

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

In the matters between:

Case No.: 2669/2016

In re: The Grassroof, Erf 663, Theescombe, Port Elizabeth

**MICHAEL GODFREY MORETON
CHARLEWOOD N.O.**

First Applicant

CHARLES GODFREY CHARLEWOOD N.O.

Second Applicant

ROBERT BERNARD SPANJAARD N.O.

Third Applicant

and

**THE VALUATION APPEAL BOARD FOR THE
NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY**

First Respondent

**THE CHAIRMAN OF THE VALUATION
APPEAL BOARD, NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

Second Respondent

**THE NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

Third Respondent

**MUNICIPAL MANAGER OF THE NELSON
MANDELA BAY METROPOLITAN
MUNICIPALITY**

Fourth Respondent

AND

Case No.: 2861/2016

In re: Pink Fig, Erf 422, Theescombe, Port Elizabeth

CHRISTOPHER BAILLIE LOVEMORE N.O.

First Applicant

ROBERT BAILLIE LOVEMORE N.O.

Second Applicant

ELLEN LOVEMORE N.O.

Third Applicant

and

**THE VALUATION APPEAL BOARD FOR THE
NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY**

First Respondent

**THE CHAIRMAN OF THE VALUATION
APPEAL BOARD, NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

Second Respondent

**THE NELSON MANDELA BAY
METROPOLITAN MUNICIPALITY**

Third Respondent

**MUNICIPAL MANAGER OF THE NELSON
MANDELA BAY METROPOLITAN
MUNICIPALITY**

Fourth Respondent

JUDGMENT

REVELAS J:

[1] This judgment is in respect of two separate applications wherein the applicants seek to review and set aside two decisions of the first respondent which categorized two respective properties as “*multi-purpose other*” for purposes of levying rates upon the property in terms of the Property Rates Act.¹ The applications are brought in terms of section 6 of the Promotion of Administrative Justice Act² The

¹ The Municipal Property Rates Act, 6 of 2004 or the MPRA.

² Act 3 of 2000 or “*the PAJA*”

applicants also seek to substitute the decisions of the first respondent with ones categorizing both properties in their entirety as for “*agricultural purposes only*”.

[2] In the first application, under case number 2669/16, the applicants are the three trustees of the Charlewood Property Trust, the owner of Erf 663, Theescombe, Port Elizabeth on which there is a restaurant called “*The Grassroof*” (“*the Grassroof property*”). The second application under case number 2861/16, the three applicants are the trustees of the Lovemore Children Primary Trust which the owner of Erf 422, Theescombe, Port Elizabeth, on which there is also a restaurant called “*The Pink Fig*” (“*the Pink Fig property*”).

[3] In both applications, the applicants have brought their review applications in their capacities as trustees of the trusts that own the properties (the Grassroof property and the Pink Fig property) affected by the first respondent’s categorization. Their complaint is the same. In respect of both applications the applicants maintain that the core and most substantial operations conducted on the properties are farming operations. In the case of the Grassroof property its applicants say it is vegetable farming, and the trust supplies various retail stores in Port Elizabeth with a variety of vegetables. The trust

who owns the Pink Fig property say it is utilized extensively for cattle farming which includes the breeding and sustaining of a herd of Boran Stud cattle (75 calves are sold annually to commercial farmers) and the growing of mushrooms that are also sold commercially.

[4] The total extent of the Grassroof property is 155 650 square meters, and the trust says a restaurant, nursery and farm stall takes up 0,26% of the property. The remainder of the property is utilized for the vegetable growing referred to. On the Pink Fig property, an even smaller portion of the property is let out as the restaurant and a playground. In both applications the applicants maintain that not less than 99% of each property is utilized for farming operations.

[5] During 2013, each of the owners of the two properties concerned, received a notice from the third respondent (*the Municipality*), informing them that the categorization of their properties had been changed *“from agricultural to business and commercial”*. The most direct and relevant consequence of the new categorization was that the owners of the properties would be liable to pay much higher rates, approximately ten times more than they were liable to pay under their *“agriculture”* categories. Both owners lodged objections in terms of section 50(1)(c) of the MPRA and requested that

the properties be categorized as “*for agricultural purposes*” on the basis that it was in accordance with the dominant use of the properties in both cases.

[6] In respect of both cases the outcome of the objection was that the categorization in respect of both properties was changed from “*business and commercial*” to “*multi-purpose property: other*”. This change brought the two trusts in question cold comfort in that the increased property rates associated with the first change of categorization remained the same under the latest categorization.

[7] The trusts then lodged appeals against the aforesaid categorization. The first respondent convened in May 2015 to consider the two appeals. In June 2015 the two owners of the properties, i.e. the two trusts, were notified that the first respondent had decided that the categorization in respect of both properties would remain as “*multi-purpose: other*”.

[8] The two applications for review of the decisions were brought on 2 August 2016 and 17 August 2016 respectively, more than 180 days³ after the decisions sought to be reviewed were taken. Consequently

³ The period envisaged in section 7 of the PAJA within which to lodge an application for review of decisions such as those presently considered.

the question of extending the 180-day period in terms of section 9 of PAJA (condonation) also requires determination in both applications. The third and fourth respondents have also filed counter-applications, in addition to their opposition to the applications for review.

[9] The basis of both review applications is that the decisions taken by the first respondent i.e. the categorization of the properties, are contrary to the provisions of section 9(1)(b) of the MPRA and part 6: clause 21 of the (then) applicable Municipal Rates Policy of the Municipality. The latter makes provision for the categorization of a property according to its *dominant use* which in both cases is agriculture. The applicants also seek substitution orders to the aforesaid effect.

[10] The opposition to the two review applications is premised on the proposition that the provisions of Part 6: Clause 21 of the previous 2014/2015 Municipal Rates Policy of the municipality, upon which the respondent rely, are contrary to the provisions of sections 9(1) and 9(2) of the MPRA and accordingly, in their counter-application, the third and fourth respondents seek declaratory orders to the effect that those provisions are null and void.

[11] The third and fourth respondents also oppose the granting of the extension sought by the applicants in terms of section 9 of the PAJA on account of what they allege is an unexplained, inordinate delay (more than year after the impugned decisions were taken and more than double the 180 period prescribed in the PAJA) and the lack of merit in the application.

Extension in terms of section 9 of the PAJA

[12] Section 9 of the PAJA empowers the courts to condone an applicant's non-compliance with the provisions of section 7(1) of the PAJA "*where the interests of justice so require*".

[13] The applicants blame the lack of expertise on the part of former attorneys and the consequent necessity for a change in legal teams for the delay. However, the applicants took a further few months to consult with their present attorneys of record, to prepare documents and bring the present applications. The latter delay ought to have been explained and was not.

[14] In the light of my approach to the merits of both applications, and given the dearth of proper reasons for the delay, I do not deem it to be in the interests of justice to grant the extension sought.

The Reviews and Counter-Applications

[15] The relevant part of section 9 of the MPRA which deals with multi purpose properties reads as follows:

“9 Properties used for multiple purposes

(1) A property used for multiple purposes must, for rates purposes, be assigned to a category determined by the municipality for properties used for-

- (a) a purpose corresponding with the permitted use of the property;
- (b) a purpose corresponding with the dominant use of the property; **or**
- (c) multiple purposes in terms of section 8 (2) (r).

(2) A rate levied on a property assigned in terms of subsection (1) (c) to a category of properties used for multiple purposes must be determined by-

- (a) apportioning the market value of the property, in a manner as may be prescribed, to the different purposes for which the property is used; and
- (b) applying the rates applicable to the categories determined by the municipality for properties used for those purposes to the different market value apportionments.”⁴ (emphasis added)

[16] Part 6, clause 21 of the municipality’s 2014/15 Property Rates Policy reads:

“PART 6: CRITERIA FOR RATING MULTIPLE PURPOSE PROPERTY

[21] The NMBM will categorize and rate properties used for multiple purposes in terms of section 9(1)(b) of the MPRA, i.e. such properties will be assigned to a category corresponding to the dominant use of the property as determined by the municipality” (emphasis added)

⁴ Sections 8 and 9(c) of the Property Rates Act have been substituted by sections 6 and 7 of the Local Government Property Rates Amendment Act 29 of 2014.

[17] The applicant relies on the aforesaid provisions in support of their argument that the properties have to be assigned to *agriculture*. Clause 21 was however, amended, and in its present form, in the new 2016/2017 Property Rates Policy, it reads:

“PART 6: CRITERIA FOR CATEGORISING AND RATING ‘PROPERTY USED FOR MULTIPLE PURPOSES’

[21] With regards to the categorizing and rating of ‘property used for multiple purposes’ the NMBMM will:

- (i) categorize such properties in terms of section 9(1)(c) of the MPRA, i.e. “as multiple purposes in terms of section 8(2)(r)”⁵; and
- (ii) determine a rate in terms of section 9(2) of the MPRA, i.e. “(a) apportioning the market value of the property, in a manner as may be prescribed, to the different purposes for which the property is used; and (b) applying the rates applicable to the categories determined by the municipality for properties used for those purposes to the different market value apportionments.””

[18] In terms of section 2(3) of the MPRA, a municipality must exercise its power to levy a rate on property subject to section 229 of the Constitution of the Republic of South Africa, the provisions of

⁵“*properties used for multiple purposes, subject to section 9*”

the MPRA, and the rates policy it must adopt in terms of section 3 of the MPRA.

Section 3 of the MPRA requires a municipality to adopt a rates policy determining the criteria to be applied by the municipality if it levies different rates for different categories of properties,⁶ and it must determine how the municipality's powers in terms of MPRA section 9(1) must be exercised in relation to properties used for multiple purposes.⁷ The amendment to the policy in the 2016/2017 has the effect of bringing the policy in line with section 9. The previous policy only makes provision for the categorisation of a property according to its dominant use, whereas the later policy echoes the multi purpose categorization as set out in section 9(1)(a).

[19] A municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property⁸. The following different categories are set out in section 8(1) of the MPRA (and echoed in Part 5: clause 17 of the Municipality's 2014/2015 Property Rates Policy):

"8 Differential rates

⁶ MPRA section 3(3)(b)(i) & 3(3)(c)(i)

⁷ MPRA section 3(3)(d)

⁸ MPRA section 8(1)

- (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.
- (2) Categories of rateable property that may be determined in terms of subsection (1) include the following:
 - (a) Residential properties;
 - (b) industrial properties;
 - (c) business and commercial properties;
 - (d) farm properties used for–
 - (i) agricultural purposes;
 - (ii) other business and commercial purposes;
 - (iii) residential purposes; or
 - (iv) purposes other than those specified in subparagraphs (i) to (iii);
 - (e) farm properties not used for any purpose;
 - (f) smallholdings used for–
 - (i) agricultural purposes;
 - (ii) residential purposes;
 - (iii) industrial purposes;
 - (iv) business and commercial purposes; or
 - (v) purposes other than those specified in subparagraphs (i) to (iv);
 - (g) state-owned properties;
 - (h) municipal properties;
 - (i) public service infrastructure;
 - (j) privately owned towns serviced by the owner;
 - (k) formal and informal settlements;
 - (l) communal land as defined in section 1 of the Communal Land Rights Act, 2004;
 - (m) state trust land;
 - (n) properties–

- (i) acquired through the Provision of Land and Assistance Act, 1993 (Act 126 of 1993), or the Restitution of Land Rights Act, 1994 (Act 22 of 1994); or
- (ii) which is subject to the Communal Property Associations Act, 1996 (Act 28 of 1996);
- (o) protected areas;
- (p) properties on which national monuments are proclaimed;
- (q) properties owned by public benefits organisations and used for any specific public benefit activities listed in Part 1 of the Ninth Schedule to the Income Tax Act; or
- (r) properties used for multiple purposes, subject to section 9.”⁹**

[20] The applicants submit that the clear meaning of section 9(1)(b) of the MPRA, especially if consideration is given to a municipality’s autonomy in electing which rates categories to create, is that the municipality may elect to utilize one of the options stated in section 9(1), in determining how to categorize a property which has more than one use.

[21] The applicants’ main argument is however that, if a property is used for multiple purposes, it must thus be assigned a category corresponding to the *dominant use* of the property, which in their case is agriculture.

⁹ This reference is referred in the amended policy

[22] Section 3 (1) of the MPRA prescribes that a municipality “must adopt a policy which is consistent with [the MPRA] on the levying of rates”.

[23] The provision in the rates policy relied on by the applicants is clearly in conflict with sections 9 (1) and 9 (2) of the MPRA, because it only envisages one method of categorization being the dominant use of a particular property at the exclusion of methods such as “permissible use” specifically provided for in section 9 (1) and 9 (2). The earlier policy is also in conflict with rationale of part 5 of the policy, which echoes section 8 of the MPRA cited above, and which categorizes property rates according to their actual use.

[24] Since this contradiction may affect other categorizations, I believe that it would be in the public interest to grant the declaratory relief sought by the third and fourth respondents in their counter application.

[25] Also, a municipality “is bound to follow the prescripts of section 9 (2) in cases of multiple use” even where its rates policy is based on a different categorization method. ¹⁰In other words, section 9 of MPRA takes preference over rates policies. In the present case the policy

¹⁰ *City of Johannesburg v Chairman, Valuation Appeal Board and Another 2014(4) SA 10 (SCA)*, para [33]

relied upon by the applicants does away with “multi-purpose” categorization.

[26] The applicant has not demonstrated that they rely on any of the grounds for a successful review envisaged in the PAJA. They simply challenge the outcome of the appeal decisions because they seek a categorization that attracts lesser rates. There is also no basis upon which it can be found that the decisions sought to be reviewed are incorrect, if one applies legal principles. As shown above, the two decisions are correct as far as the applicable laws are concerned.

[27] The construction the applicants seek to place on section 9 of the MPRA is that section (9)(1)(b) thereof is prescriptive. It is not. It provides more than one method to categorise a property according to its use.

[28] The fact that the non-farming activities or operations on the properties, (the farm stall, nursery, restaurant on the Grassroof property and the restaurant and playground on the Pink Fig property) are conducted from small areas, less than one percent of the actual farms, cannot mean that the income generated from these areas are necessarily as negligible as their two physical footprints in relation to the income derived from the remainder of the farms in question.

These aspects were never pertinently investigated in accounting terms during the appeals. Both businesses do generate income, however. Since the businesses commenced in on the farms, the farms were no longer run as purely agricultural entities, but as properties from where more than one income generating business are run.

[29] In terms of sections 9 (1) and 9 (2) of the MPRA the two properties simply ought to be categorized as multi-purpose properties because according to their actual and permitted use that is what they are. They are no longer purely agricultural use properties for purposes of according them a rates character.

[30] For the considerations set out above I conclude that both applications for review fall to be dismissed and that the declaratory relief sought by the respondents ought to be granted.

Costs

In so far as the review applications are concerned, costs must follow the result. In respect of the counter applications I am of the view that the municipality is responsible for the confusion arising from its own 2014/2015 rates policy. It sought the declaratory order in this regard to avert future litigation. The applicants should not be out be mulcted

in costs for this reason. Accordingly I decline to award a costs order in its favour of the respondents in this regard.

Order

1. The application for review under case number: 2669/2016 is dismissed with costs.
2. The application for review under case number: 2861/2016 is also dismissed with costs.
3. The phrase *“i.e such properties will be assigned to a category corresponding to the dominant use of the property as determined by the municipality”* in Part 6, Clause 21 of the third respondent’s Municipal Rates Policy for 2014/15 is declared to be inconsistent with section of the Local Government Municipal Property Rates Act, no. 6 of 2004.

E REVELAS
Judge of the High Court

Appearances:

Case No.: 2669/2016

For the applicants: Adv Moorhouse, instructed by : RJM Attorneys,
145 Main Road, Walmer, Port Elizabeth

For the respondents: Adv Euijen SC, instructed by: Goldberg & De
Villiers, 13 Bird Street, Central, Port Elizabeth

Case No.: 2861/2016

For the applicants: Adv Moorhouse, instructed by: RJM Attorneys,
145 Main Road, Walmer, Port Elizabeth

For the respondents: Adv Euijen SC, instructed by: Gray Moodliar
Attorneys, 19 Raleigh Street, Central, Port Elizabeth

Date heard: 30 March 2017

Date delivered: 12 December 2017