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

Case No: 1046/2021P

In the matter between:

CAPITAL CITY HOUSING NPC **FIRST APPLICANT**

PETER STRYDOM N.O **SECOND APPLICANT**

and

MSUNDUZI MUNICIPALITY **FIRST RESPONDENT**

THE SOUTH AFRICAN LOCAL GOVERNMENT
ASSORCIATION **SECOND RESPONDENT**

THE MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS **THIRD RESPONDENT**

THE MEC FOR COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS, KWAZULU –NATAL **FOURTH RESPONDENT**

THE MINISTER OF FINANCE **FITH RESPONDENT**

THE MINISTER OF HUMAN SETTLEMENT **SIXTH RESPONDENT**

THE MEC FOR HUMAN SETTLEMENT,

KWAZULU-NATAL **SEVENTH RESPONDENT**

ORDER

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1. The first respondent is ordered to determine in terms of section 8 (3) of Local Government Municipal Property Rates Act no.6 of 2004 that the following properties owned by the first applicant are an additional category of rateable property of 'social housing properties;

(a) a property known as Acacia Park at 1[...] O[...] Road (Portion 10 of Erf 8[...] Pietermaritzburg which consist of 311 residential units.

(b) a property known as Aloe Ridge at 2[...] W[...] Road (Portion 2[...] of Erf 1[...], Pietermaritzburg) which consist of 952 residential units

(c) a property known as Signal Hill at 4[...] N[...] Road (Sub-portion 8[...] of portion 4[...] of Erf 3[...], Pietermaritzburg) which consists of 393 residential units.

2. The first respondent is ordered to comply with parag1 above within thirty (30) days from the date of this order.

3. The first respondent is ordered to amend its Rates Policy to incorporate the determination and the consequences thereof made in terms of paragraph 1 of this order within sixty (60) days from the date of this order.

4. The first respondent is ordered to levy rates on the first applicant's abovementioned properties in terms of this order as from the time it started to levy rates on the said properties.

5. The first respondent is ordered to pay the costs of the application including costs of two counsel where so employed.

JUDGMENT

Delivered on:

Mngadi J

[1] The applicant seeks an order declaring a provision in first respondent's Rates Policy and the definition of 'specified public benefit activity' in s1 of the Local Government: Municipal Property Rates Act No 6 of 2004 (Rates Act) inconsistent with the Constitution. The applicant by the relief seeks to obtain rebates on rates comparable to that of public benefit organisations (PBOs). The first, third, and fourth respondents oppose the application.

[2] The first applicant is Capital City Housing NPC a non-profit company as defined in the Companies Act No.71 of 2008 (Companies Act) in business rescue. The second applicant is Pieter Hendrick Strydom an adult insolvency practitioner appointed for the first applicant in terms of chapter 6 of the Companies Act as first applicant's business rescue practitioner.

[3] The first respondent is Msunduzi Municipality a municipality established in terms of s12 of the Local Government: Municipal Structures Act 117 of 1998 (Municipal Structures Act). The second respondent is the South African Local Government Association established and recognised in terms of the Organised Local Government Act No 52 of 1997. The third respondent is the Minister of Co-Operative Governance and Traditional Affairs a minister of state in the government of the Republic of South Africa. The fourth respondent is the Member of the Executive Council representing Co-Operative Governance and Traditional Affairs in the Province of KwaZulu – Natal.

The fifth respondent is the Minister of Finance a minister of a state department in the National Government. The sixth respondent is the Minister of Hauman Settlement a Minister of a state department in the National Government. The seventh respondent is the MEC for Human Settlement a Member of the Executive Council in the Provincial Government in the Province of KwaZulu-Natal.

[4] The first applicant is a duly accredited social housing institution functioning as a social housing institution as defined in the Social Housing Act No. 16 of 2008 (Housing Act). It has acquired and developed three properties within the municipality

district of the first respondent. The first property consists of 311 residential units, the second property consists of 952 residential units and the third property consists of 393 residential units. The first applicant owns and manages the three properties for the purposes of providing 'social housing' as defined in the Housing Act.

[5] The Housing Act seeks to contribute to the realisation of a constitutional right of access to adequate housing. The Constitution proscribes the three spheres of government to promote the establishment, development and maintenance of socially and economically viable communities and for the provision of safe and healthy living conditions. The Housing Act defines social housing to mean 'a rental or co-operative housing option for low to medium income households at a level of a scale and built form which requires institutionalised management, and which is provided by social housing institutions or other delivery agents in approved projects in designated restructuring zones with the benefit of public funding. Section 2 of the Housing Act provides:

'(1) In giving priority to the needs of low- and medium-income households in respect of social housing development the National, provincial and Local spheres of government and social housing institutions must-

(a) ensure their respective housing programmes are responsive to local housing demands, and special priority must be given to the needs of women, children, child-headed households, persons with disabilities and the elderly;

(b) support the economic development of low to medium income communities by providing housing close to jobs, markets and transport aid by stimulating job opportunities to emerging entrepreneurs in the housing service and construction industries;

(c) afford residents the necessary dignity and privacy by providing residents with clean, healthy and safe environment;

(d) not discriminate against residents on any of the grounds set out in section 9 of the Constitution, including individuals affected by HIV and AIDS;

(e) consult with interested individuals in all phases of social housing development;

(f) ensure the sustainable and viable growth of affordable social housing as an objective of housing policy;

(g) facilitate the involvement of residents and key stakeholders through consultation, information sharing, education, training and skills transfer, thereby empowering residents;

(h) ensure secure tenure for residents in social housing institutions on the basis of the general provision governing the relationship between tenants and landlords as set out in the Rental Housing Act, 1999 (Act No 50 of 1999), and between primary housing co-operatives and its members as set out in the Co-operatives Act,2005 (Act No 14 of 2005)

(i)…

[6] Section 14 of the Housing Act as functions of social housing institutions, provides:

(1) Social housing institutions must:-

(a) comply on an ongoing basis with the criteria which qualify for them for accreditation;

(b) acquire, develop, manage, or both develop and manage, approved projects primarily for low income residents with joint support of local authorities;

(c) promote the creation of quality living environments for low income residents;

(d) re-invest operational surpluses generated as a result of funding provided in terms of the social housing programme, in further approved projects;

(e) consult with municipalities with a view to developing social housing stock;

(f) enter into and comply with annual performance agreements with municipalities on approved projects in their areas of jurisdiction;

(g) inform residents on consumer rights and obligations in respect of social housing;

(h) observe and operate within government policy on social housing

(i) …

[7] The applicants contend that one way of promoting the objectives of the Constitution and the Housing Act is to provide affordable quality housing to as many people as possible is affording providing social housing institutions some relief in respect of rates and taxes. That enables social housing institutions to acquire and maintain reasonable stock of accommodation and to keep rentals at affordable levels.

[8] The first applicant states that its working capital consists of immovable property. The rates bill is its greatest expense. The expenses schedule attached shows that rates by far is a major monthly expense. The first applicant's only source of income is the rental from its tenants. The issue of rates is critical for the existence of the first applicant. The first applicant is a non-profit company and any savings from reduced costs accrue for the benefit of its social housing enterprise.

[9] The applicants state that to obtain tax relief, including rates relief, social housing institutions are required to be approved as Public Benefit Organisations (PBOs) in terms of section 30 of the Income Tax Act No. 58 of 1962 (Income Tax Act).). The first applicant is an approved PBO. The applicants refer to an attached certificate dated 27 January 2003 issued by South African Revenue Service which evidences the approval of Msunduzi Housing Association's exemption. The applicants refer to the provisions of the section 8 read with s15 the Rates Act which provides that properties owned by PBO's and used for specified public benefit activities area placed by the municipality in a category conferring on the owners

thereof preferential rates rebate. The applicants point out that since item 3 of Part 1 of the 9th Schedule 6 of the Income Tax Act in the definition of 'specified public benefit activity' excludes 'land and housing', the first applicant is excluded from the said category. The applicants maintain that the exclusion is arbitrary, unjustified and discriminatory to it, and the first respondent in its Rates Policy to align itself with the Rates Act excludes the first applicant.

[10] The applicants state that following the provisions of s19.3 of the Msunduzi Rates Policy, the first applicant on 30 July 2019 applied to the Chief Financial Officer to have its properties determined as 'public benefit organisation properties. The first respondent refused the application, and it pointed out that the definition excluded the applicants' properties. The first respondent maintains that the first applicant's properties for rates classification are residential properties qualifying for the rates relief in that the first Rr15 000 of the market value of the property excused.

[11] The applicants state that if its properties were classified as public benefit organisation property it would qualify for relief of 75% rates rebate on the value of each property. The municipal values of its three properties are R66.6 million, R178.5 million and R92.8 million respectively. The applicants in addition, indicate that even the first R15 000 of the market value for which rates are not charged is not the market value of each residential unit in a block but refers to a registered cadastral unit. It results in it receiving no relief and being overcharged for rates which is illogical and indicates that it is entitled to a relief.

[12] The applicants submit that the provision referred to of the Msunduzi Rates Policy is unreasonable and irrational. Similarly, contends the applicants, the Rates Act in that respect is unconstitutional in providing that social housing is not a 'specified public benefit activity'.

[13] The first respondent in the answering affidavit claims that the applicants have not alleged and have not provided factual basis which National Economic Policies have been materially and unreasonably prejudiced by the first respondent's Rates Policy. In addition, claims first respondent, there are no factual basis to contend that exclusion of particular PBOs such as social housing institutions from obtaining rates relief offend against first respondent's obligation to take reasonable measures to achieve progressive provision of affordable housing.

[14] The first respondent admits that the first applicant conducts business in the housing sphere in terms of the Housing Act, incorporated with a specific aim of providing affordable rental accommodation to households earning between R2 000 and R15 000 per month. It states that the business of the first applicant and its operations are conducted in conjunction with the Provincial and National Government. Government grants are awarded to the first applicant to assist it with its capital expenditure in the construction of low-cost housing, and the rental the first applicant can charge is regulated by the Social Housing Regulatory Authority. The first respondent points out that the relied sought by the applicants is drastic and it will impact negatively on the revenue of Local Authorities. The first applicant, argues first respondent, is entitled to apply for the amendment of the first respondent's rates

policy in terms of s3 of the Rates Act, and to develop its properties not as block of flats but as individually owned units.

[15] The second respondent has not taken part in those proceedings and fifth, sixth and seventh respondents filed notices to abide by the decision of the court. The third and fourth respondents contend that the applicants have not laid down any factual basis for contending that the first respondent's rate policy and impinged definition of 'specified public benefit activity' materially and unreasonably prejudice national economic policy. In addition, they contend that the applicants have failed to exhaust an internal remedy provided in section 16 of the Rates Act which empowers the Minister to intervene where a municipality has not exercised properly its power to levy rates on property. They contend that the first applicant, as an entity, is not a bearer of rights envisaged in s26 of the constitution because a right to access to adequate housing applies only to natural persons.

[16] The respondents contend that rates are a source of revenue critical for municipalities which receive a small portion of the nationally collected revenue. The relief sought by the applicants, if granted, it is argued, shall result in the reduction of rates to be collected by the municipalities. The third respondent disputes that if the applicant properties were categorised as public benefit organisation properties, they should receive a 75% rebate on the value of each property and states that it is in fact up to 25% of the residential rate.

[17] The fourth respondent in an affidavit deposed to by the Chief Director in charge of the monitoring and support of municipalities' contends that there are other options for rate payers to lobby and motivate for rates rebates and concessions within the current legislation, namely, participation in the annual review of the Rate Policy, applying for concession, in terms of clause 22.5 of the Msunduzi Rates Policies by a developer, converting residential property to sectional title ownership, etc. The fourth respondent states that the exclusion of the first applicant in the Rates Act and the Rates Policy is consistent with the exclusion of the first applicant from the category of favoured institutions in the Ninth Schedule to the Income Tax Act, and therefore, the exclusion is logical and rational. The differentiation, argues fourth respondent, is not unfair as a result, the Rates Policy and the Rates in the claimed respects are not unconstitutional.

[18] The applicants in reply state that the opposing papers raised grounds which are technical and superficial. No justifiable reason is given why the impugned legislative provisions oppressive to the applicants were necessary and in line with constitutional provisions. The retrospective effect of the relief from the year 2000 is not over burdensome. The applicants deny that the rates revenue from housing institution is such that if restricted it will have a measure impact in the revenue of Local authority. The applicant is the only social housing institution in the Msunduzi Municipality area.

[19] The first respondent exercises its power to levy rates over a property in accordance with the Section 229 of the Constitution, the provisions of the Rates Act and its Rates Policy. Section 3 of the Rates Act provides that a Local Government

Rates Policy must be consistent with the Rates Act and, *inter alia*, must treat persons equally. Section 7 of the Rates Act obliges municipality to, subject to specified exclusions, levy rates on all rateable properties in its area. Section 8 of the Rates Act empowers a municipality, in terms of the *criteria* set out in the Rates Policy, to levy different rates on different categories of rateable property determined in subsection (2) and (3), which must be determined according to the use of the property, or the permitted use of the property, or as combination of the use and permitted use of the property. Section 8(2) of the Rates Act obliges a municipality to determine specified categories of rateable property in terms of ss (1), provided that such property category exists within the municipality.

[20] The first step is for a category of rateable property to exist within the municipal area. The second step is for the municipality to determine in terms of s 8(2) the said category of rateable property. The next step is for the municipality in its Rates Policy determined *criteria* applicable for determination of rates on the category determined. The municipality in its Rates Policy, acting in terms of section 15 of the Rates Act, may grant companies, reductions and rebates in respect of rates.

[21] The following is common cause. The first applicant's properties are not residential properties in the hands of the first applicant. They constitute its stock. They are properties for use as social housing units. They are used to provide rental accommodation to qualifying persons. It is incorrect to regard them as residential properties. A block with multiple units is one property. The value of the block takes into account the profit generated by the rental income.

[22] The first respondent has placed the first applicant's properties in the category of residential properties and states that the first applicant losses the accumulative benefit solely because it elects to develop its properties as blocks of apartments which accumulatively hold one single title. And that this serves to increase the value of the entire property, however, if the first applicant develops its property as sectional title units or any available mechanism which separates the title of the units then it would derive this benefit per unit. The applicants state that section 5 of the Rates Act does not confer upon the applicant any right to demand an amendment of first respondent's Rates Policy. Further, the first respondent has no intention to modify its Rates Policyy. Furthermore, the provisions of section 5(2) of the Rates Act are limited by 'specified public benefit activity' definition and that as long as the definition of 'specified public benefit activity' remains, no remedy within the existing provisions is available to the applicants.

[23] The applicants in the notice of motion set out the relief they seek as follows:

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1.

It is declared that the following legislative provisions are inconsistent with the Constitution of the Republic of South Africa Act, No. 108 of 1996 (the Constitution)

1.1 section 1.31 of First Respondent's Rates Policy (the Msunduzi Rates Policy)

1.2 the definition of the term 'specified public benefit activity' contained in section 1 of the Local Government : Municipal Property Rates Act No. 2 of 2004 (the Rates Act).

2.

The said provisions are amended as follows:

2.1 In respect of section 1.31 of the Msunduzi Rates Policy:

(a) the words following". Excluding item 3 and 5…" are deleted from the first sentence.

(b) the words "for items 1, 2 and 4 o0f the schedule" are deleted from the second sentence.

2. In respect of the said definition in section 1 of the Rates Act: the words "in item 1(welfare and humanitarian), item 2 (health care) and item 4 (education and development) of" are deleted

The applicants then seek an order that the first respondent be ordered to reconsider the levying of rates on first applicant's properties from the time it levied rates on first applicants properties in accordance with the amendments sought above in the relief.

[24] The first respondent took issue with the vague retrospectivity effect of the relief sought. All the opposing respondents took serious issue with the broad impact of the relief sought, if granted. The respondents argue that the applicants cannot rely on section 26 of the Constitution which provides that everyone has the right to have access to adequate housing since the first applicant is not a natural person. But in my view, the argument loses sight of the fact that social housing institutions are for the realisation of the constitutionally enshrined right to access to housing by natural persons.

[25] The applicants by the relief they seek, seek to effect amendments to the Rates Act resulting in a consequential amendment to the Rates Policy of the first respondent. The amendment sought has the effect of including in a category of entities specifically excluded by the legislation. The court is required to exercise a

legislative power the Constitution reserves for parliament. The amendment sought has government policy implications for the whole country which requires wide consultations before a decision on it is made. It is undesirable for a court to assume for itself such a task. The declaration of a national legislation provision as unconstitutional is to be done if absolutely necessary, and it be done cautiously, judiciously and pragmatically. See *Kause v Minister of Home Affairs & others* 1996 (4) SA 965 (NmS 974D-E/F; *Bernstein v Others v Bester& Others* 1996(2) SA 751 (CC) para 2)

[26] The first respondent points out what it regards as alternative remedies available to the applicants. It refers to a right to request an amendment to the first respondent Rates Policy. However, the first respondent argues that its Rates Policy as it stands is in line with the provisions of the Rates Act. In my view, the first respondent has not pointed out any viable alternative remedy available to the applicants. It is clear that the first respondent is not prepared to consider any remedy that may result in the reduction of its revenue. The first respondent prefers that the first applicant should have developed its properties differently without pointing out anything wrong in the manner the first applicant developed its properties.

[27] The first respondent, as well as the other respondents, fully comprehend the predicament of the applicants. The first respondent in its answering affidavit dealt at length with the legislative framework within which rates are levied. But for some reason it saw no way out for the applicants. The fourth respondent likewise in a detailed affidavit deposed to by its Chief Director in charge of the monitoring and

support of municipalities in respect of their functions and powers in terms of the of Rates Act dealt with the provisions of section 8 which provides for differentiation based on different categories determined according to use says that the avenue open to applicants is to apply for amendment to first respondent's rates policy or to convert its properties to sectional title units.

[28] The court is a court of law and justice. It is not confined to granting the relief as prayed for in the notice of motion. It may grant any relief supported by the averments made in the papers. It must be a relief falling within the confines of the case set out by the applicant. The parties must have been given ample opportunity to address the court on the relief the court considers granting. The granting of the envisaged relief should cause no procedural prejudice to the respondents. See *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 380H-381B for comparable considerations..

[26] The applicants have made a case for a clear distinct category of rateable property. That such category exists within the municipality area. The municipality has not determined the existence of the said category and has failed to provide for it in its Rates Policy. Instead, the municipality forces the applicants' rateable property to a category it does not belong resulting in over burdensome rates levied on the applicants, which is irrational and unlawful. Section 8 of the Rates Act provides:

'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, determined in subsection (2) and (3) which must be determined according to the –

(a) use of the property;

(b) permissible 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) miming 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 specified public benefit activities;

(i) properties used for multiple purposes, subject to section9 ; 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 what must be determined in terms of subsection (2).

[28] It is correct as argued by the applicants that the first respondent's Rats Policy together with the Rates Act excluded social housing property from preferential rates granted to public benefit organisations. The applicants then contend that as a result of the aforesaid exclusion, social housing institutions are excluded from the benefit of specialised categorisation as contemplated in section 8 of the Rates Act. It seems

the applicant, inexplicably in my view, did not consider a relief that the first respondent in terms of section 8 of the Rates Act adds in terms of section 8 (3) an additional categorisation of social housing property.

[29] The applicant regards the exclusion from benefiting as a specialised category as discrimination, but, it is trite that differentiation is not necessarily discrimination. The social housing property is a distinct category created by the national legislation, the Housing Act. It promotes access to adequate housing a constitutional imperative. It is the obligation of all spheres of government to promote all measures directed at the realisation of constitutional rights.

[30] The provisions of s8(3) of the Rates Act grants power to be exercised by the municipality. It does not require that the property owner must apply for the exercise of the power. If the municipality levied rates not in accordance with the law, it is not entitled not to account for the amount for the rates unlawfully levied. The municipality once it has placed the first applicant's property in a proper category and it has amended its Rates Policy to provide the *criteria* for determining rates for the determined category will be in a position from the information in its possession in consultation with the applicants to determine the rates that should have been levied on the applicants' properties and to do the necessary reconciliation.

[31] In the circumstances, the relief sought by the applicant in the notice of motion is not granted. In the place thereof it is ordered as follows:

1. The first respondent is ordered to determine in terms of section 8 (3) of Local Government Municipal Property Rates Act no.6 of 2004 that the following properties owned by the first applicant are an additional category of rateable property of 'social housing properties;

(a) a property known as Acacia Park at 1[...] O[...] Road (Portion 1[…] of Erf 8[...] Pietermaritzburg which consist of 311 residential units.

(b) a property known as Aloe Ridge at 2[...] W[...] Road (Portion 2[...] of Erf 1[...], Pietermaritzburg) which consist of 952 residential units

(c) a property known as Signal Hill at 4[...] N[...] Road (Sub-portion 8[...] of portion 4[...] of Erf 3[...], Pietermaritzburg) which consists of 393 residential units.

2. The first respondent is ordered to comply with parag1 above within thirty (30) days from the date of this order.

3. The first respondent is ordered to amend its Rates Policy to incorporate the determination and the consequences thereof made in terms of paragraph 1 of this order within sixty (60) days from the date of this order.

4. The first respondent is ordered to levy rates on the first applicant's abovementioned properties in terms of this order as from the time it started to levy rates on the said properties.

5. The first respondent is ordered to pay the costs of the application including costs of two counsel where so employed.

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Mngadi J

APPEARANCES

Case Number	:	1046/2021P
Applicants represented by	:	Adv DP Crampton
Instructed by	:	Hay and Scott Attorneys PIETERMARITZBURG
First Respondent represented by	:	Adv. V. Moodley
Instructed by	:	Mathew Francis Inc. PIETERMARITZBURG
Third Respondent represented by	:	TSI Mthembu SC with D Nyembe
Instructed by	:	State Attorney

PIETERMARITZBURG

Fourth Respondent represented by	:	A.J. Dickson SC PKX Attorneys PIETERMARITZBURG
Date of Hearing	:	17 August 2023
Date of Judgment	:	01 September 2023