional section or additional sections." Instead of serving as support for respondents' submissions, quite the contrary is true. The extensions cannot be regarded as rateable property.

[57] The Appeal Board has wide powers on appeal, but insofar as it might be suggested that it could value the s 25 real right on appeal, several objections might have been raised as indicated on behalf of applicants. Most important of all is that s 78 pertaining to supplementary valuations and the procedures to be followed has not been complied with. It is not necessary to consider other possible objections in the light thereof that the Appeal Board made it clear that they regarded the unregistered units as part of the hospital complex and did not value them separately as a s 25 registered real right.

[58] Respondents placed emphasis on the fact that the unregistered sectional title units have been utilised and it is no secret that the complex is fully operational. Therefore the use of the buildings should be seen as unlawful thereby allowing the Municipality to rate them. I referred to **City of Tshwane v Marius Blom** *supra* in which case the Tshwane municipality was found to be entitled to levy higher rates on properties which fell within the category of "non-permitted use" as set out in its Rates Policy. That case is clearly distinguishable. *In casu* the Municipality's Rates Policy does not contain a category of "non-permitted use". Such a category does not appear in s 8 of the Rates Act, but the court allowed the

Tshwane municipality to include such a category in its Rates Policy. I indicated that the s 25 real right was never valued separately, alternatively at all. Insofar as respondents purport to rely also on s 46(2), I am of the view that the erection of or the use of the buildings cannot be regarded as inconsistent with or in contravention of the permitted use of the property. The idea is clearly to extend the Hydromed sectional scheme and ensuring that the unregistered units be registered, but as stated in the papers, several problems prevented the process from being finalised. Even if I am wrong in this regard, the basis of the valuation by the Appeal Board remains irrational as set out herein.

[59] The application is therefore bound to succeed, but only on limited issues. In granting our orders there is no attempt to unscramble the egg as mentioned in **Eskom** and **Sapoa** *supra* as the effect will not be to set aside the Municipality's budget. The Appeal Board's decision must be set aside in respect of the total valuation arrived at. The valuation of unit 88, as is the case with all other individual sectional title units referred to *supra,* is in order. Unit 88's valuation of R296 million cannot be criticised. The orders to be granted do not mean that it is the end of the road for the Municipality. It may utilise s 78 of the Rates Act to do supplementary valuations to mention but one possible solution.

VIII COSTS

[60] Applicants achieved substantial success, but the individual sectional title owners were unsuccessful in their bid to have the valuations of their individual properties set aside. Insofar as they

failed they should generally speaking be ordered to pay the respondents' costs. However, much of the debate revolved around the so-called Friedlander drawings and the issue as to whether the unregistered units could be valued and rated. It would also be a difficult and time-consuming exercise for the taxing master to establish what fees and expenses relate directly to this part of the application. In exercising my discretion I intend to penalise applicants by disallowing them a portion of their costs. Respondents should be ordered to pay 75% only of applicants' costs which I believe to be fair to all the parties.

IX **ORDERS**

[61] The following orders are granted:

1) First respondent's valuation of R81 million in respect of the extensions to the Mediclinic Hospital, erected in accordance with 2nd applicant's right of extension in terms of s 25 of the Sectional Titles Act, 95 of 1986, which consists of unregistered units still to be added to the existing Hydromed sectional title scheme, is reviewed, set aside and substituted with a valuation of R nil.

2) Respondents shall pay 75% of the costs of the application, jointly and severally, the one to pay the others to be absolved.

3) Save for the above relief, the application is dismissed.

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J.P. DAFFUE, J

I concur.

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P. U. FISCHER, AJ

On behalf of applicant: Adv. Bridgman with Adv. Rautenbach
Instructed by: Johann Marais & Assoc

STELLENBOSCH

On behalf of respondent: Adv. Moerane SC with Adv. Manye
Instructed by: Poswa Inc

BLOEMFONTEIN

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