THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 451/2013

In the matter between:

RANDBURG MANAGEMENT DISTRICT **APPELLANT**

and

WEST DUNES PROPERTIES 141 (PTY) LIMITED **FIRST RESPONDENT**
CITY OF JOHANNESBURG **SECOND RESPONDENT**

Neutral citation: *Randburg Management District v West Dunes Properties* (451/2013) [2015] ZASCA 135 (30 September 2015)

Coram: Leach, Tshiqi, Theron, Willis and Mathopo JJA

Heard: 02 September 2015

Delivered: 30 September 2015

Summary: Local government – formation of a city improvement district under the Gauteng City Improvement Districts Act 12 of 1997 – municipal council may not delegate authority to approve a city improvement district to mayoral committee by reason of s 59(2) of the Local Government: Municipal Systems Act 32 of 2000 read with s 160(2)(*c*) of the Constitution – levies imposed by a city improvement district not validly formed not recoverable – such levies in any event offending s 229 of the Constitution as imposed by provincial and not national legislation.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Sutherland J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Leach JA (Tshiqi, Theron, Willis and Mathopo JJA concurring)

[1] At issue in this appeal is the legality of certain levies imposed upon the first respondent under the Gauteng City Improvement Districts Act 12 of 1997 (the CID Act) which provides for the imposition of levies on rateable properties[1] situated within a 'city improvement district'[2] (for convenience I intend to use the acronym CID in place of this phrase). These levies are then paid over to a management body charged with the implementation of a 'city improvement district plan' to finance various services that, in terms of s 6(4) of the CID Act, '. . . must be in addition to or an enhancement of those provided by the municipality'.

[2] The first respondent is the owner of two immovable properties known as erven 1768 and 1978 Ferndale. Both properties are situated within the municipal area of the City of Johannesburg (the City), a municipality envisaged by the CID

[1] '[R]ateable property' is defined in the CID Act as immovable property on which a rate or rates may be levied in accordance with the Local Authorities Rating Ordinance (Ordinance No 11 of 1977).

[2] Defined in s 1 of the CID Act as meaning 'a geographic district approved in terms of s 3 of this Act'.

Act. The properties also fall within the geographical area of what is known as the Randburg CID, purportedly established under the CID Act in or about 2004.

[3] The appellant, an association incorporated under s 21 of the Companies Act 61 of 1973, is the 'management body' of the Randburg CID established in compliance with s 4(2) of the CID Act (to which further reference will be made in due course). As such, under s 5(3) the appellant may sue for and recover unpaid levies as a debt due to it.

[4] After the formation of the Randburg CID, levies under the CID Act were imposed on properties within its geographical area. The first respondent refused to pay certain of these levies imposed on its erven in Ferndale. In due course the appellant, purporting to exercise its rights under s 5(3), instituted two separate actions in the court a quo seeking payment of the amounts it contended the first respondent owed. In its first action (case number 53025/09) it claimed unpaid levies in respect of erf 1768 for the periods 1 October 2005 to 1 May 2006 and 1 July 2009 to 1 December 2009, and in respect of erf 1978 over the period 1 July 2008 to 1 December 2009. In the second action (case number 11637/2011) its claim for both properties was calculated over the period 1 January 2010 to 1 March 2011. Both actions were defended and were subsequently consolidated for hearing. The City was joined as a second defendant before the trial, but declined the invitation to appear or take part in the hearing – although counsel for the appellant informed the court that it had cooperated with the appellant in making available witnesses and documents. (I should mention that the City was also cited as the second respondent in this appeal but, again, took no part in the proceedings.)

[5] In any event, when the matter came to trial the parties agreed to separate certain of the issues under the provisions of Uniform rule 33(4). The statement of issues separated in terms of this rule, and which the court ordered were to be

determined separately with the remaining issues being stayed until they had been resolved, were the following:

'1. Whether or not the [appellant] was duly established under and in terms of the [CID Act] for the area which included Erf 1978 Ferndale . . . and Erf 1768 Ferndale . . . ?

2. If question [1] is answered in favour of the plaintiff, whether or not:

2.1 the first property; and/or

2.2 the second property are "rateable property" as defined in the CID Act, as read with the Local Authorities Rating Ordinance, 11 of 1977 . . . and the Local Government Municipal Property Rates Act 6 of 2004 . . . for the periods claimed in the summonses . . . . ?

3. If questions 1 and 2 are answered in favour of the [appellant], whether or not the amounts claimed in these actions were duly levied under and in terms of the CID Act?'

[6] Having heard evidence and argument, the court a quo held in regard to the first of these issues that the appellant had failed to show that it had been duly established. Although for that reason alone, the appellant's claim fell to be dismissed, the court went on to decide a number of further legal issues in order to resolve the controversies that had been the subject of the debate. Its ultimate conclusions relevant to the issues raised in this appeal were the following:

'77.1 It has not been proven that the Randburg CID was formed in compliance with Sections 2 and 4 of the CID Act.

77.2 It has not been proven that the imposition of increased levies, from 2004 onwards [was valid].

77.3 The decisions of the [Randburg CID management board], from 11 September 2008 to increase levies are *ultra vires* its powers and invalid, regardless of whatever status the levies imposed prior thereto might have enjoyed.

77.4 [Erf 1978] was at all times throughout the era of the Rating Ordinance until 1 July 2008, exempt from rates because it qualified in terms of section 5(1)(d), and accordingly, could not lawfully have been subjected to any levy in respect of the CID.'

[7] Pursuant to these findings, the appellant's claims were dismissed with costs. The appeal to this court is with leave of the court a quo. The first respondent did not appear on appeal.

[8] In the light of the stated case and the findings made in regard thereto, the first issue that falls to be decided is whether the court a quo was correct in concluding that the appellant had failed to prove that it had been duly established under the CID Act. The appellant conceded that should the finding of the court a quo on this point be upheld, an element essential to its claims would not have been established and its appeal should fail.

[9] In considering this question, it is necessary to take account of the process that has to be followed to form a CID as laid down in the CID Act and the regulations promulgated thereunder.[3] In brief:

(a) Under s 2(1) of the CID Act, a municipal council is obliged to consider the formation of a CID on receipt of a petition indicating the support of 25 per cent of owners of rateable properties within the boundaries of such a proposed district.

(b) Section 2(4) requires the petition to take the form of a CID plan 'covering a three year period . . . and must include the prescribed requirements and be in the prescribed form'.

(c) Such prescribed requirements and the prescribed form are set out in the regulations which require, inter alia, that the CID plan is to set out the services and level of services being provided by the municipality and the proposed services and levels thereof to be provided under the CID plan.

(d) Sections 2(5) to (10) of the CID Act and regs 10-15 prescribe certain procedures for public participation in the consideration of the approval of the CID plan, including a public hearing, and both written and oral objections and comments.

(e) Under reg 11 notifications and advertisements are to be given to ratepayers and the public and are to contain details of the date, time and place at which a public hearing is to be held, a place at which the proposed CID plan will be available for inspection, the location of boundaries of the proposed CID plan, the additional

[3] Regulations in terms of the Gauteng City Improvement Districts Act 12 of 1997, GNR 1145, *Provincial Gazette* 491, 11 May 1998.

services which are proposed to be provided thereunder. Importantly, these advertisements and notices must detail the proposed levy to be imposed.[4]

(f) Once this public meeting has been held and the associated consultative process followed, the municipal council is called upon to take a decision on a petition. In that regard s 3(2) provides:

'A municipal council may –

(*a*) approve the formation of a city improvement district and a city improvement district plan;

(*b*) approve the formation of a city improvement district and a city improvement district plan with amendments or conditions as the municipal council considers in the public interest; and

(*c*) refer the petition back to the petitioners with written reasons for not approving the formation of a city improvement district or city improvement district plan indicating that the petition may be resubmitted to the municipal council in the time period prescribed: provided that if the resubmitted petition proposes an increased levy for any owner of rateable property, the petitioner must notify such owner by registered mail.

(g) It is only after the establishment of a CID has been approved under s 3(2) that it and its management board may be formed. In this regard s 4 of the CID Act provides, inter alia:

'(1) After a petition is approved in terms of section 3, the city improvement district may be formed only after written proof in the prescribed form is provided to the municipal council by the petitioner indicating that more than 50 (fifty) percent of the owners of rateable property who represent more than 50 (fifty) percent of the rate base in value of the property in the city improvement district, approve the formation of the city improvement district and city improvement district plan as approved by the municipal council.

(2) After the written proof mentioned in subsection (1) is acknowledged by the municipal council, a city improvement district management body must be formed and incorporated in terms of section 21 of the Companies Act (Act No 61 of 1973) or as any other legal entity approved by the MEC.'

[10] The appellant was thus obliged to prove that a petition relating to the formation of the Randburg CID under s 3(2) had been properly approved in terms of these provisions. For present purposes it can be accepted that the necessary

[4] Regulation 11(*e*).

preliminary requirements of public consultation were fulfilled, and one would have expected it would then have been a straightforward matter to show that the plan was thereafter properly approved. However, despite the assistance of the City that I have already mentioned, the appellant was unable to call any direct evidence of such approval. The high-water mark of its case was a letter dated 18 October 2004 addressed by a Ms Tau, then an employee of the City, to Kagiso Urban Management (the company that had lodged the petition for the establishment of the Randburg CID and, after its alleged formation, provided management services to the appellant). The letter reads as follows

'THE RANDBURG IMPROVEMENT DISTRICT

Your application for the establishment of a City Improvement District in the Randburg area to be called The Randburg Improvement District was approved by the Mayoral Committee on Thursday 14 October 2004, item No 98 on the minutes of the meeting.

This letter also serves as confirmation that all the requirements in terms of the Gauteng City Improvement District Act, 1997 (Act No 12 of 1997) has been complied with.

We further acknowledge the receipt of a schedule and copies of voting forms summarising 54.76% of number of rateable erven representing 55.36% of the rates value in favour of establishing a City Improvement District in the abovementioned area.'

[11] Ms Tau, when called to testify, had no real recall of the circumstances under which she had come to write this letter, something which is understandable given that a period of some eight years had since elapsed. However, she stated that she assumed that the City's mayoral committee on whose behalf she had written had been delegated authority by the City's municipal council to consider the approval of the Randburg CID, although she could not say whether that had in fact been the case.

[12] It is truly startling that neither the City nor the appellant was able to produce any further direct or documentary proof relating to the approval and formation of

the Randburg CID. The learned judge in the court a quo was fully justified in remarking that in this respect both had been 'guilty of dereliction of their duty towards the public, to safeguard and keep accessible public records, and have been poor stewards of the trust reposed in them'. Be that as it may, counsel for the appellant was constrained to concede that the decision to approve the establishment of the Randburg CID had probably been made by the mayoral committee and not by the municipal council itself. He submitted, however, that Ms Tau's assumption had been correct and that the municipal council must have duly delegated the mayoral committee to deal with the petition. Accordingly, so the argument went, the latter's approval of the petition was valid and binding.

[13] The first obstacle to this argument is, of course, that there is no proof, documentary or otherwise, that the municipal council had in fact delegated authority to the mayoral committee to deal with the approval of the Randburg CID petition. But, assuming for present purposes that such a delegation did take place, a second and insurmountable hurdle facing the appellant is that, for the reasons set out below, that delegation was unlawful.

[14] Section 60(1)(*a*) of the Local Government: Municipal Structures Act 117 of 1998 provides that if a municipal council has more than nine members, its executive mayor may appoint a mayoral committee from amongst the municipal councillors (in the present case one must presume that this was properly done). However, although s 59(1)(*a*) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) provides that a municipal council may delegate certain of its powers, s 59(2)(*a*) goes on to provide that any such delegation 'must not conflict with the Constitution'. Section 160(2) of the Constitution, in turn, provides that a municipal council may not delegate 'the imposition of rates and other taxes, levies and duties'. Consequently the imposition of a levy is a function that the City was not permitted to delegate to its mayoral committee. If what was imposed under the

CID Act indeed constitutes such a levy, then the delegation upon which the appellant relies would be invalid.

[15] The appellant sought to overcome this hurdle by arguing, first, that levies under the CID Act are not imposed by a municipality and, second, that such levies are in any event not levies envisaged by s 160(2)(*c*) of the Constitution. I shall deal with each of these contentions in turn.

[16] In regard to the first, at first blush the argument that a municipality does not impose the levies flies in the face of s 6 of the CID Act which, inter alia, provides:

'(1) Once a city improvement district has been formed, a municipality must levy an amount on behalf of the management body from the owners of rateable property in the city improvement district in accordance with the approved plan.

(2) Such amount must be levied together with other amounts which the municipality may levy from the owners of rateable property in respect of rates and taxes but the purpose of the amount must be indicated as a separate item from other rates and taxes levied by the municipality.

(3) The levies collected by the municipality for the city improvement district must be paid on a monthly basis to the management body free of any deductions or set-off for the purpose of implementing the city improvement district plan.'

However, relying upon the decision of *Kerkstreet City Improvements District v Johnbuild Properties (Pty) Ltd & another* 2005 JDR 0501 (T), the appellant argued that the use of the word 'levy' in ss 6(1) and (2) meant no more than the municipality is to 'collect' the levies as provided in s 6(3), rather than to determine and impose them.

[17] The issue in *Kerkstreet* was whether it had been lawful for the municipality concerned to have appointed an agent to collect the levies imposed under the CID Act on its behalf. In concluding that the agency agreement was not unlawful, and that the second respondent was doing nothing but collecting the taxes and not levying them, the court accepted an argument that 'levy' in ss 6(1) and (2) connoted

the collection of levies as specifically provided for in s 6(3). However it had not been called on to decide whether or not the municipality had 'levied' the monthly CID levies in the sense that it had determined and imposed them.

[18] In any event, it is clear from the structure of the prescribed process that the levies are imposed by the municipality under the CID Act. As I mentioned earlier, s 2(4) requires the petition to take the form of a CID plan that complies with the requirements prescribed by the regulations. Part D of the schedule to the regulations requires details of the proposed monthly levy to be given. Moreover, Part E prescribes that there be attached a 'Schedule of Appointment of monthly Levy to each Erf'. Consequently, the proposed levy forms part of the CID plan that lies at the heart of the public consultative process, that is debated at the necessary public hearing, and is thereafter considered by a municipal council. If the plan is then approved under s 3(2), and the necessary proof of approval by ratepayers is thereafter given by the petitioner as required under s 4(1), the CID may be formed. Thereafter the levy, so debated and then approved by the municipal council, will be levied by the municipality under s 6(1) 'in accordance with the approved plan'.

[19] In these circumstances it cannot be said that the levy which a ratepayer becomes obliged to pay under the CID Act, albeit after having been subjected to debate in the public participation process, was not determined and imposed by the municipality. Even if the monthly sum is reflected on property owners' accounts as a separate item from other rates and taxes, and is collected by the municipality before being paid to the management board of a CID, it is clearly imposed by the municipal council and is not an amount merely collected by the municipality.

[20] I turn to the appellant's alternative argument that, even if the monthly amount a ratepayer becomes due to pay under the CID is to be regarded as a levy, it does not fall within the category of 'rates and other taxes, levies and duties' the imposition of

which, under s 160(2)(*c*) of the Constitution, may not be delegated by a municipal council.

[21] The argument in this regard was that CID levies was neither intended to provide revenue to the State nor unilaterally imposed upon property owners but was, rather, 'payable by the property owners to their own private management body consequent upon their majority decision to form an improvement district'.[5] It was also argued that as the persons who benefitted from the CID levies formed only a portion of the *populus* of the larger municipal area, the levies could not be regarded as being required for municipal services.

[22] Neither of these contentions can be accepted. At the outset, s 160(2)(*c*) of the Constitution clearly seeks to impose a limitation upon a municipal council's power to delegate so as to ensure that the council, and only the council, is responsible for the function of raising municipal revenue. Undoubtedly, this was such a function. The purpose of the CID Act is stated in its preamble to be:

'To provide procedures for the formation and independent management of city improvement districts to fund the provision of services in addition to those which a municipality ordinarily provides in order to facilitate investment in the city improvement district; to halt further degeneration of cities; and to promote economic growth and sustainable development within cities; and to provide for matters connected therewith.'

Moreover ss 6(4) to (7) of the CID Act provide as follows:

'(4) Services provided for in the city improvement district plan and financed by the levy charged to the owners of rateable property must be in addition to or an enhancement of those provided by the municipality.

(5) Any increase in applicable services provided by municipalities throughout its area of jurisdiction must be matched with increases in such services within the city improvement district.

[5] I quote from counsel for the appellant's heads of argument.

(6) The municipality must notify the management body in writing of any reduction or substantial change to services provided by the municipality in the city improvement district.

(7) If the level of services provided by the municipality in the city improvement district is reduced by the municipality without a corresponding reduction of services throughout the municipality's area of jurisdiction, the management body may, by written notice, notify the municipality and require the municipality to reinstate such services within a period of 30 (thirty) days from such notice.'

[23] Significantly in the present case, the CID plan prepared by Kagiso in February 2004 (and ultimately approved by the mayoral committee) recorded the results of a perception survey of ratepayers in the proposed CID carried out in March 2003. This indicated that, in order of importance, the following issues need to be addressed: safety and security, public environment (including maintenance of public facilities), litter, cleaning of grime, public transport and traffic flow, marketing, street lighting, mini-bus taxis and parking, and social issues. It further went on to state:

'The perception survey indicates that the majority of respondents regard litter in the public environment to be an area of concern, and there are a number of interventions that the CID must therefore undertake. The CID manager will have to liaise closely with a number of council departments to ensure that the CID is able to undertake certain actions to ensure a high quality of environmental maintenance. The CID manager will have to negotiate and monitor a performance level contract with Pikitup, the council refuse collection agency.'

[24] From this it appears that the whole purpose of the CID is for it, through its management board, to work in conjunction with the municipality to provide services falling within the sphere of municipal government but not at the time being adequately provided by the municipality. Consequently the services funded by the CID levies, while an adjunct to those being provided by the municipality itself, are of a municipal nature and are designed to supplement and enhance those which the municipality is able to deliver.

[25] Not only are a CID's services municipal in nature but, despite the appellant's protestations to the contrary, the amounts payable by landowners under the CID Act constitute a revenue charge of the nature of a tax or other levy. In *South African Reserve Bank & another v Shuttleworth & another* 2015 (5) SA 146 (CC); (CCT 194/14, CCT 199/14 [2015] ZACC 17 (18 June 2015) the court was called upon to decide whether a particular amount charged by the Reserve Bank as an exit charge upon a resident transferring capital out of this country was a tax or a regulatory charge. In the majority judgment Moseneke DCJ, in holding that the exit charge was not calculated to raise revenue but was directed at curbing or discouraging the export of capital, said:[6]

'So, aside from mere labels, the seminal test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct. If regulation is the primary purpose of the revenue raised under the statute, it would be considered a fee or a charge rather than a tax. The opposite is also true. If the dominant purpose is to raise revenue then the charge would ordinarily be a tax. There are no bright lines between the two. Of course, all regulatory charges raise revenue. Similarly, "every tax is in some measure regulatory". That explains the need to consider carefully the dominant purpose of a statute imposing a fee or a charge or a tax. In support of this basic distinguishing device, judicial authorities have listed non-exhaustive factors that will tend to illustrate what the primary purpose is.'

[26] The authorities to which the learned Deputy Chief Justice went on to mention[7] include *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W) and *Maize Board v Epol (Pty) Ltd* 2009 (3) SA 110 (D), both of which were referred to by the appellant in argument before this court. In *Permanent Estate and Finance* the court was called upon to decide whether a condition obliging the developer of a township to pay as an endowment to the local authority a percentage of the land value of all erven sold constituted a tax. The endowment had as its objective placing the municipality in funds to enable it to

[6] Paragraph 48.
[7] Paragraphs 49-51.

make available the services such as sanitation, water and lights, and roads that the township would require. The court concluded that the imposition of the obligation to pay such an endowment was not the imposition of a tax as:

'To require any person who carries on business or who owns a dog or a motor-car to pay a prescribed fee is, I think, to impose a tax. The money paid is taken into general revenue and is used for general purposes; the person who pays receives no specific service in return for his payment. Endowment money paid by a township owner is quite a different thing; it is an agreed payment for services which are to be performed for the improvement of the township and from which the township owner will derive financial benefit. To require the township owner himself as a condition for the grant of permission to establish a township to make the township habitable by an urban community would not be to impose a tax upon him, and where that work is to be performed by a local authority, to require him to pay for, or to contribute towards the cost of, the work is likewise not to impose a tax.'[8]

[27] Relying on this, the appellant argued that the levies were not of the nature of a tax as they are not to be paid into the municipality's general revenue fund for general public use but, after collection by the City, are to be paid to the management board for the specific services rendered in terms of the CID plan. That may well be so, but an endowment which was in effect to be used as payment to a municipality for its costs in establishing the infrastructure of a township is a far cry from monthly levies being imposed to enable what in effect amounts to the on-going provision of municipal services. The endowment related to a reimbursement of cost on municipal services. Monthly CID levies, on the other hand, are akin to rates: they are levied on the value of an owner's land and give rise to an on-going obligation to pay a monthly contribution to enable services of a municipal nature to be provided.

[28] The decision in *Permanent Estate and Finance* thus does not advance the appellant's case. Neither does the decision in *Maize Board*. In that matter the Maize Board sought to recover various levies imposed under the Marketing Act 59 of 1968

[8] At 259A-C.

as well as a maize marketing scheme. The structure of the Act was to regulate the production and sale of agricultural products with a view to ensuring stability in the market. It was argued that the levies were imposed for the purpose of benefitting the general public who would then enjoy an orderly market system, and was thus a tax. The court concluded otherwise. It held that the levies were not imposed upon the public as a whole or on a substantial sector thereof; were restricted in terms of the products to which they were related; were not utilised for public benefit as only a few members of the public were to benefit; were not intended to raise public revenue since they were not used to support government activities in general; and therefore did not constitute a tax.[9]

[29] For present purposes it is not necessary to decide whether the CID levies are, strictly speaking, a 'tax' or merely a 'levy' as envisaged in s 160(2)(*c*) of the Constitution. Whether a charge is a tax or a levy may well at times be difficult to determine with precision. But in either event, CID levies clearly have as their purpose the raising of revenue to fund the provision of services to enhance those actually rendered by a municipality. They are compulsory and not optional. They are imposed by a municipality on a substantial sector of the public, namely those who own land within the CID. And the revenue derived therefrom is utilised to provide services of a municipal nature in the general interest of those members of the public in the CID. The dominant object of the CID levies is therefore 'to raise revenue to fund the State and its public operations'.[10] The decision in *Maize Board* is thus clearly distinguishable. Indeed, if anything, it shows that the levies presently under consideration are in the nature of a tax.

[30] For these reasons, I conclude that the imposition of CID levies amounts to 'the imposition of rates and other taxes, levies and duties' as envisaged by s 160(2)(*c*) of the Constitution. As the imposition of such levies is therefore a function

[9] Paragraphs 27 and 28.
[10] *S A Reserve Bank v Shuttleworth* para 52.

which could not be delegated by a municipal council, any delegation to the mayoral committee to decide upon the approval of a CID plan under s 3 of the CID Act is invalid; and consequently a decision of the mayoral committee to approve such a plan lacks legality.

[31] The appellant's entire case hinged upon an acceptance that the mayoral committee had been entitled to take the decision to approve the Randburg CID. For the reasons I have given, it was not and, as a result, the court a quo's finding that the appellant had not discharged the onus it bore in proving that the CID had been properly formed must be upheld. The appellant conceded, correctly, that if this court should find this to be the case, it had failed to show that the CID was lawfully established; that its claim for levies was therefore unenforceable; that the claims of the appellant were correctly dismissed by the court a quo; and that the appeal must fail.

[32] Strictly speaking, this renders the various other issues debated in this court unnecessary to decide. However, like the court a quo, it may be of assistance in local government circles if this court, albeit briefly, deals with certain of these issues.

[33] First, a further problem facing the appellant is to be found in s 229(1) of the Constitution which provides that a municipality may impose:

> '(*a*) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
>
> (*b*) *if authorised by national legislation*, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.' (My emphasis.)

CID levies, which for the reasons already set out are embraced by 'other taxes, levies and duties' envisaged in s 160(2)(*c*) of the Constitution, must fall within the

compass of ‘other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls’ as envisaged by this section. However, as is spelled out in s 229(1)(*b*), such levies can only be imposed ‘if authorised by national legislation’. CID levies are not authorised by national legislation. They are authorised by legislation passed by the Gauteng Provincial Legislature. On this basis, too, the levy imposition of CID levies offends the Constitution and therefore lacks legality.

[34] Secondly, even if the Randburg CID had been properly formed and the imposition of its levies for the three years after its formation was lawful, the appellant faces yet a further difficulty in regard to establishing the extent of the first respondent’s liability. The entire scheme envisaged by the CID Act is that a CID is to be established for a period of no more than three years in order to enhance the services being delivered by the municipality during that period. That is clear from s 2(4) of the CID Act which states that the petition ‘must take the form of a city improvement district plan, covering a three year period taking into account the requirements of this Act, and must include the prescribed requirements and be in the prescribed form’. The prescribed form set out in the regulations defines a ‘city improvement district plan’ as meaning ‘a business plan for the operation of a city improvement district covering a three year period from the anticipated date of approval of the district’. Under Part D of the schedule to the regulations, particulars have to be given of the CID budget in respect of the three year period of the plan. All of this shows that the life of a CID may be no more than three years.

[35] Despite this, it was argued on behalf of the appellant that there is no indication in either the CID Act or the regulations of an intention on the part of the legislature to limit the lifespan of a CID to three years; and that the three year period referred to in s 2(4) merely prescribes the length of time which the CID plan should

cover in the context of the petition submitted to the municipality. This was presumably, so the argument went, that such period was considered to be sufficient to enable the municipality (and other interested parties) to properly assess the merits or demerits of the proposed CID plan; and that once a petition is approved and a CID formed, the relevance of the three year period falls away.

[36] There is no merit in this argument. The CID Act and its regulations simply just do not provide for the suggested scheme of details being given in the petition for the initial three year period merely to illustrate the advantages of approving a CID plan. On the contrary, it is quite clear from the legislative provisions I have mentioned that the CID Act intended a CID plan to endure for no longer than three years from the date of its approval.

[37] This conclusion is relevant to the amounts the Randburg CID could have recovered even if it had been validly formed (which it was not). The precise date on which it came into existence is not clear but it can be accepted that the initial three year period after its formation probably lapsed in 2007 (the court a quo found it was probably 'sometime in 2007 or 2008'). But, importantly, it is common cause that at no time thereafter was the original CID plan amended by an extension (for which a procedure is prescribed[11]) nor was a fresh plan ever approved by the municipal council. Despite that, the appellant and its agent, Kagiso, continued to do business not only as if the original plan remained in force, but by collecting levies which it, without the approval of the municipal council, had increased and imposed from time to time in clear contravention of both the CID Act and the Constitution.

[38] As appears from the details of the appellant's claims set out in para 4 above, all the levies claimed by the appellant in Case No 11637/2011 and, probably, the majority of those claimed in Case No 53025/09, relate to periods more than three

[11] Section 7 of the CID Act.

years after the CID was approved. That being so, the levies claimed were not recoverable as they were determined by the appellant without lawful authority to do so.

[39] In view of what is set out above, the issue whether the first respondent's two properties were 'rateable property' as set out in para 2 in the statement of issues becomes moot in the light of the conclusion that the CID was not lawfully formed. It is an issue which is, in any event, fact sensitive and in which the general public have no interest. In the result, although it was an issue of considerable debate and formed the subject of a finding in the court a quo attacked by the appellant in this court, it is unnecessary to deal therewith.

[40] On the other hand, it is necessary to record that the appellant argued that, in the event of this court concluding that the Randburg CID had not been legitimately formed, it would be just and equitable for an order to be issued under s 172(1)(*b*) of the Constitution limiting the retrospective effect of a declaration of invalidity to enable the appellant and the City to remedy the situation. I see no reason to do so. In reaching its conclusion this court has not determined that any statute or legislation is unconstitutional. The underlying ratio of this decision is that the City's mayoral committee took a decision which, in terms of the Systems Act, only the municipal council was lawfully entitled to take, and there is no reason to in effect declare that which was unlawful to be lawful.

[41] Moreover, there must be considerable doubt whether it is possible to lawfully validate the imposition of levies under the CID Act. The decision in this case has been reached on the assumption that the CID Act is valid. But in the light of the provisions of s 229 of the Constitution already mentioned, and its directive that levies can only be imposed if authorised by national legislation, I have grave reservations as to whether the CID Act, being provincial legislation under which a

municipality imposes levies on owners of immovable property, can pass constitutional muster. As the necessary interested parties to a decision on the constitutional validity of the CID Act were not joined and the issue was not properly ventilated either in the papers or in argument before this court, it would be inappropriate to deal any further with it.

[42] As neither of the respondents appeared, there is no necessity to make any order as to costs.

[43] The appeal is dismissed.

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L E Leach
Judge of Appeal

Appearances:

For the Appellant:	A G Amiradakis Instructed by: Moodie & Robertson, Braamfontein Claude Reid Inc, Bloemfontein
For the Respondent:	None