| | |
|---|---|
| Reportable: | YES / NO |
| Circulate to Judges: | YES / NO |
| Circulate to Magistrates: | YES / NO |
| Circulate to Regional Magistrates: | YES / NO |

**IN THE HIGH COURT OF SOUTH AFRICA**
**(NORTHERN CAPE DIVISION, KIMBERLEY)**

CASE NO: 680/21
Date heard: 07/03/2022
Date delivered: 02/09/2022

In the matter between:

**EKAPA MINERALS (PTY) LTD** First Applicant

**EKAPA RESOURCES (PTY) LTD** Second Applicant

and

**SOL PLAATJE LOCAL MUNICIPALITY** First Respondent

**THE MINISTER OF CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS** Second Respondent

**THE NATIONAL MINISTER OF FINANCE** Third Respondent

**THE MEMBER OF EXECUTIVE COUNCIL FOR LOCAL GOVERNANCE, NORTHERN CAPE** Fourth Respondent

**Coram:** MAMOSEBO, J *et* RAMAEPADI, AJ

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**JUDGMENT**

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**INTRODUCTION**

1. This application concerns the legality of six decisions taken by the Council of the Sol Plaatje Local Municipality (''the *first respondent''*) to set a property rates ratio of 1:22 in respect of the rating category of ''*mining*'', as defined in the first respondent's Rates Policy, for the financial years 2015/16; 2016/17; 2017/18; 2018/19; 2019/20; 2020/21 to 2020/21 (''the *impugned decisions''*).

2. The applicants (''*Ekapa Minerals (Pty) Ltd''*, and ''*Ekapa Resources''*) seek to have the *impugned* decisions reviewed and declared constitutionally invalid on the grounds that the *impugned* decisions were taken in breach of the Local Government: Municipal Property Rates Act, No. 6 of 2004 (''the *Rates Act''*), and section 229(2)(a) of the Constitution of the Republic of South Africa Act, 108 of 1996 (''the *Constitution*'').[1] The applicants contend that by setting the property rates ratio of 1:22 for properties under the category of ''*mining*'', the first respondent's Council acted *ultra vires* the empowering provisions and, in a manner that is unlawful, irrational, unreasonable and offends the doctrine of legality. [2]

3. The application is opposed by the first respondent only. It does so essentially on five grounds.

   3.1. First, in taking the *impugned* decisions, the first respondent's Council was not performing an administrative action as defined in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 (''*PAJA*''), but was acting in its capacity as democratically elected representatives, exercising a power that under the Constitution is a power peculiar to elected bodies and are accordingly, not subject to judicial review under PAJA.[3]

   3.2. The applicants lack *locus standi* to challenge the *impugned* decisions under PAJA.[4]

   3.3. Non-joinder of De Beers Consolidated Mines Proprietary Limited (''*De Beers*''), and Petra Diamonds Limited as parties to the application.[5]

[1] FA p19 para 11.14
[2] FA p26 para 15.6
[3] AA p196 paras 7-8
[4] AA p197-198 paras 16-17
[5] AA p198 paras 20-21

3.4. Failure to exhaust internal remedies provided for in section 16 of the Rates Act before bringing the application.[6]

3.5. Unreasonable delay in bringing the application.[7]

**THE APPLICATION**

4. It is important at the outset to delineate what this application does not concern. This is particularly important because a bulk of the first respondent's grounds of opposition are not germane to the central question in the case.

4.1. Contrary to the misconceptions promulgated in the first respondent's answering affidavit, this application does not concern a review of administrative action in terms of PAJA. The applicants have specifically disavowed any reliance on PAJA,[8] and nowhere in their founding affidavit have the applicants placed any reliance on PAJA. Instead, the applicants have made it plain that the application is brought under the doctrine of legality.[9]

4.2. Neither does the application concern the powers of the first respondent to determine rates in terms of a rates policy adopted by the Council of the first respondent in terms whereof various properties are rateable on a different basis depending on the category the property has been placed in, or the values that have been placed on the properties for purposes of determining rates. The applicants have conceded, rightfully so, that the first respondent may create different categories of rateable property within the framework provided for in section 19 of the Rates Act.[10] Rather, the application concerns the reasonableness of the differentiation in the rates ratios and thereby the rates tariffs that are charged by the first respondent on various categories of non-residential properties.

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[6]AA p200 paras 27-28
[7]AA p201 para 35
[8]Ra p267 para 7
[9]FA p19 para 11.15; RA p267 para 6
[10]Applicants' heads of argument p6 para 7.1 and p8 para 7.4

**BACKGROUND**

5. The background to this matter has extensively been canvassed in the affidavits filed by the parties. It is not necessary, therefore, for it to be repeated in detail here. Suffice it for present purposes to point out the following:

5.1. On 30 November 2015 the first applicant purchased eight immovable properties from De Beers in terms of a Sale of Business Agreement (''the *Sale Agreement*'').[11] The immovable properties involved are:

5.1.1. The remaining Extent of the Farm Kenilworth Estate Number 71, District of Kimberley, Northern Cape Province;

5.1.2. The remaining Extent of the Farm Dorstfontein Number 77, District of Kimberley, Northern Cape Province;

5.1.3. The Remaining extent of the Farm Bultfontein Number 80, District of Kimberley, Northern Cape Province;

5.1.4. The remaining Extent of the Farm Benauwdheidfontein Number 124, District of Kimberley, Northern Cape Province;

5.1.5. The Remaining Extent Erf 5024, Kimberley, Sol Plaatje Municipality, District of Kimberley, Northern Cape Province;

5.1.6. The Remaining extent Erf 5045, Kimberley, Sol Plaatje Municipality, District of Kimberley, Northern Cape Province;

5.1.7. Erf 6143, Kimberley, Sol Plaatje Municipality, District of Kimberley, Northern Cape Province; and

5.1.8. The Remaining Extent Erf 6489, Kimberley, District of Kimberley, Northern Cape Province.[12]

[11]FA (Annexure ''JH1'') p39-117
[12]FA p11-12 paras 9.1.1-9.1.8

5.2. All the immovable properties listed in paragraphs 5.1.1 to 5.1.8 above, are within the Sol Plaatje Local Municipality (the first respondent). Though some of these properties have not yet been transferred in the name of the first applicant, the first applicant took occupation of these properties and is in terms of the Sale Agreement obliged to pay all the rates and taxes and other charges levied by the first respondent in respect of the properties since date of the Sale Agreement.[13] In this regard clause 12.2.16 of the Sale Agreement provides in relevant part, that with effect from the Effective Date, De Beers and the purchaser agree that:

5.2.1 the Purchaser shall be liable for all rates, taxes, levies and similar imposts levied in respect of the Immovable Properties;

5.2.2 the Purchaser shall be entitled free of charge to the use and enjoyment of the Immovable Properties as if it were the owner thereof even if transfer takes place after that date; and

5.2.3 all risk and benefit in and to the Immovable Properties shall pass to the Purchaser.[14]

5.3. The first applicant has already become the owner of the immovable properties described in paragraphs 5.1.6 to 5.1.8 above.[15] This is not denied by the first respondent.[16]

5.4. The first applicant is the holder of Mining Right MPT29/2010 under Notarial Deed Number MPT27/2019 in respect of portions of the immovable properties described in paragraphs 5.1.1 to 5.1.8 above.[17]

5.5. The first applicant conducts diamond mining operations on portions of these immovable properties. The operations entail re-working the old

[13]FA p13 para 9.3.4
[14]FA (annexure ''JH1'') p75 paras 12.2.16.1-12.2.16.3
[15]FA p13 para 9.4
[16]AA p203 para 43
[17]FA p13 para 9.5

mine dumps (tailings) that exist on these properties and elsewhere within the first respondent's jurisdiction for the purpose of recovery of diamonds by using new technology, which allows the applicants to identify and find diamonds that were not recovered during the original mining operations. The first applicant also processes the ground which the second applicant recovers through its own mining operations in respect of three underground mines in terms of mining licenses and permits held by the second applicant.[18]

5.6. The second applicant is the registered owner of the Farm Petra Number 215, District Kimberley, Northern Cape Province. The second applicant is the holder of Mining Right MPT28/2010 under Notarial Deed of Variation/Amendment Number MPT18/2019 in respect of the Farm Petra Number 215.[19] This is not denied by the first respondent.[20]

5.7. The applicants commenced their mining operations after purchasing the immovable properties from De Beers, which ceased with its active diamond operations.[21]

5.8. By virtue of their operations of these properties, the immovable properties are categorised under ''*mining property*''.

**CALCULATION OF RATES**

6. The applicants have summarised the method of calculation of rates for different categories of properties, and in terms of that summary,

6.1. rates are calculated first, based on the valuation of property, which has to be a market value;

[18]FA p20 paras 12.2-12.3
[19]FA p13 paras 10.1-10.2
[20]AA p203 para 43
[21]FA p20 para 12.4

6.2. all rates ratios are linked back to the rates ratio of a normal residential property which rates ratio is determined as 1:1. All other rateable properties are then given a rate ratio relative to the 1:1 rates ratio of a residential property;

6.3. each year the first respondent determines the rates ratio that is applicable to all other rateable properties in comparison to that of a residential property. Apart from determining the rates ratio, the rates tariff of residential properties is also determined to then be multiplied by the various rates ratios of different property categories such as mining.[22]

6.4. Table 1 below illustrates the rates ratio applicable to different categories of properties.

Table 1 – Rates Ratio Table in relation to residential rate

| Category | Rate Ratio in relation to residential rate |
|---|---|
| Residential Property | 1 |
| Vacant Residential Property | 1.5 |
| Industrial Property | 3.2 |
| Vacant Industrial | 3.5 |
| Business and Commercial Property | 3 |
| Vacant Business and Commercial Property | 3.5 |
| Agricultural Property | 0.25 |
| Mining Property | 22 |
| Public Service Property | 4.5 |
| Property Used by Organ of State | 4.5 |
| Public Service Infrastructure | 0 |
| Private Service Infrastructure | 0 |
| Public Benefit Activity Property | 0 |
| Private Open Space | 1 |
| Place of Worship | 0 |
| Land Reform Beneficiary | 0 |
| Municipal | 0 |
| Independent Schools | 0.25 |
| Solar Farms | 3 |
| Sports Fields | 0 |
| University | 3 |

[22]FA p22 para 13.2

6.5. Table 2 below reflects the tariffs that have been applied by the first respondent since the 2014/15 financial year.

Table 2

| CATEGORY OF PROPERTY | TARIFF 2014/15 | TARIFF 2015/16 | TARIFF 2016/17 | TARIFF 2017/18 | TARIFF 2018/19 | TARIFF 2019/20 | TARIFF 2020/21 |
|---|---|---|---|---|---|---|---|
| Residential Property | 0.011618 | 0.009315 | 0.009688 | 0.010221 | 0.010834 | 0.009752 | 0.010376 |
| Vacant | | | | | | | |
| Vacant Residential Property | | | 0.014531 | 0.015331 | 0.016251 | 0.014628 | 0.015564 |
| Industrial Property | 0.047634 | 0.032602 | 0.031000 | 0.032707 | 0.034670 | 0.031206 | 0.033204 |
| Vacant Industrial | | | 0.033907 | 0.035773 | 0.037920 | 0.034132 | 0.036316 |
| Business & Commercial Property | 0.034854 | 0.027479 | 0.028578 | 0.030254 | 0.032069 | 0.029256 | 0.031128 |
| Vacant Business & Commercial Property | | | 0.033907 | 0.035773 | 0.037920 | 0.034132 | 0.036316 |
| Agricultural Property | 0.002905 | 0.002329 | 0.002422 | 0.002555 | 0.002709 | 0.002438 | 0.002594 |
| Mining Property | 0.191698 | 0.195612 | 0.213127 | 0.224858 | 0.238354 | 0.214544 | 0.228275 |
| Public Service Property | | | 0.029063 | 0.051104 | 0.054171 | 0.043884 | 0.046693 |
| Property Used by Organ of State | | | 0.067813 | 0.071546 | 0.075840 | 0.058512 | 0.046693 |
| Public Service Infrastructure | | | 0.000000 | 0.000000 | 0.000000 | 0.000000 | 0.000000 |
| Public Benefit Activity Property | | | 0.000000 | 0.000000 | 0.000000 | 0.000000 | 0.000000 |
| Place of Worship | | | 0.000000 | 0.000000 | 0.000000 | 0.000000 | 0.000000 |
| Land Reform Beneficiary | | | 0.000000 | 0.000000 | 0.000000 | 0.000000 | 0.000000 |
| Private Open Space | | | | 0.010221 | 0.010834 | 0.009752 | 0.010376 |
| Multi-purpose Properties | | | 0.019375 | | | | |
| Municipal Property Used for | | | 0.000000 | 0.000000 | 0.000000 | 0.000000 | 0.000000 |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Municipal Purposes | | | | | | | |
| Independent Schools | | 0.000000 | 0.000000 | 0.000000 | 0.000000 | 0.002438 | 0.002594 |
| Guest Houses | | 0.018630 | 0.019375 | 0.020442 | 0.021669 | | |
| Solar Farms | | | | 0.020442 | 0.021669 | 0.029256 | 0.031128 |
| Sports Grounds and facilities operated for gain | | | | 0.000000 | 0.000000 | 0.000000 | 0.000000 |
| University | | | 0.000000 | 0.000000 | 0.021669 | 0.029256 | 0.031128 |

6.6. An examination of Tables 1 and 2 above will immediately reveal that in 2015/16 the owner of a property in the industrial category would have paid at average 3.2602 cents per one rand on the valuation of the property. On this calculation, a person who owned an industrial property valued at R1 million in 2015/16, would have paid R32,602.00 per annum or R2,716.83 per month.[23]

6.7. On the other hand, the owner of a mining property during the same period (2015/16), which had a rate ratio of 1:22 and a rates tariff of 0.195612 would have paid 19.5612 cents per one rand on the valuation of the property per year. On this calculation, a person who owned a mining property valued at R1 million in 2015/16 would have paid R195,612.00 per year, or the equivalent of R16,301.00 per month.[24]

6.8. In the 2015/16 financial year, therefore, a person who owned mining property would have paid almost eight (8) times more than what an industrial property owner for the same period (2015/16) would have paid.

6.9. Table 2 above reveals that the rates tariff for mining property increased from the 0.195612 cents per rand applicable in 2015/16, to the amount of 22.8275 cents per rand applicable in 2020/21. On this data, the rates payable by a mining property owner in 2020/21 have increased from the R195,612.00 per year payable in 2015/16 to R228,275.00 per year or the

[23] FA p24 para 15.2
[24] FA p25 para 15.3

equivalent of R19,022.92 per month per million-rand property value in 2020/21.[25]

6.10. An examination of Tables 1 and 2 above will further reveal that the rates payable by a mining property is significantly higher than those payable by other non-residential properties. This is the differentiation that the applicants are complaining about – i.e. the differentiation in the rates ratios applicable to various categories of non-residential properties. The first respondent does not deny in its answering affidavit, that in 2015/16 a mining property would have paid 8 times what an industrial property would have paid or approximately 21 times what a residential property would have paid.[26]

**THE RELEVANT LEGISLATIVE FRAMEWORK**

7. The starting point is section 229(2) of the Constitution. It provides in relevant part that: the power of a municipality to impose rates on property, surcharges on fees for services by or on behalf of the municipality, or other taxes, levies or duties –

(a) may not be exercised 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, and

(b) may be regulated by national legislation.''

8. The Rates Act is the national legislation contemplated in section 229(2)(b) of the Constitution, which has been enacted *inter alia*, to regulate the power of a municipality to impose rates on property.[27]

9. The following provisions of the Rates Act are relevant for purposes of this case:

9.1 Section 2(3) provides that:

[25]FA p225-26 paras 15.4-15.5
[26]FA p25 para 15.3; AA p205 para 54
[27]The long title of the Rates Act

*''A municipality must exercise its powers to levy a rate on property subject to –*

*(a) section 229 and other applicable provisions of the Constitution;*
*(b) the provisions of this Act; and*
*(c) the rates policy it must adopt in terms of section 3.''*

9.2 Section 3 provides in relevant part that:

''*(1) The council of a municipality must adopt a policy consistent with this Act on the levying of rates on rateable property in the municipality.*

*(2) A rates policy adopted in terms of subsection (1) takes effect on the effective date of the first valuation roll prepared by the municipality in terms of this Act, and must accompany the municipality's budget for the financial year concerned when the budget is tabled in the municipal council in terms of section 16(2) of the Municipal Finance Management Act*

*(3) A rates policy must (a) treat persons liable for rates equitably.''*

9.3 Section 4 provides in relevant part that:

''*(1) Before a municipality adopts its rates policy, the municipality must –*

*(a) follow a process of community participation in accordance with Chapter 4 of the Municipal Systems Act; and*

*(b) comply with subsection (2).*

*(2) The municipal manager of the municipality must –*
*(a) conspicuously display the draft rates policy for a period of at least 30 days –*
*(i) at the municipality's head and satellite offices and libraries; and*
*(ii) if the municipality has an official website or a website available to it as envisaged in section 21B of the Municipal Systems Act, on that website; and*

*(b) advertise in the media a notice –*
*(i) stating –*
*(aa) that a draft rates policy has been prepared for submission to the council; and*
*(bb) that the draft rates policy is available at the municipality's head and satellite offices and libraries for public inspection during office*

*hours and, if the municipality has an official website or a website available to it, that the draft rates policy is also available on that website; and*

*(ii) inviting the local community to submit comments and representations to the municipality concerned within a period specified in the notice which may not be less than 30 days.*

*(3) A municipal council must take all comments and representations made to it or received by it into account when it considers the draft rates policy."*

9.4 Section 5(1) provides:

*"(1) A municipal council must annually review, and if necessary, amend its rates policy. Any amendments to a rates policy must accompany the municipality's annual budget when it is tabled in the council in terms of section 16(2) of the Municipal Finance Management Act."*

9.5 Section 8(1) provides:

*"(1) Subject to section 19, a municipality may in terms of the criteria set out in its rates policy levy different rates for different categories of rateable property, which may include categories determined according to the –*

*(a) use of the property;*
*(b) permitted use of the property; or*
*(c) geographical area in which the property is situated."*

9.6 Section 12 provides that:

*"(1) When levying rates, a municipality must levy the rate for a financial year. A rate lapses at the end of the financial year for which it was levied.*

*(2) The levying of rates must form part of a municipality's annual budget process as set out in Chapter 4 of the Municipal Finance Management Act. A municipality must annually at the time of its budget process review the amount in the Rand of its current rates in line with its annual budget for the next financial year.*

*(3) A rate levied for a financial year may be increased during a financial year only as provided for in section 28(6) of the Municipal Finance Management Act."*

9.7 Section 13(1) provides:

*''(1) A rate becomes payable –*

*(a) as from the start of a financial year; or*

*(b) if the municipality's annual budget is not approved by the start of the financial year, as from such later date when the municipality's annual budget, including a resolution levying rates, is approved by the provincial executive in terms of section 26 of the Municipal Finance Management Act.''*

9.8 Section 16 provides in relevant part:

*''(1) In terms of section 229(2)(a) of the Constitution, a municipality may not exercise its power to levy rates on property in a way that would materially and unreasonably prejudice –*

*(a) national economic policies;*

*(b) economic activities across its boundaries; or*

*(c) the national mobility of goods, services, capital or labour.*

*(2)(a) If a rate on a specific category of properties, or a rate on a specific category of properties above a specific amount in the Rand, is materially and unreasonably prejudicing any of the matters listed in subsection (1), the Minister, after notifying the Minister of Finance, must, by notice in the Gazette, give notice to the relevant municipality or municipalities that the rate must be limited to an amount in the Rand specified in the notice.*

*(b) A municipality affected by a notice referred to in paragraph (a) must give effect to the notice and, if necessary, adjust its budget for the next financial year accordingly.*

*(3)(a) Any sector of the economy, after consulting the relevant municipality or municipalities and organised local government, may, through its organised structures, request the Minister to evaluate evidence to the effect that a rate on any specific category of properties, or a rate on any specific category of properties above a specific amount in the Rand, is materially and unreasonably prejudicing any of the matters listed in subsection (1).*

*(b) If the Minister is convinced by the evidence referred to in paragraph (a) that a rate on any specific category of properties, or a rate on any specific category of properties above a specific amount in the Rand, is materially and unreasonably prejudicing any of the matters listed in subsection (1), the Minister must act in terms of subsection (2).*

*(4) A notice issued in terms of subsection (2) must give the reasons why a rate on the relevant category of properties, or a rate on the relevant category of properties above the amount specified in the notice, is materially and unreasonably prejudicing a matter listed in subsection (1).*

*(5) The Minister, after consultation with the Minister of Finance, may by notice in the Gazette issue guidelines to assist municipalities in the exercise of their power to levy rates consistent with subsection (1).*"

9.9 Then, section 19 provides that:

"*(1) A municipality may not levy –*
*(a) different rates on residential properties, except as provided for in sections (11(1)(b), 21 and 89;*
*(b) a rate on non-residential properties that exceeds a prescribed ratio to the rate on residential properties determined in terms of section 11(1)(a);*
*(c) rates which unreasonably discriminate between categories of non-residential properties; or*
*(d) additional rates except as provided for in section 22.*

*(2) The ratio referred to in subsection (1)(b) may only be prescribed with the concurrence of the Minister of Finance.*"

10. In the founding affidavit, the applicants had initially challenged the *impugned* decisions based on breach of sections 16 and 19(c) of the Rates Act.[28] However, in their replying affidavit as well as the heads of argument filed on their behalf, the applicants have jettisoned the challenge based on breach of section 16 of the Rates Act. Accordingly, all that is left of the applicants' case is a challenge based on breach of section 19(c) of the Rates Act.

**THE ISSUE IN THE CASE**

11. This case turns on a fine narrow point. It turns, in particular, on the interpretation of section 19(c) of the Rates Act. The central question in the case is whether the determination of a rates ratio of 22:1 between residential and mining rates, whilst having as the next highest ratio 3:6 in respect of vacant industrial and vacant business and commercial properties, unreasonably discriminates between non-residential categories of properties as contemplated in section 19(c) of the Rates Act? Besides the preliminary points that have been raised by the first respondent, this is the crisp question for determination in this case.

[28] FA p14-15 paras 11.4-11.6

12. In the discussion below, I deal with the question posed in paragraph 11 above. Before doing so, it is necessary and in good order that I should first dispose of the preliminary points raised by the first respondent.

***IN LIMINE*; JURISDICTION**

13. The jurisdictional point is premised on two grounds.

13.1 First, that the *impugned* decisions are not reviewable under PAJA because in taking the *impugned* decisions, the Council of the first respondent was not performing '*administrative action*' as defined in section 1 of PAJA but was acting in its capacity as democratically elected representatives exercising a power that under the Constitution is a power peculiar to elected legislative bodies; and

13.2 Second, that the *impugned* decisions are not justiciable by the Court. In support of this contention, the first respondent relies on paragraph 8 of the SCA Judgment in *Nokeng Tsa Taemane*.[29]

> *''[8] The obligation of a municipality not materially and unreasonably to prejudice national economic policies by its rates is juridically of the same kind as two other provisions on which the association relied, namely s 152(1)(c) and s 195(1)(b). The first provides that an object of local government is to promote social and economic development and the second deals with the basic value of public administration which requires that the efficient, economic and effective use of resources must be promoted. These provisions are, as submitted by the municipality, not justiciable by courts. (I should note that counsel for the association did not suggest otherwise during argument.) The same view was expressed by this court (per Cameron JA) who echoed the misgivings of Froneman J in (CDA Boerdery (Edms) Bpk v Nelson Mandela Metropolitan Municipality [2007] ZASCA 1; 2007 (4) SA 276 (SCA) paras 45-46). These provisions concern political and inter-governmental issues, evidently specialist areas involving policy issues and a consideration of a host of other issues in respect whereof the court does not have the necessary expertise. It would be wrong for the courts to usurp the powers of municipalities and determine rates and taxes for them. The best course for a court is to show judicial*

[29]Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others [2011] 2 All SA 46 (SCA) at para 8

*deference to the decisions taken by democratically elected municipal councils."*

14. Both premises are flawed precisely because,

14.1 this application does not concern a review of administrative action in terms of PAJA. In their heads of argument[30] and in oral argument, the applicants have made clear that the review is not brought in terms of PAJA, but under the doctrine of legality. However, the fact that the *impugned* decisions are not administrative does not completely immunise them from judicial scrutiny. It simply means that they may not be *impugned* under PAJA. This was made plain by the Constitutional Court in Gijima.[31] Once it is so, then it follows that the first ground advanced by the first respondent must fail.

14.2 nor, do the applicants seek to *impugn* the first respondent's powers to determine rates in terms of a rates policy adopted by the Council of the first respondent in terms whereof various properties are rateable on a different basis depending on the category the property has been placed in, or the values that have been placed on the properties for purposes of determining rates. The applicants concede rightfully so, that the first respondent has the power to determine rates and that it may create different categories of rateable properties within the framework provided for in section 19 of the Rates Act. It is probably for this reason that the applicants did not seriously press upon this Court, in the event of it being found that the rates ratio applicable to the category of mining is unreasonable, to determine the appropriate rates ratios for various categories of non-residential properties. Instead, the applicants only seek an order reviewing and setting aside the *impugned* decisions as being unlawful, irrational, and unreasonable. Once it is so, then it follows that the first respondent's reliance on *Nokeng Tsa Taemane* is misplaced.

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[30]Applicants' heads of argument p2 para 2. This was also emphasised in p267 para 7 of the applicants' replying affidavit.

[31]State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC) at para 38

14.3 *Nokeng Tsa Taemane* was not concerned with the legality and/or lawfulness of a municipality's decision to impose different rates between the various categories of non-residential properties. In *Nokeng Tsa Taemane*, the Court was concerned with a particular power - the power of a local authority under section 229(1)(a) of the Constitution to impose rates on property and surcharges on fees for services provided by or on behalf of a municipality. The exercise of that power – the power under section 229(1)(a) - is subject to section 229(2)(a) which provides, *inter alia*, that the power may not be exercised in a way that materially and unreasonably prejudices national economic policies. That is the particular power – the power to levy rates on property and surcharges on fees for services rendered by a municipality, which the SCA found not to be justiciable by courts because it concerns political and inter-governmental issues. An examination of section 16 of the Rates Act will immediately reveal that the exercise of the power under section 229(2)(a) to levy rates on property in a way that would not materially and reasonably prejudice national economic policies; or economic activities across its boundaries; or the national mobility of goods, services, capital or labour, indeed concern political and inter-governmental issues.

14.3.1 In my view, the determination of whether a property rates materially and reasonably prejudices national economic policies, or economic activities across municipal boundaries is a matter that falls outside the expertise of this Court. It involves an investigation and eventually a determination of, *inter alia*, the national economic policies; the economic activities across the municipal boundaries; and the national mobility of goods, services, capital or labour. These are matters which in the words of Justice Cameron, involve 'polycentric decision-making',[32] which fall outside the expertise of the court to investigate and determine.

[32]Logro Properties CC v Bedderson NO and Others [2003] 1 All SA 424 (SCA) at para 20

14.3.2 Further, section 16(2) and (5) involve inter-governmental relations between the municipality, the Minister of Cooperative Governance and Traditional Affairs (CoGTA), and the Minister of Finance.

14.4 The power under section 229(1)(a) of the Constitution to levy rates on property and surcharges on fees for services provided by or on behalf of a municipality is significantly different from the power under section 19(c) of the Rates Act to determine rates that do not unfairly discriminate between various categories of non-residential properties. The former is clearly not justiciable by courts whilst the latter is.

15. For the reasons set out above, I find that both grounds advanced by the first respondent are unmeritorious. In the result, the jurisdictional point falls to be dismissed.

***LOCUS STANDI***

16. The first respondent's argument on the *locus standi* point runs as follows: the relief sought pertains to the property rates ratio that was set by the Council of the first respondent in respect of the properties that are registered in the name of De Beers; in terms of section 24(1) of the Rates Act, read with Chapter 9 of the Local Government: Municipal Systems Act, 32 of 2000 (''the *Systems Act*'') rates levied by a municipality on a property must be paid by the owner of the property; the terms of the Sale Agreement are *res inter alios acta* between the applicants and the other parties to the agreement; the applicants do not have a direct and substantial interest in the *impugned* decisions; consequently, the applicants do not have *locus standi* to bring this application.[33]

17. The applicants on the other hand, contend that as property owners in the Kimberley area they have a clear interest to challenge the legality and validity of the *impugned* decisions.

[33]AA p197-198 paras 12-17; First respondent's heads of argument p4-5 paras 8-14

18. It is common cause that the first applicant is the registered owner of the immovable properties described in paragraphs 5.1.6 to 5.1.8 above,[34] whereas the second applicant is the registered owner of the Farm Petra Number 215 District Kimberley, Northern Cape Province.[35] It is further common cause that the applicants conduct mining operations on portions of the immovable properties described in paragraphs 5.1.6 to 5.1.8 above, and the Farm Petra Number 215.[36]

19. Just like the other immovable properties described in paragraphs 5.1.1 to 5.1.5 above, the properties described in paragraph 18 above also fall under the category of mining and are affected by the *impugned* decisions.

20. It cannot be disputed that by virtue of their ownership of the immovable properties described in paragraph 18 above, the applicants are parties that are directly affected by the impugned decisions. Once it is so, then it follows that the applicants have a 'direct and substantial interest' in the subject matter of this litigation. For this reason, the applicants have *locus standi* to bring this application for the relief sought in the notice of motion.

21. In any event, section 38 of the Constitution has considerably expanded the grounds of standing. It confers standing on,

    21.1 anyone acting in their own interest;
    21.2 anyone acting on behalf of another person who cannot act in their own name;
    21.3 anyone acting as a member of, or in the interest of, a group or class of persons;
    21.4 anyone acting in the public interest; and
    21.5 an association acting in the interest of its members.

22. The applicants are not bringing this application on behalf of another person; or as a member of, or in the interest of, a group or class of persons; or in the public interest. Though the applicants do not explicitly say so, the allegations by the

[34] FA p13 para 9.4; AA p203 para 43
[35] FA p13 para 10.1; AA p203 para 43
[36] FA p19 para 12.1; AA p204 para 49

applicants that they are entitled to challenge the *impugned* decisions as property owners within Kimberley must mean, therefore, that the applicants are bringing the application in their own interest.

23. It is trite that a broad approach is to be taken to '*own interest*' standing under section 38(a) of the Constitution and that in approaching the question of standing, the applicants' contention that the difference in the rates tariffs between the various categories of non-residential properties imposed by the first respondent is unlawful, must be taken to be correct. If it is correct, then some amounts for property rates that have been paid by the applicants to the first respondent may have to be repaid to the applicants, if successful. In my view, the benefit accruing to the applicants, if successful, is more than sufficient to give them own standing to bring this application.

24. The first respondent's contention that the terms of the Sale Agreement are *res inter alios acta* between the applicants and the other parties to the agreement, but do not give the applicants standing to bring this application, overlooks two important factors.

    24.1 First, it ignores the requirement that the allegations by the parties claiming standing must be accepted as correct because standing is an issue to be determined *in limine* before the merits are addressed.

    24.2 Second, it requires this Court to enter upon and determine the merits of the first respondent's contention about the nature of the arrangement between the applicants and De Beers under the Sale Agreement, and determine whether the terms of the Sale Agreement indeed create binding obligations on the applicants to pay rates in respect of the immovable properties.

25. It is not necessary for this Court to enter the merits at this stage in order to determine the issue of the *locus standi* of the applicants to bring this application. The issue in this case is about the legality or lawfulness of the *impugned* decisions. The purpose of the challenge is to recover the amounts which have been paid by

the applicants to the first respondent pursuant to the *impugned* decisions, or to prevent the first respondent from recovering the outstanding rates and taxes from the applicants. This was made clear by Adv. Rip SC who together with Adv. Viviers appeared on behalf of the applicants. That must provide a sufficiently direct and substantial interest in the outcome of the litigation to confer standing on the applicants.

26. In any event, it is disingenuous for the first respondent to deny that the applicants have a direct and substantial interest in the subject-matter of this litigation, when the first respondent does not dispute that the applicants are the registered owners of some of the immovable properties on which they conduct mining operations. The application is about the lawfulness of the first respondent's decisions to levy unreasonable rates on properties in the mining category. It is, therefore, irrelevant that some of the immovable properties are still registered in the name of De Beers. It is also significant that notwithstanding the fact that some of the immovable properties involved in this case are still registered in the name of De Beers, the first respondent did not consider that to be an impediment to opening accounts for property rates in respect of the said immovable properties in the names of the applicants; rendered monthly statements for rates in respect of the immovable properties to the applicants; and recovered amounts due and owing for rates in respect of the immovable properties, from the applicants.

27. Clearly, the first respondent considered the applicants, but not De Beers, as parties that are liable for rates levied in respect of the immovable properties involved in this case. For these reasons, the first respondent's claim that the applicants lack *locus standi* to bring this application is rejected. The applicants have the necessary standing to bring this application to challenge the lawfulness of the rates levied by the first respondent on immovable properties in the category of ''mining''.

**NON-JOINDER**

28. The considerations leading to the conclusion that the applicants have *locus standi* to bring this application also lead to the conclusion that the non-joinder point is unmeritorious and falls to be rejected.

**UNREASONABLE DELAY**

29. The *impugned* decisions date back to the 2015/2016 financial year. It is common cause between the parties that the rates ratio that is applicable to the immovable properties have been determined by the Council of the first respondent on an annual basis as part of its budgeting process. It is further common cause that annually the first respondent gives notice of the rates ratio and tariffs applicable to that year.

30. The applicants do not take issue with the contention that a lengthy period has elapsed since some of the rates were levied.[37] In an apparent attempt to explain this delay, the applicants give two reasons for the delay in bringing this application.

    30.1. First, that they were unaware of the imposition of the rates at the ratio indicated prior to 2019.

    30.2. Second, that since 2019 the applicants have made every attempt to engage with the first respondent to resolve the dispute.[38]

31. It was further common between the parties that a legality review is not subject to the strict time frames prescribed under PAJA but must be brought within a reasonable period. This is a trite proposition for which no authority is required. The reasonableness of the delay, however, cannot be assessed in a vacuum but must be assessed based on the explanation given.[39]

32. In this case, the explanation given by the applicants for the delay in launching this application is extremely sketchy and unsatisfactory in a number of respects.

    32.1 there is no explanation as to why the applicants were unaware of the rates ratio applicable to the immovable properties until 2019, when on the

[37] FA p32 para 18.1
[38] FA p31 para 17.5
[39] Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) at para 48

applicants' own case, they purchased the immovable properties on 30 November 2015[40] and have been responsible for payment of rates in respect of the immovable properties since then.[41]

32.2 the applicants have been receiving monthly statements for rates and taxes payable in respect of the immovable properties I would assume, since the applicants purchased the properties from De Beers. Even if it could be argued that the first applicant did not receive monthly statements for rates and taxes in respect of the properties described in paragraphs 5.1.1 to 5.1.5 above, the applicants would certainly have received monthly statements for rates and taxes in respect of the immovable properties described in paragraphs 5.1.6 to 5.1.8 above, which on the applicants' own version, are registered in the name of the first applicant. The same would apply to the second applicant in respect of the Farm Petra 215, which is registered in the name of the second applicant.

33. I find it astonishing why the applicants would not have become aware of the rates ratio applicable to the immovable properties for such a lengthy period, especially considering that the applicants have for all that period been responsible for payment of the rates and taxes levied on the immovable properties.

34. The period from 2015 to 2021 when this application was launched is extensive. The absence of cogent reasons to account for the delay in launching this application renders the delay unreasonable. However, a finding that the delay is unreasonable does not signal the end of the matter. The Court must still consider whether to overlook the delay and nevertheless entertain the application.[42]

35. The approach to overlooking delay in a legality review was explained by the Constitutional Court in *Tasima.*[43]

''*[170] But what is the prejudice suffered by Tasima in overlooking the delay? Condoning the delay does not prevent them from enforcing the Court orders*

[40]FA p 11 para 9.1
[41]FA p13 para 9.3.4
[42]Buffalo City Metropolitan Municipality (supra) at para 8
[43]Department of Transport and Others v Tasima (Pty) Limited 2017 (2) SA 622 (CC) at para 170

*that have been granted in their favour. In addition, the contract extension itself has already expired. Setting aside the extension at this point should not, therefore, impact negatively on Tasima going forward. It is also a factor that this Court may rely on its section 172(1)(b) powers to ameliorate the prejudice suffered is minimal, particularly in comparison to the prejudice to be suffered by the Department and the Corporation if the counter-application is not condoned. This is consonant with the dicta in Khumalo that, "consequences and potential prejudice…ought not in general, to favour the Court non-suiting an applicant in the face of the delay."*

36. In this case, the prejudice to the first respondent is clear. On the applicants' own version, as at the time of launching this application the applicants owed an amount of R30 million to the first respondent for rates levied in respect of the immovable properties. This is the money which the first respondent would have budgeted to collect in the previous financial years. It is not far-fetched to assume that the first respondent may even have borrowed money from financial institutions with the hope of paying off the loans on receipt of the money owed to it by the applicants. This is part of everyday business life.

37. Should the *impugned* decisions be set aside, the first respondent would, therefore, not be able to recover the amount of the debt owed to it by the applicants. This is a real prejudice which the first respondent is likely to suffer if the Court overlooks the delay and entertains the application.

38. However, prejudice alone is not a factor that should prevent this Court from interfering with a clear unlawful decision. Section 172(1)(a) of the Constitution requires this when deciding a constitutional matter within its powers, to declare any law or conduct that is inconsistent with the Constitution in valid to the extent of its inconsistency. This is a constitutional injunction which the Court is obliged to give effect to once it comes to the conclusion that the impugned decisions are unlawful.

39. Mindful of the prejudice which may result from a declaration of invalidity, section 172(1)(b) of the Constitution has given the Court wide remedial powers when deciding a constitutional matter. It is empowered to make any order that is just and equitable in the circumstances of the case. Such order may include, an order

limiting the retrospective effect of the declaration of invalidity, in order to ameliorate any potential prejudice resulting from the declaration of invalidity.

40. It is now well-established that a review under the doctrine of legality is a constitutional matter. Thus, once the Court concludes that the impugned decisions are unlawful, then the Court will be entitled to invoke its section 172(1)(b) powers to ameliorate any potential prejudice resulting from the declaration of unlawfulness.

41. For reasons which shall become apparent from what I set out below, the *impugned* decisions are clearly unlawful. There is a striking differentiation in the rates ratios applicable to the various categories of non-residential properties. In some instances, the difference is about 8 times. On the face of it, this differentiation is unreasonable. Moreover, the first respondent has not provided any explanation for the differentiation and the margin between the rates ratios applicable to properties in the mining category and other non-residential properties. In my view, in the absence of explanation, the differentiation is unreasonable and in breach of section 19(c) of the Rates Act, which prohibits a municipality from levying rates which unreasonably discriminates between categories of non-residential properties. Once it is, then it follows that the *impugned* decisions are unlawful.

**THE CENTRAL QUESTION IN THE CASE**

42. Returning to the essential question in the case, I have already delineated what the central question in the case is – it is whether the difference in the rates ratios between the various categories of non-residential properties is in breach of section 19(c) of the Rates Act.

43. The applicants concede that the first respondent is entitled to levy rates on a different basis depending on the category the property has been placed in. This

differentiation is specifically provided for in section 8(1) of the Rates Act which provides that:

*''Subject to section 19, a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property, which may include categories determined according to the use of the property; or permitted use of the property; or geographical area in which the property is situated.''*

44. As correctly pointed out by the applicants in their heads of argument, the fact that a municipality may create different categories of rateable property is subject to the proviso contained in section 19(c) of the Rates Act, which provides that rates may not unreasonably discriminate between categories of non-residential properties.

45. The applicants' case is that in imposing a ratio difference of 22:1 between residential rates and mining rates whilst having as the next highest ratio 3:6 in respect of vacant industrial and vacant business and commercial properties, the first respondent has acted in breach of the prohibition contained in section 19(c). They contend that having regard to the rates ratios applicable to other categories of non-residential properties, the difference between mining and other categories of non-residential properties is significantly higher. Based on this, the applicants then contend that the differentiation is unreasonable. I agree with the applicants. In the absence of explanation for the difference in the applicable rates ratios, the high margin in the differentiation between mining category, and other non-residential properties renders the *impugned* decisions *prima facie* unreasonable, in breach of section 19(c) of the Rates Act, and consequently, unlawful.

46. The first respondent has not seen it fit in its answering papers to explain to the Court the considerations that led to the imposition of a rates ratio of 22:1 in respect of immovable properties in the mining category, which is significantly higher than other immovable properties in the non-residential category. This is a weakness in the first respondent's case. The first respondent should have explained in its answering affidavit why a rates ratio of 22:1 was imposed on the mining category, whilst business and commercial property is rated at 3:1, and the considerations underpinning such determination.

47. Since there is no explanation by the first respondent for the huge difference between the rates for mining category, and that of other non-residential categories, the inference becomes irresistible that the differentiation is irrational. If there was a good and rational explanation for the differentiation, one would have expected the first respondent to provide that. Such explanation may even have explained why it was necessary in Kimberley, for instance, to impose a rates ratio of 22:1.

48. Unfortunately, that explanation is not before the Court. The Court is left in the dark as to why the first respondent imposed such a huge ratio difference between the mining category, and other non-residential categories.

49. In the result, I find that the *impugned* decisions are unlawful, irrational, and unreasonable. Section 172(1)(a) of the Constitution imposes an obligation on the Court when deciding a constitutional matter to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. As I have demonstrated above, the *impugned* decisions are in breach of section 19(c) of the Rates Act. The *impugned* decisions are therefore unlawful. Once it is so, then it follows that the *impugned* decisions must be declared unlawful and set aside.

**REMEDY**

50. For the reasons already advanced above, setting aside the *impugned* decisions will have a potentially disruptive effect on the affairs of the first respondent in that the first respondent will not be able to enforce the outstanding rates owed by the applicants.
51. In order to ameliorate the potentially disruptive consequences of setting aside the *impugned* decisions, the Court makes an order in terms of section 172(1)((b)(i) of the Constitution by limiting the retrospective effect of the declaration of invalidity and giving the order prospective effect only. That way, the first respondent will still be able to enforce payment of the debt owed by the applicants in respect of outstanding rates and taxes, notwithstanding the setting aside of the *impugned* decisions.

**CONCLUSION**

52. In the result I make the following orders:

52.1 The decisions taken by the Council of the first respondent to set a property rates ratio of 1:22 in respect of the category of ''*mining*" for the financial years 2015/2016; 2016/2017; 2017/2018; 2018/2019; 2019/2020; and 2020/2021 are declared unlawful and set aside.

52.2 In terms of section 172(1)(b)(i) of the Constitution, the order in paragraph 52.1 above shall have prospective effect only.

52.3 The first respondent shall pay the costs of the application, including the costs consequent upon the employment of two counsel.

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**RAMAEPADI, MJ**
**ACTING JUDGE**
**NORTHERN CAPE HIGH COURT**

I concur.

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**MAMOSEBO, MC**
**JUDGE**
**NORTHERN CAPE HIGH COURT**

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|---|---|
| **Obo Applicants:** | Adv. M.M. Rip SC & Adv A.M. Viviers<br>(oio Duncan & Rothman Inc.) |
| **Obo 1st Respondent:** | Adv. B. Knoetze SC<br>(oio Van de Wall Inc.) |