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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D6834/2019

In the matter between:

ELIAS PARTNERS AND SONS (PTY) LTD	**FIRST APPLICANT**
AMAKHAZA MOIA (PTY) LTD	**SECOND APPLICANT**
and	
ETHEKWINI MUNICIPALITY	**RESPONDENT**

ORDER

The applicants' application is dismissed with costs.

JUDGMENT

Date Delivered:26 March 2021

Masipa J:

Background

[1] This matter came before court as an urgent application on 22 August 2019 when it was adjourned to 17 September 2019. On 17 September 2019, it was adjourned to afford the respondent an opportunity to file its answering affidavit. It was subsequently allocated a preferential date to be argued on the opposed roll. The purpose of the application is to prevent the respondent from terminating the electricity supply to the first applicant's property.

[2] The relief sought by the applicants is the following:

'1. That the forms and service provided for in the Uniform Rules of Court be dispensed with and that the matter be dealt with urgently as contemplated in Rule 6(12).

2. Calling on the respondent to show cause on ____________ 2019 at 09h30 or so soon thereafter as the matter may be heard, why the following order should not be made pending the final outcome of proceedings to be instituted by the first applicant to challenge a decision by the respondent to levy rates in respect of the first applicant's immovable property situated at portions 120 and 121 of ERF 39 of Durban North ("the property") on the basis of a rates category named by the respondent as "unauthorised or illegal development/use":

2.1 the respondent is interdicted and restrained from terminating the electricity supply to the property;

2.2 in the event that the respondent has terminated the electricity supply to the property, it is ordered to immediately restore such supply;

2.3 the respondent shall pay the costs of this application, if the application is opposed, alternatively, that the costs of this application be reserved for decision in the proceedings referred to above, if this application is not opposed;

2.4 further or other relief.

3. That paragraphs 2.1 and 2.2 operate as an interim order with immediate effect.'

[3] This matter was thereafter adjourned two further times until 5 December 2019. Accordingly, the respondent contends that the need for interim relief has fallen away and the court should determine whether a case has been made out for final relief, I agree with the respondent in this regard.

Parties

[4] The first applicant, Elias Partners and Sons (Pty) Ltd, a company, owns the immovable property described as portions 120 and 121 of Erf 39 Durban North situated at 20 Kenneth Kaunda Drive, Durban North ('the property'). The second applicant, Amakhaza Moia (Pty) Ltd, is a company that provides heating, ventilation and air conditioning services ('the services') from the property as a tenant. Both these companies are established in accordance with the company laws of South Africa. The first applicant derives an income from the business of the second applicant.

[5] The respondent is the Ethekwini Municipality, a local municipality established in terms of the municipal laws with its place of business at 18th floor, Embassy Building, 199 Anton Lembede Street, Durban.

[6] The services provided by the second applicant are provided remotely through a building management system. These services are rendered to the respondent at its premises at City Hall, the library and theatre. These services are also provided to the biological research laboratory at the University of KwaZulu-Natal, which manufactures serum for Malaria, and the Nelson Mandela School of Medicine. The second applicant's business cannot properly function without electricity.

[7] According to the first applicant, the property is located in a mixed-use neighbourhood. It was zoned in terms of the respondent's town-planning scheme as a transitional office, which allowed the applicants to carry on business. Initially, the respondent did not raise property zoning as an issue giving rise to the threat of termination of electricity. This only became apparent later.

Facts

[8] The chronology of this matter, as set out by the respondent, dates back to 22 August 2016, when Mr Rodney Chain ('Mr Chain'), a building inspector of the respondent inspected the property and issued a notice in terms of s 49 of the Local Government: Municipal Property Rates Act 6 of 2004 ('the MPRA') on 23 August 2016. Following from this and up until January 2019, numerous property inspections were conducted by the building inspectorate in terms of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act') and the MPRA. The building inspectorate issued notices regarding unauthorised alterations to the main building and outbuilding on the property and in respect of a container stored on the property without approval. The first applicant failed to take steps to correct this, which resulted in numerous summonses being issued by the Durban Metro Police between August 2016 and January 2019. As a result of the first applicant failing to heed the summonses, warrants of arrest were authorised.

[9] On 28 July 2017, the property was rezoned to permit a transitional office. It seemed that prior to that rezoning, the second applicant was conducting business at the property with the knowledge and permission of the first

applicant. This was unlawful and demonstrated the applicants' disregard for the law.

[10] During October 2018, the first applicant received a warrant to appear in the Durban Magistrates' Court. The warrant was for allegedly contravening s 4(1) and s 4(4) of the Act by wrongfully and unlawfully erecting a building or causing it to be erected on its premises without prior approval by the respondent. When appearing at the magistrates' court, Mr Elias V Mechanicos ('Mr Mechanicos'), a director of the first applicant, was told that the matter would not be proceeded with. Subsequent to the 2018 court appearance, the first applicant heard nothing more about the charge.

[11] During February 2019, Mr Robert John McKenzie ('Mr McKenzie'), a building inspector of the respondent, completed a document headed 'Request for change of rating category in respect of unauthorised building works/compliance'. The request was co-signed by Mr Mkhize, the principal inspector, on 6 February 2019 and by, Mr Daniel Fente, the manager building inspectorate. It was submitted to the Joint Enforcement Action Team ('the JEAT'). The team considers requests for changes of rating based on unauthorised or illegal use of buildings and submits recommendations to the office of the municipal valuer.

[12] The JEAT concluded that the first applicant's use of the property was illegal as contemplated in clause 11 of the respondent's rates policy. A recommendation was made to the Deputy Head: Development Planning, Environment and Management Unit, Mr Sbu Ndebele, and the Head: Development Planning, Environment and Management Unit, Ms Lihle Phewa, who signed the recommendation on 15 February 2019. On 26 February 2019, Ms Ivy Modisani sent a bundle of documents on behalf of the JEAT to the office of the municipal valuer. The documents were considered and the change of category for the property to illegal use was implemented.

[13] On 4 March 2019, further statements were submitted to the Durban Metro Police and criminal summonses were issued but not served. On 23 May 2019, the respondent sent the first applicant a notice in terms of s 49 of the MPRA. The first applicant allegedly received this notice during June 2019. As

shall appear later in the judgment, this is disputed by the first applicant. The purpose of the notice was to advise the first applicant of the property valuation pursuant to a supplementary valuation conducted under the MPRA which would have resulted in the increased rate charges.

[14] Section 49 of the MPRA provides as follows:

'(1) The valuer of a municipality must submit the certified valuation roll to the municipal manager, and the municipal manager must within 21 days of receipt of the roll –

(a) publish in the prescribed form in the *Provincial Gazette*, and once a week for two consecutive weeks advertise in the media, a notice-

(i) stating that the roll is open for public inspection for a period stated in the notice, which may not be less than 30 days from the date of publication of the last notice; and

(ii) inviting every person who wishes to lodge an objection in respect of any matter in, or omitted from, the roll to do so in the prescribed manner within the stated period;

(b) disseminate the substance of the notice referred to in paragraph *(a)* to the local community in terms of Chapter 4 of the Municipal Systems Act; and

(c) serve, by ordinary mail or, if appropriate, in accordance with section 115 of the Municipal Systems Act, on every owner of property listed in the valuation roll a copy of the notice referred to in paragraph *(a)* together with an extract of the valuation roll pertaining to that owner's property.

(2) If the municipality has an official website or another website available to it, the notice and the valuation roll must also be published on that website.'

[15] The valuation received by the first applicant reflected an acceptable market value for the property. Consequently, the first applicant did not object to the valuation. It is unclear as to why the issue of the changed rates were not attended to. According to Mr Mechanicos, he did not pay further attention to the remainder of the valuation document. He accordingly did not notice that the first applicant's rates had increased from R3 000 a month to an amount in excess of R30 000. In contradiction, he states that since the excessive charges made no sense, the first applicant assumed that the charges were a mistake. Accordingly, he continued to pay the old amount with the result that the account was in arrears.

[16] During 26 June 2019, and upon the first applicant receiving notice that its account was in arrears, Mr Mtshali, its accountant, attended at the office of the respondent to seek clarity on the exorbitant amounts. He was referred to a complaint about the placement of a shipping container on the property, which was allegedly previously brought to the first applicant's attention through a notice dated 12 February 2018. The head of the respondent's Development Planning, Environment and Management Department referred Mtshali to a notice dated 30 October 2017 as the reason for the rates change. According to the first applicant, the notice was not served on it. In any event, the notice did not refer to the container or a complaint by the building inspectorate.

[17] The respondent terminated the electricity supply to the first applicant's property on 9 July 2019. Shortly thereafter, Mr Mkhize met with Mr Mechanicos at the property and informed him of the illegal use regarding the container. Subsequently, the container was removed and Mr Sibongile Zulu, a building inspector, requested a change in the rates category on 11 July 2019. It was on this date that the first applicant learnt that this was in respect of outstanding rates relating to some unauthorised use of the property. The first applicant's attorney, Ms Janine Lee ('Ms Lee') of Lee Attorneys, addressed a letter to the respondent indicating that no notice had been received and demanded the re-instatement of the electricity supply. She was advised to complete a dispute form and return it to Mr Peet du Plessis ('Mr du Plessis') of the respondent.

[18] Mr Mtshali completed the form on the same day, forwarded it to Mr du Plessis, and raised a lack of information as the reason for the objection being brief. The electricity supply was reinstated to the property on 13 July 2019. On 15 July 2019, Mr du Plessis provided reasons for the punitive rates as being a transgression of building regulations. He referred to the February 2018 notice and suggested that the first applicant had ignored it, resulting in penalties being levied. He referred the first applicant's attorney to Mr Pentasaib, another employee of the respondent. Mr du Plessis indicated that failure to pay the arrears by/on 19 July 2019 would result in the termination of the electricity supply.

[19] On 15 July 2019, Mr Mtshali wrote to Mr Pentasaib requesting a meeting. Mr Pentasaib declined the request and advised the first applicant to follow the internal process. After the meeting was denied, Ms Lee wrote to Mr Pentasaib to withdraw the intended disconnection. Mr du Plessis replied on 16 July 2019, again raising the first applicant's non-compliance with the building inspector's notice of 30 October 2017. He indicated that the increased rates charges would continue until the building inspectorate gave instructions to the valuer to change the category of the property back to residential.

[20] Ms Lee wrote back and indicated that the June 2019 notice was inadequate since it was written after the imposition of the sanction and made no reference to the container; the October 2017 letter; and did not mention the imposition of punitive rates. She stated that reasons were not provided for the imposition of additional/punitive rates and indicated that the property had been rezoned as a transitional office.

[21] Mr du Plessis responded that the respondent did not have a property zoning category called transitional office for rates purposes. He reiterated the intention to disconnect the electricity supply on 19 July 2019. The first applicant replied that the applicants could not afford to pay the outstanding amount and could not function without electricity. A further request for a meeting was made. In reply, Mr du Plessis indicated that Ms Philile Madonsela ('Ms Madonsela') would meet with Mr Mechanicos.

[22] The meeting was held on 19 July 2019, between Ms Madonsela and Mr Powdel of the respondent and Mr Mechanicos and Ms Lee. Mr Mechanicos and Ms Lee were advised to meet Mr Pentasaib. As a result, the disconnection date was extended by a month. On 22 July 2019, Mr Powdel provided a calculation of the rates assessment, which showed that the respondent applied a punitive rates category.

[23] During July 2019, the first applicant had, upon realising that the container was the cause of the high assessment, removed it. This resulted in the reversal of the property use/category from 11 July 2019. This, however, did not resolve the historical rates charges and intended disconnection.

[24] On 25 July 2019, further correspondence was sent to the first applicant from Mr Ntombela of the respondent, advising that the instruction to change the first applicant's rates category from residential to unauthorised or illegal use was with effect from 12 February 2018, which totalled R321 209.42. The first applicant was advised to contact Mr McKenzie who had made the request for the rates change.

[25] Ms Lee immediately requested a meeting with Mr McKenzie, who replied on 6 August 2019, indicating that he had no authority over the supply of electricity and that the first applicant should direct its request to the relevant department. Ms Lee wrote to various employees of the respondent requesting that she be directed to the relevant person in the legal department. The JEAT approved the change, which was effected on 13 August 2019 by the municipal valuer. On the same day, Mr du Plessis replied to Ms Lee and referred to the difference between the rates and the zoning policies. In an attempt to resolve the issue, Ms Lee wrote back, but was informed that the first applicant's only option was to pay and then challenge the rates in a s 78 query.

[26] On 21 August 2019, the respondent notified the first applicant of its intention to terminate the electricity supply to the property. The first applicant avers that it immediately took all necessary steps to prevent this from happening before approaching this court on an urgent basis. According to the first applicant, if the application were to follow the normal course, the property would be without electricity for months. To prevent the termination of electricity, the respondent informed the first applicant that it could pay the disputed rates, in excess of R300 000, under protest (paying but reserving the right to challenge the said amount) or make payment arrangements. According to the first applicant, it could not afford to pay.

[27] The applicants aver that the intended termination of electricity has the potential of damaging the second applicant's system. In an earlier and unrelated termination, it was proven that operating the system by means of a generator was highly expensive and created nuisance for neighbours. In addition, it was stated that the second applicant directly employs 16 employees who depend on its survival. Accordingly, the first applicant seeks interim relief

interdicting the respondent from terminating the electricity supply pending the outcome of proceedings to be instituted to challenge the rates said to be due.

Submissions and Analysis

[28] The first applicant contends that the respondent appears to have overlooked the distinction between its constitutional mandate to recover taxes and its obligations to enforce building regulations.

[29] According to the applicants, in respect of the mandate to recover taxes, the respondent's powers are as set out in the Constitution of the Republic of South Africa, 1996 and the MPRA, together with its rates policy. In terms of s 8 of the MPRA, there are differential rates:

'(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 properties of rateable property, determined in subsections (2) and (3), which must be determined according to the-

(a) use of the property;

(b) permitted use of the property; or

(c) a combination of *(a)* and *(b)*.

(2) A municipality must determine the following categories of rateable property in terms of subsection (1): Provided such property category exists within the municipal jurisdiction:

(a) Residential properties;

(b) industrial properties;

(c) business and commercial properties;

(d) agricultural properties;

(e) mining properties;

(f) properties owned by an organ of state and used for public service purposes;

(g) public service infrastructure properties;

(h) properties owned by public benefit organisations and used for specific public benefit activities;

(i) properties used for multiple purposes, subject to section 9; or

(j) any other category of property as may be determined by the Minister, with the concurrence of the Minister of Finance, by notice in the *Gazette*.

(3) In addition to the categories of rateable property determined in terms of subsection (2), a municipality may determine additional categories of rateable property, including vacant land: Provided that, with the exception of vacant land, the

determination of such property categories does not circumvent the categories of rateable property that must be determined in terms of subsection (2).

(4) *(a)* Where a municipality can, on good cause, show that there is a need to sub-categorise the property categories listed in subsection (2), a municipality must apply to the Minister in writing for authorisation to create one or more of such sub-categories.'

[30] The respondent identifies various categories of properties in clause 5.6 of its rates policy that are in line with s 8 of the MPRA. The relevant category as alleged by the respondent is clause 5.6(h), which refers to unauthorised or illegal development or use, or abandoned property or building. The first applicant contends that the property use is not unauthorised or illegal and it is not abandoned. Further, that the property is being used in accordance with the zoning categories of the respondent's town-planning scheme.

[31] The applicants, that the building regulations and their enforcement is a function of the respondent as the authority charged with the enforcement of such laws, but in that regard, the respondent fulfils an entirely different mandate when it collects taxes based on the use or permitted use of property or a combination of the two.

[32] The applicants also contend that the building regulations cannot be carried out with impunity. The consequences of non-compliance with these regulations include demolition of buildings and prosecution, which is distinct from the tax collection mandate of the respondent. The applicants contend that the respondent's confusion is demonstrated by the fact that the building inspector has dictated how rates should be imposed on the first applicant, which is a matter outside his authority. According to the applicants, the manner in which the respondent has handled this case ignores the distinctions in its functions.

[33] The applicants contend further that the imposition of punitive rates on it is not sanctioned by the laws empowering the respondent to collect municipal rates and falls to be reviewed and set aside based on the principle that the respondent may not do that which it is not legally empowered to do. They further contend that the respondent's punitive rates in relation to the use of property is based on authority decided prior to the amendments of the MPRA.

Consequently, the very creation of the punitive rates category falls to be set aside as being beyond the respondent's powers.

[34] The applicants aver that s 49 of the MPRA envisages a comprehensible notice to a ratepayer, which enables him to understand the respondent's decision in order to be able to object meaningfully. The applicants aver that the respondent failed to meet the object of this section by giving notice after imposing the punitive rates, and obscured the real reason for the sanction. The sanction arose from the erection of an unauthorised structure on the property and did not fit into the scheme envisaged under s 49 of the MPRA. According to the applicants, the notice did not comply with the MPRA and consequently the imposition of the valuation charge without a proper opportunity to object thereto was unlawful and invalid. As shall appear further on in the judgment, this is not true. The respondent directed the applicant as to the procedure to follow in order to object to the decision.

[35] The first applicant completed the objection form to challenge the unlawful imposition of punitive rates on 11 July 2019. Subsequently, Mr du Plessis claimed that the procedure was wrong. It is not clear as to what more was expected of the first applicant. The first applicant contends that it attempted to comply with the respondent's dispute resolution procedures, which exercise was fruitless.

[36] In respect of the requirements for an interim interdict, the applicants contend that they have demonstrated a prima facie right to challenge the respondent's decision to impose punitive rates. They contend that they have no other means to prevent the harm, and that if they did not approach this court for interim relief they would be without electricity supply for many months and would be unable to perform their obligations. Further, they simply cannot afford to pay the exorbitant rates amounts claimed by the respondent. Accordingly, the very existence of the applicants and their employees are being placed at risk. The harm is therefore irreparable and for the same reason, there will be tremendous inconvenience to the applicants if interim relief is not granted. If the respondent ultimately succeeds, its only inconvenience is the delay in collecting

the rates. The applicants therefore request that an order be granted as sought in the notice of motion.

[37] In opposing the application, the respondent states that the first applicant placed a steel container on its property without any prior approval. It is unknown what the container was used for and the applicants did not disclose this in their founding papers. The respondent contends that in terms of the Act, the word 'building' has a wide definition and includes any structure, whether of a temporary or permanent nature, erected or used for or in connection with the accommodation or convenience of human beings and the manufacture, processing, storage, display or sale of any goods. Once any structure is used for such purpose, it must be regulated.

[38] Several contravention notices have been delivered to the first applicant's property since 2017, and criminal summonses served on and received by Mr Mechanicos, who refused to acknowledge receipt thereof. The first applicant, through its representatives, failed to appear in court in response to the summonses, and warrants of arrests were issued. The building inspectorate's request to change the rates category for the property to unauthorised or illegal development/use as part of the enforcement process under the Act resulted in the issuing of contravention notices. The relevant authorities approved the request. Provisions are made in the rates policy for the re-categorisation of property in accordance with its use. Clause 11.1 of the rates policy states that:

'Where the property being or has been developed or is being used amongst others in contravention with national legislation, the municipality may change its category to unauthorised or illegal use or development.'

[39] The respondent contends that the change in the rates category does not constitute an administrative action. This is because the notices to the first applicant were in terms of s 49 of the MPRA and there was no contradiction between the enforcement procedures, the rates policy and changes to the property rates code. Mr Mechanicos accepted that the use of the container at the property was unlawful and removed it from the property. The property category was then reversed to its previous category.

[40] Regarding the interim relief, the application was served on it at 15h59 on 20 August 2019, for the matter to be heard at 09h30 on 22 August 2019. The respondent also contends that the applicants failed to disclose all the relevant facts in the application, and would have known that in bringing the application as a matter of urgency, the respondent would not have had time to prepare a proper and comprehensive answering affidavit. Consequently, the application had the effect of an ex-parte application. In view of this, the applicants owed an obligation to make full disclosure of all material facts, which they failed to do. The respondent contends that the applicants have a character of disregarding the law and have consistently disregarded contravention notices and summonses to appear in court.

[41] On 4 September 2019, following the first adjournment in this matter, Ms Mtolo of the respondent attended at the Durban Magistrates' Court to establish whether Mr Mechanicos had attended court. This was in an attempt to answer his vague allegation in the founding affidavit regarding his attendance at court. The court records reflect that Mr Mechanicos attended court on 22 October 2018. The respondent's speculation was that this was after Mr Mechanicos received a letter from the Durban Metro Police advising him that warrants for his arrest were issued. This is consistent with Mr Mechanicos' evidence in his founding affidavit.

[42] The respondent contends that Mr Mechanicos repeatedly refused to sign the acknowledgments of criminal summonses, and that he did not disclose that he had not attended court in accordance with the summons. Further, that numerous compliance notices were sent to the property via registered mail and hand delivered to the post box.

[43] The respondent contends that it is inconceivable that the first applicant did not receive these notices, yet none of them are mentioned in the founding affidavit. The respondent also contends that Mr Mechanicos ignored the notices and would have the court accept that the notice appeared to refer to the valuation, which he did not pay attention to. The first applicant's accounts reflected the category of unauthorised/illegal development/use but this did not seem to worry them. The first applicant removed the container when it was

threatened with the disconnection of the electricity supply. This was acknowledgment that the use of the container was unlawful.

[44] As regards the issue of urgency, the respondent disputes that the application is urgent. It contends that the applicants created the urgency through their inordinate delay in launching the application. Ms Lee was made aware that a meeting could only be held to arrange a payment plan and that if they wanted to challenge the valuation, they could approach court.

[45] The respondent raised three different challenges to the applicants' case. Firstly, that the first applicant and Mr Mechanicos knew for some time about the change in the property category or should have known by reasonably reading the documents sent to the property.

[46] The respondent contends that the first applicant had constructive knowledge of the change in the property category:

(a) Having been notified of the change during 2019; through further correspondence and its municipal accounts.

(b) That it is clear from the chronology that the first applicant must have known for years that the respondent contended that the use of the container at the property was illegal, yet it did nothing until July 2019 when it faced the disconnection of electricity.

(c) It should have been clear to the applicants and their attorneys by 15 August 2019 that their only option to prevent the electricity cut was to approach the court, as this was made clear from the email sent on that day.

[47] Furthermore, internal remedies were available to the first applicant, which included lodging an objection with the municipal manager. The first applicant did not explain why it did not exhaust the available internal remedies. The respondent contends that the justification set out by the applicants is unacceptable.

[48] The respondent contends that the change in the property category is not an administrative action and is regulated and enabled by s 78 of the MPRA. The requisite notices to the property owner for the change were sent on 5 March

2019. As regards procedural fairness, the notice of 5 March 2019 provided for an objection in accordance with s 49 of the MPRA, which option the applicants elected not to exercise.

[49] The respondent further contends that the s 49 notice complies with the provisions of the MPRA as interpreted by the courts. In respect of the issue of illegal use of the property, the respondent interprets the applicants' referral to this to suggest that the property does not offend the town-planning provisions and that the property can be used for business purposes and is so used. Further, that in such circumstances, the property use cannot be illegal for purposes of rates imposition.

[50] In response to this, the respondent relies on the provisions of clauses 5.6(h) and 11 of the Ethekwini rates policy. Clause 5.6(h) relates to 'Unauthorised or illegal development or use and abandonment of property or building'. Clause 11 amplifies the context of unauthorised or illegal use by providing that the municipality may change the category of properties being developed or which have been developed or are being used inter alia in contravention of national legislation, to unauthorised or illegal development or use. The respondent contends that the first applicant's property use contravened the Act in respect of the steel container, the unauthorised alteration to certain structures and that it (the respondent) was empowered in terms of s 8 of the MPRA read with clauses 5.6 and 11 of its rates policy category to act as it did.

[51] In reply, the applicants contend that the respondent attempted to create confusion by referring to the transgressions of the building regulations and to notices allegedly given to them by building inspectors in relation to matters, which did not give rise to the re-categorisation of rates for the property. The applicants submit that when the first applicant purchased the property, it had fallen into disrepair and that the renovation of the property irritated some of their neighbours. They claim that the respondent changed its property category because of the container placed on the property, which was placed there long after the respondent issued some of the notices. The container was placed on the property on 21 September 2017, subsequent to the issuing of Mr Chain's

notice dated 23 August 2016. The applicants aver that in any event, the property was re-zoned to allow for a transitional office.

[52] The applicants further contend that the container was used for archives and storing building materials for renovations and not as an office. According to the applicants, the first applicant did not receive the August 2016 notice since the address used was not one belonging to the first applicants. The statement by Mr Mtolo dated 27 October 2016 did not state that the first applicant had committed a transgression. In any event, the alleged transgression had nothing to do with the container. The subsequent summons served on Mr Mechanicos referred to a building being erected without plans. Mr Mechanicos was of the view that no crime had been committed, as no structural work had been done.

[53] The applicants contend that they were not aware that more than one summons had been served. Mr Mechanicos avers that he did not deliberately disregard the summonses, but that he was going through turmoil as one of his companies was liquidated in 2017. As a result, he forgot to diarise the appearance date of 11 May 2018. Those summonses related to an incident, which preceded the placing of the container on the property.

[54] According to Mr Mechanicos, his only appearance at the Magistrates' Court was because members of the South African Police Service, KwaMashu served him with a warrant for his arrest on 21 October 2018 for failing to appear in court on 11 May 2018. He was informed to meet them at the Durban Magistrates' Court the next morning. When he appeared in court, no one knew of the case and he was sent to 'Metro Court' where he was directed to one of the courts. After explaining to the magistrate why he was in court, the prosecutor advised him and his associate that there was a criminal case pending, but that it was unclear what it related to. The prosecutor told Mr Mechanicos to go and resolve the matter with his neighbours.

[55] The applicants deny that inspection was ever carried out by the building inspectors, which led to the notices or that those notices were served. The applicants aver that their post is received through the post office.

[56] According to the applicants, it is apparent from the answering affidavit that the property category change resulting in the change in the rate charges was instituted at the instance of the building inspectorate in conjunction with the JEAT. The applicants contend that it is not the function of the JEAT to change rates or impose punitive rates. Further, that the respondent did not follow s 78 of the MPRA. It was contended by the applicants that the respondent's decision was a *fait accompli* and did not include the valuer since there were no records of any valuation or deliberations by the valuer. In addition, the date for the change of the rates category was determined by the building inspectors as 12 February 2018, which date precedes the date of the 2019 notice. A further fact was that the street delivery at the property is unreliable, consequently, any mail sent by ordinary mail was not received.

[57] Mr Mechanicos contends that he did not understand the notice he received dated 23 May 2019 to refer to anything other than the property value. This was because of his failure to read adequately the notice. The discovery of a complaint on 26 June 2019, led to the first applicant removing the container. According to the applicants, Mr Mechanicos met Mr Mkhize on 9 July 2019 at his office. The applicants contend that the allegation that the rates change was as a result of the unauthorised structure was an afterthought designed to remedy the defects in the respondent's case.

[58] The applicants dispute that the respondent acted within its powers when it imposed the new rates. Accordingly, the decision falls to be reviewed, and set aside on the principles of legality. See *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 58 and s 172(1)*(a)* of the Constitution. In *Fedsure Life*, the court stated the following:

'[58] It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.

[59] There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to "administrative action" the principle of legality is enshrined in s 24*(a)*. In relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution. Therefore, the question whether the various local governments acted *intra vires* in this case remains a constitutional question.'

[59] The respondent refutes the applicants' argument and relies on *City of Tshwane v Marius Blom & GC Germishuizen Inc & another* 2014 (1) SA 341 (SCA) para 19, the court stated as follows:

'. . .The municipality's power to impose taxes is an original power which stems from the Constitution in terms of s 229(1)*(a)*. It is a legislative act. As such, it is not an administrative action subject to administrative law. That being the case, the setting of rates and determination of categories of rateable property under s 8 of the Rates Act cannot be challenged, as counsel for the respondents seemed to suggest in his argument, simply on the ground that it is unfair.' (Footnote omitted).

[60] The respondent argues that the applicants' challenge was based on administrative law, which they sought to change upon realising that the respondent's conduct is legislative in nature and not subject to administrative review. See *Breakers Share Block Limited v Ethekwini Municipality* 2016 JDR 1697 (SCA); *Kungwini Local Municipality v Silver Lakes Home Owners Association & another* 2008 (6) SA 187 (SCA). While I agree with the respondent in this regard, I will venture into considering the matter without accepting that the legality point was properly raised.

[61] The respondent's second challenge is that if use includes unlawful use of a building under the Act, then the building inspectorate is the right entity to establish the facts.

[62] It is common cause that the respondent's powers to impose rates arises from s 229(1)*(a)* of the Constitution, the MPRA and the rates policy. In advancing their argument, the applicants rely on the definition of "permitted use" in the MPRA to limit the respondent's powers in changing the property category, which definition states as follows:

"permitted use", in relation to a property, means the limited purpose for which the property may be used in terms of-

(a) any restrictions imposed by-

(i) a condition of title;

(ii) a provision of a town planning or land use scheme; or

(iii) any legislation applicable to any specific property or properties; or

(b) any alleviation of any such restrictions;'

[63] It is contended further that the determination of different rates is based on use, in accordance with s 8 of the MPRA incorporated into the rates policy. Further, that clause 5.2.1 makes specific reference to the actual use of the property. Clause 5.3 of the rates policy provides for the change of property categorisation as a result of a change of use. The respondent submits that in the rates policy, 'use' is defined as being in relation to the levying of a rate for a rateable property, actual use as contemplated in the MPRA and relates to the activity that takes place on the property. Emphasis was placed on the activity taking place on the property.

[64] According to the applicants, the objects of the MPRA determine how its provisions must be interpreted. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, where Wallis JA set out the approach to interpretation as follows:

'. . .Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[64] At para 26 he stated that:

'In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

This approach was followed in *City of Tshwane.*

[66] The applicants submit that on a proper interpretation, the scheme of the MPRA is to apply different municipal rates for different categories based on actual or permitted use of property. The applicants accordingly argued that the respondent acted outside its powers when it changed the rates category based on a transgression of the building regulations.

[67] It was argued that the applicants' main defence is based on the issue of use. The respondent correctly submits that the applicants seek to restrict the ambit of the word "use" to permitted use under a town-planning scheme. It is argued by the respondent that s 8(1)*(a)* of the MPRA allows for categories based on permitted use and use of property. Accordingly, to read the word as is suggested by the applicants ie to exclude unlawful or illegal use, would amount to rewriting the statute under the guise of construction. See *Starmark Enterprises Ltd v CPL Distribution Ltd* [2002] 4 All ER 264. This would have a similar effect to the rates policy.

[68] It was argued further that the applicants failed to read the respondent's policy as a whole since clause 11 of the policy gives insight to the word "use" as being where a property is used without authority or illegally in contravention with national or provincial legislation, such use justifies application of the illegal use category. It is common cause that the MPRA requires the respondent to levy rates based on its adopted rates policy.

[69] The respondent contends that the issue has already been decided in *City of Tshwane*. It submits that at paras 1, 3, 13 and 22 of the judgment, the court addressed the creation of a category called "non-permitted use" or "illegal use" dealing with residential property which was used as a business. It was argued that there was no reason why non-permitted use would not include the use of an illegal structure for a business. *City of Tshwane* also recognised the non-permitted use category at para 17. Further, that even town-planning schemes exclude unlawful use. The word "use" is extended to include use other than applicable zoning.

[70] The respondent argues that the applicant's interpretation of the word "use" leads to absurdity. This is because it would mean that while a punitive rates category can be imposed where residential property is used to operate a business, where such property was used for illegal purposes, for example, to store illegal objects, punitive costs could not be imposed. The respondent further contends that the second applicant runs a business and used part of the property for illegal storage. Per *City of Johannesburg v Cantina Tequila* (775/2011) [2012] ZASCA 121 (20 September 2012) para 8, a court is entitled to find that an interpretation is absurd if its results are in conflict with the overall purpose of the legislation. A sensible meaning must always be preferred. See *Endumeni* paras 18 and 19; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12. I agree with the respondent's argument in this regard.

[71] Section 8 of the MPRA does not limit the respondent from imposing a penalty on use not specifically provided for since it uses the word "includes" in its provision of use. Accordingly, it is open to the respondent to sanction any use which is not approved, by imposing penalties in the form of punitive costs. Accordingly, the applicants' interpretation of the section leads to absurdity.

[72] The applicants contend that the MPRA envisages the property valuation to determine the applicable rates. In this regard, it is the valuer and not the function of the building inspector who must apply his mind to the property use. It is accordingly submitted that the respondent did not comply with the MPRA. Therefore, the decision of the respondent falls to be set aside. I agree with the respondent that the role of the building inspector is a new issue raised in argument. Accordingly, the applicants failed to make out their case in this regard.

[73] The respondent argues that the container falls within the definition of a building in terms of the Act. The use of this container contravened the Act and the first applicant was given notice of the contravention. In addition, it is common cause that there were unlawful structures and additions on the property. As is apparent from the facts, the issue of unlawful additions on the property was disputed by the applicants. Much weight should however not be

placed on this since it is clear that the cause of the change in the rates and the resultant threat to disconnect the electricity was the container. I say so because subsequent to the removal of the container, the rates change was reversed.

[74] The respondent submits that the request for the rates change was made by the building inspectorate staff, which followed the decision making structure and was approved. It is argued that it was the valuer who caused the change. It is contended by the respondent that there was no suggestion that the valuer acted improperly and therefore that the complaint was based on form and is factually and legally anaemic. What is apparent is that the proposal for the rate change was made by the JEAT and recommended to the Valuer. The rate changed was actioned by the valuer.

[75] As regards the review, the applicants' case, whether it was an administrative or legality review, was not adequately advanced in the founding affidavit and sought to be covered in reply. It is trite that a case should not be made in reply and that a litigant must make out its case in its founding papers. See *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd & others* 1974 (4) SA 362 (T) at 369A-C.

[76] The third challenge is that respondent contends that the applicants approached the court with unclean hands, and accordingly should not be rewarded with interim relief. The respondent submits that it is contrary to public policy to render assistance to those who defy the law. See *Afrisure CC & another v Watson NO & another* 2009 (2) SA 127 (SCA) paras 39-40; *Afriforum & another v Chairperson of the Council of the University of Pretoria & others* [2017] 1 All SA 832 (GP) para 60. This was because the first applicant ignored letters/notices from the respondent, failed to remedy the unlawfulness arising from the illegal structure and failed to attend court when summoned to do so on several occasions.

[77] The respondent submits further that the applicants have not denied the criminal conduct by the first applicant. In *Black Uhlans Inc v New South Wales Crime Commission* & Ors [2002] NSWSC 1060 the court held that a plaintiff with unclean hands is not entitled to relief unless this is remedied before the relief sought is determined. It is common cause that the first applicant removed

the container and that the rates charges were changed back before it could approach court for the relief sought. Lastly, the respondent submits that the applicants in their relief seek an equitable intervention of the court in the form of an interdict but that they have not surpassed the equitable hurdle of clean hands. See *Municipality of Kwekwe v Imprecon (Pvt) Ltd* 1984 (1) SA 38 (ZS). The respondent asked that the application be dismissed with costs. I agree with the respondent. The applicants failed to place relevant facts which showed its tardiness in dealing with the matter which resulted in these proceedings which could have been avoided.

[78] After considering the matter, I am of the view that the applicants have failed to prove their case for the relief sought and find that the case falls to be dismissed. I see no reason why the costs should not follow the results.

Order

[79] The applicants' application is dismissed with costs.

M.B.S. [signature]

Masipa J

APPEARANCE DETAILS:

For the Applicants:	A V Voormolen
Instructed by:	Lee Attorneys
For the Respondent:	A Boulle
Instructed by:	Luthuli Sithole Attorneys

Matter heard on:	5 December 2019
Judgment delivered on:	26 Mach 2021