IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION: DURBAN CASE NO: 6957/2010

In the matter between:

Independent Schools Association of Southern Africa Applicant

and

Ethekwini Municipality First Respondent

The National Minister for Co-operative Governance & Traditional Affairs Second Respondent

The National Minister of Finance Third Respondent

Stellenbosch Municipality Intervening Party

Judgment

Lopes J

[1] The dispute in this matter is whether the first respondent, Ethekwini Municipality, is bound by regulations promulgated by the national government which prescribe that no municipality may levy rates on public benefit organisations at a rate of more than 25 per cent of the rate charged on residential properties. The Independent Schools Association of Southern Africa ('ISASA'), a public benefit organisation, was charged property rates in excess of 25 per cent of the property rate applicable to residential property, and it seeks an order preventing Ethekwini Municipality from levying such rates. Ethekwini Municipality counter-claims for an order declaring the regulations and the enabling legislation to be unconstitutional amongst other relief.

[2] The legal framework:

(a) In terms of s 229 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’), municipalities are authorised to impose rates on immovable property. That power is subject to the provision that a municipality may not impose rates in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour. In addition the power to levy rates may be regulated by national legislation.

(b) Municipal powers are prescribed in the provisions of s 151(3) of the Constitution, and provide that ‘a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation...’ Section 151(4) provides that ‘the national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions’.

(c) Section 154(2) provides that prior to introducing national legislation which affects the powers of local government, a draft of the legislation must be published for public comment in a manner which allows municipalities and others to comment thereon.

(d) The national legislation dealing with the levying of rates is to be found in the Local Government: Municipal Property Rates Act, 2004 (‘the MPRA’), which presently provides in s 19(1):

> ‘(1) A municipality may not levy-
>
> …
>
> (b) a rate on a category of non-residential properties that exceeds a prescribed ratio to the rate on residential properties determined in terms of section 11 (1)(*a*): Provided that different ratios may be set in respect of different categories of non-residential properties.

…

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

The proviso in s 19(1)(*b*) was introduced by the Local Government Laws Amendment Act, 2008.
Sub-section 19(2) was amended in 2014.

[3] <u>The historical background:</u>

(a) On the 19th December 2007, the second respondent, the Minister of Co-operative Governance and Traditional Affairs ('the Minister') published draft regulations in the Government Gazette for comment in terms of s 19(1)(b) of the MPRA ('the 2007 draft regulations').

(b) A rate ratio of 1:0.25 was proposed for the property of public benefit organisations (as defined in s 30 of the Income Tax Act, 1962, read with item 4 in the ninth schedule to that Act). This meant that rates could only be levied at the rate of 25 per cent of the rate levied by any particular municipality on residential property.

(c) Comments were invited, and were received, from nine municipalities, including Ethekwini Municipality, and 34 non-governmental private and civic organisations. Ethekwini Municipality did not, in its submissions, object to the inclusion of public benefit organisations, or the rates applicable to them. On the 11th December 2007 the Minister invited the South African Local Government Association ('SALGA') to comment on the 2007 draft regulations. SALGA did not object to the inclusion of public benefit organisations. The intervening party, Stellenbosch Municipality, participated in the consultation process indirectly, via the SALGA submissions.

(d) SALGA was then invited to participate in visits planned by the Minister to various cities, including Durban.

(e) On the 11th February 2008 the Department of Provincial and Local Government consulted with Ethekwini Municipality in relation to the 2007 draft regulations. Ethekwini Municipality was, by then, generally opposed to regulation by the Minister and the third respondent, the National Minister of Finance, ('the Ministers') and resisted the notion of having its rates restricted.

(f) On the 3rd March 2008 the Minister wrote to SALGA acknowledging its submissions, and inviting SALGA to attend discussions, which did not occur.

(g) On the 27th March 2009 the Minister, together with the concurrence of the third respondent, the Minister of Finance, and acting in terms of s 19(1)(b) of the MPRA promulgated the 2007 draft regulations. The regulations were to be effective from the 1st July 2009.

(h) The 2009 regulations were different from the 2007 draft regulations, in that the reference to the property of public benefit organisations had been omitted.

(i) In September 2009, ISASA brought judicial review proceedings in the North Gauteng High Court to challenge that omission.

(j) The respondents in that application were the Ministers, and SALGA. SALGA did not oppose the application. Apparently following legal advice, the Minister decided not to duplicate the entire consultation process which had followed the publication of the the 2007 draft regulations. A letter was sent to SALGA on the 21st December 2009 in which the basis of the judicial review application was set out. It recorded that the Minister was of the view that his department could not successfully challenge ISASA's review proceedings, and as the public benefit organisations were not significant contributors to rates budgets, and the Minister had decided to include them in the regulations.

(k) The Minister gave SALGA 30 days to comment. Having received no comment, on the 15th January 2010 the Minister addressed a letter to the Minister of Finance seeking his written concurrence. That was considered by Treasury officials and the concurrence was provided.

(l) As at the 15th January 2010, and having received no response from SALGA, an email was sent to SALGA attaching the Minister's letter to the Minister of Finance.

(m) It transpired that on the 19th January SALGA forwarded the letter to the Institute of Municipal Finance Officers ('IMFO'), an organisation with whom the Ministers were not obliged to consult. SALGA requested comments by the 29th January 2010, notwithstanding the lapse of the period provided for by the Minister (ending on the 15th January). The President of the IMFO suggested that the ability to make regulations should be expunged from the MPRA. That reply was sent to SALGA, but never forwarded by SALGA to the Minister.

(n) SALGA only properly objected to the regulations by way of a letter on the 28th April 2010, complaining that as the result of a misunderstanding, the letter had not been posted to the ministry (an unsigned letter had been emailed to the Minister's office during February 2010. It was not accepted, because it was not signed).

(o) On the 15th March 2010 the North Gauteng High Court made an order directing the Ministers to publish regulations in terms of s 19(1)(b) of the MPRA, regulating an upper limit rate ratio of 1:0.25 for properties owned by public benefit organisations. The order provided that the regulations had to be published by no later than the 30th March 2010.

(p) During this process ISASA's attorney had addressed letters to Ethekwini Municipality on the 14th December 2009 and the 14th January 2010, drawing attention to the litigation in the North Gauteng High Court.

(q) Ethekwini Municipality refused to implement the regulations on the basis that public benefit organisations were not one of the defined categories of rate payers in their rates policies. That decision precipitated this application.

[4] The progress of the application:

(a) On the 18th of June 2010, ISASA delivered its application seeking an order that Ethekwini Municipality may not, with effect from the 1st July 2010, levy a rate in respect of the property of members of ISASA, of more than 25 per cent of the rate levied upon residential property. This was because the schools that comprise the members of ISASA are all public benefit organisations as contemplated in terms of s 30 of the Income Tax Act, 1962 read with item 4 of the ninth schedule to that act.

(b) On the 6th August 2010 Ethekwini Municipality delivered a counter-application seeking the following relief:

(i) Part A - the joinder of the Minister and the National Minister of Finance. This was achieved and does not form part of the dispute before me.

(ii) Part B - reviewing and setting aside the decision of the two ministers to amend the regulations. The declaration also seeks declaratory relief that the amended regulations are invalid and do not bind Ethekwini Municipality.

(iii) Part C - a declaration that an inter-governmental dispute as contemplated in s 44 of the Local Government: Municipal Finance Management Act, 2003 exists, and directions were sought to resolve that dispute. This dispute has been resolved inasmuch as Ethekwini Municipality and the ministers agree that the dispute cannot be resolved, and the application must proceed. No relief in this regard is sought.

(iv) Part D – a declaration that s 19(1)(b) of the MPRA is unconstitutional and invalid to the extent that it restricts the powers of a municipality to levy rates at ratios determined by that municipality.

(c) On the 15th November 2010, ISASA delivered a further notice of application addressed to Ethekwini Municipality and the Minsters that it would apply for an order declaring Ethekwini Municipality's rates policy for the 2009/2010 years unconstitutional and invalid insofar as they included the levying of a rate on the property of public benefit organisations which was not in accordance with the amended regulations. A further order was sought directing the municipality to comply with the regulations. The supporting affidavit leading this application was deposed to by one Jane Mary Hofmeyr, who had deposed to the ISASA's founding affidavit in the main application. In her affidavit Ms Hofmeyr sought to include Inanda Seminary as an additional member of ISASA. The affidavit also recorded that at that stage the Ministers opposed their joinder application.

(d) On the 25th February 2011, an interim order was granted by consent by Gyanda J in this court: that pending the outcome of the applications, Ethekwini Municipality could not levy rates in excess of 25 per cent of the rates levied by Ethekwini Municipality on residential property. Gyanda J also granted leave to Ethekwini Municipality to join the Ministers.

(e) On the 30th June 2011, and in terms of Uniform rule 28, ISASA delivered an amended notice of motion seeking again to compel Ethekwini Municipality to levy rates with effect from the 1st July 2010, in accordance with the published regulations, and further sought an order declaring Ethekwini Municipality's rates policies for 2010/11 and 2011/12 years to be unconstitutional and invalid. Further relief was sought in respect of the resolutions for the 2008/9 to 20011/12 rates policies. That amendment was again supported by a further affidavit by Ms Hofmeyr, dated the 24th June 2011, and described as an 'explanatory affidavit'.

(f) On the 11th July 2011 Stellenbosch Municipality brought an application for leave to join in the counter-application by the Ethekwini Municipality.

(g) On the 18th November 2011 Sishi J granted an order joining Stellenbosch Municipality as the second applicant in the Ethekwini Municipality counter-application. On the 18th January 2012 Ms Hofmeyr deposed to the answering affidavit of ISASA. This affidavit was not in opposition to the joinder of Stellenbosch Municipality, but rather in reply to the allegations in Stellenbosch Municipality's founding affidavit for the relief claimed in the counter-application.

(h) On the 7th March 2012 the two ministers served notice of their intention to oppose Ethekwini Municipality's application for joinder.

(i) On the 8th August 2012 Ms Hofmeyr deposed to what is described as a supplementary affidavit on behalf of ISASA.

(j) On the 25th June 2015 Ethekwini Municipality applied to this court for an order condoning the late delivery of its supplementary affidavit in the counter-application. That affidavit was deposed to on the 24th June 2015.

(k) On the 27th October 2015 Mr Lebogang Montjane deposed to ISASA's answering affidavit in Ethekwini Municipality's counter-application.

(l) Further affidavits and amendments, including an application to strike-out certain of ISASA's affidavits were delivered up to 2018.

[5] <u>The arguments:</u>

Mr *Dodson SC*, who appeared together with Mr *Sisilana* for ISASA, submitted that the MPRA was the primary legislation promulgated in terms of the Constitution in order to regulate the levying of rates by municipalities. He drew my attention to the preamble to the MPRA which provides, *inter alia,* as follows:

> 'AND WHEREAS it is essential that municipalities exercise their power to impose rates within a statutory framework that not only enhances certainty, uniformity and simplicity across the nation, but also takes into account historical imbalances and the rates burden on the poor;'

Mr *Dodson* referred to s 2 of the MPRA which provides:

> '**2. Power to levy rates** –
>
> (1) A metropolitan or local municipality may levy a rate on property in its area.
>
> …
>
> (3) A municipality must exercise its power to levy a rate on property subject to –
>
> (a) section 229 and any other applicable provisions of the Constitution;
>
> (b) the provisions of this Act; and
>
> (c) the rates policy it must adopt in terms of section 3.'

[6] Section 3(1) of the MPRA provides that the council of a municipality must adopt a policy consistent with the Act on the levying of rates on rateable property in the municipality. Section 3(3) provides that a rates policy must determine the criteria to be applied by a municipality if it levies different rates for different categories of properties determined in terms of s 8. The word 'category' is defined in s1 of the MPRA and, in relation to property, means 'a category of properties determined in terms of section 8.' Section 3(3) was amended to refer to the categories of properties as determined in s 8, by way of the Local Government: Municipality Property Rates Amendment Act, 2014. Prior to that amendment no reference was made in S 3(3) to s 8.

[7] Section 8 of the MPRA provides for the provision of differential rates, but the introduction to s 8 (1) makes it clear that the section is 'subject to section 19,…' Section 8(1) provides that the different categories of rateable properties may be determined according to, *inter alia,* the use of the property. Section 8(2) provides that municipalities must determine categories of rateable property in terms of subsection (1), and refers to 'business and commercial properties' and 'properties owned by public benefit organisations and used for specified public benefit activities.'

Section 8 was amended by s 6 of the Local Government: Municipal Property Rates Amendment Act of 2014. Prior to that amendment, the word 'must' in s 8(2) read 'may'. In addition the number of categories was more extensive, but referred to both 'business and commercial properties' and 'public benefit organisations'.

[8] Mr *Dodson* criticised the approach of the Ethekwini Municipality which has maintained that it was not obliged to use the category of public benefit organisations. Instead it has categorised independent schools as being 'schools not for gain', and included them among 'business and commercial properties'. Mr *Dodson* advanced the following reasons why Ethekwini Municipality's approach was incorrect:

(a) The provisions of s 8 are subject to the provisions of s 19. Ethekwini Municipality's approach reversed that proviso by making s 19 subject to s 8. The provisions of s 19 and in particular the introduction in subsection 1 thereof that 'a Municipality may not levy …' is peremptory in form and did not allow Ethekwini Municipality the discretion not to follow the categorisations reflected thereafter. He referred to a great number of authorities for the proposition that it is not open to an administrator acting under a statute to determine or alter the meaning to be attributed to that statute. If it does so, it acts beyond its powers. Similarly, subordinate or delegated legislation cannot be used to interpret a statute. He referred in this regard to the dicta of Chaskalson P in *Executive Council, Western Cape Legislature & others v President of the Republic of South Africa & others* 1995 (4) SA 877 (CC), paras 50-65 and *Sebola & another v Standard Bank of South Africa Ltd* & another 2012 (5) SA 142 (CC), para 62.

(b) The municipality referred to categories of owners, instead of categories of property, as it was obliged to do. The MPRA had defined a category of public benefit organisations, into which the members of ISASA fall. To avoid including them in that particular category was to exclude them from the benefit available to that category.

(c) In *the City of Johannesburg Metropolitan Municipality v The Chairman of the valuation Appeal Board for the City of Johannesburg & another* (282/2013) [2014] ZASCA 5 (12 March 2014), the local authority had valued rateable property which was zoned and used for multiple permitted uses, as 'commercial and residential'. The municipality had, in terms of s 8 of the MPRA, catered in its rates policy for the levying of different rates in respect of different categories of rateable property: in clarifying the categories of property, the rates policy determined that where property had multiple purposes, the properties would be rated according to the highest applicable tariff. The business, commercial and industrial uses of multi-purpose property attracted a higher rate than the residential elements, and that higher rate was then applied to the residential properties.

The court emphasized the need for municipalities to enact policies which are consistent with the MPRA. In *City of Johannesburg* it appears that the municipality categorised the property otherwise than in accordance with the categories listed in s 8 of the MPRA. The court emphasized the fact that ss 2 and 3 of the MPRA oblige municipalities to exercise their power to levy rates subject to the provisions of the MPRA, and in terms of policies which are consistent with that Act.

[9] In *Kalil N.O. & others v Mangaung Metropolitan Municipality & others* (210/2014) [2014] ZASCA 90 (4 June 2014) the municipality had, in its rates policy, approved increased rates to be applied to commercial properties in the municipal area. The appellant argued, *inter alia*, that the ratio between the proposed rate for commercial properties and that of the residential properties exceeded the permissible ratio prescribed under s 19(1)(b) of the MPRA. The court held that the actual use of the property was of cardinal importance as a reason advanced for business and commercial properties paying more than other categories of property.

[10] Mr *Dodson* emphasized that it was important to note that there are no shareholders in any of the members of ISASA. In addition they are all schools which are not designed to make a profit. The submission was also made that as the subsequent policies of Ethekwini Municipality included public benefit organisations, they have no option but to accept the regulations as promulgated by the Minister.

[11] Mr *Dodson* emphasised that SALGA was the authorised and recognised representative of local government in South Africa. They chose not to oppose the regulations promulgated in terms of the MPRA. When the litigation in the North Gauteng High Court was proceeding, Ethekwini Municipality was twice informed of the litigation, but did not intervene. In the intervening period, no party has rescinded or appealed the order of that court. It is trite that court orders cannot simply be disobeyed.

[12] Mr *Dodson* submitted that the counter-application by Ethekwini Municipality required this court to think away the order issued by the North Gauteng High Court. With regard to the publication of the order Mr *Dodson* submitted:

(a) The rationality behind the provisions of the MPRA were that public benefit organisations are to be protected from the imposition of excessive rates.

(b) SALGA, as the legal representative of the municipalities, was consulted.

(c) On the 21st December 2009 a letter was sent by the Minister with a time limit within which representations were to be made.

(d) SALGA responded on the 8th April 2010, well after the taking of the consent order, and the publication of the amended regulations.

[13] Mr *Dodson* emphasised the holistic approach to be adopted in an analysis of the fairness of publication. The Minister was entitled to change his mind, and did so.

In *South African Poultry Association v Minister of Agriculture, Forestry and Fisheries & others* [2016] JOL 36802 (GP), para 15 Fabricius J referred to *Minister of Health & another v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), para 630 where Sachs J stated:

> 'The forms of facilitating an appropriate degree of participating in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say'.

Fabricius J also referred to *City of Tshwane Metropolitan Municipality v Afriforum* & another (157/15)[2016] ZACC 19 (21 July 2016) where the following was said in para 67:

> 'Public participation should not be elevated to co-governance or equal sharing of executive and budgetary responsibilities'.
>
> …
>
> Fabricius J concluded that: 'Not every procedural flaw will invalidate the consultation process…. A holistic view of the five-year consultation process leads me to the conclusion that a fair process was followed. It would be an impossible burden to simply repeat the chronology of events herein, and to comment thereon by way of reference to each individual meeting, letter and email. I have considered the process as a whole and deem it to be fair'

[14] In *Electronic Media Network Limited & others v e. tv (Pty) Ltd & others* (CG 140/16, CG141/16, CG145/16) [2017] ZACC 17, para 37 the court stated:

> 'Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy development it must mean that a genuine effort is being made to obtain views of industry or sector roleplayers and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration. People or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible. The standpoints of interested parties, who

> want to have their views taken into account, must thus be allowed to reach a policymaker. But, consultation fulfils a role that is fundamentally different from negotiation'.

[15] Mr *Dodson* referred to the answering affidavit deposed to on behalf of the Ministers in the Ethekwini Municipality counter-application, where they deal extensively with the reasons for the 2010 changes.

[16] With regard to the constitutional challenge to s 19(1)(b) of the MPRA, this challenge is not grounded in the Constitution, and there is nothing to suggest where the legislation has gone wrong. There has been a general compliance regarding the separation of powers between the national government and local government. In addition, it is not for the courts to opine on the appropriateness of policy enacted by the legislature pursuant to the wishes of the executive.

[17] Mr *Dodson* pointed out that the reactive challenge by ISASA to the Ethekwini Municipality's rates policies from 2010 onwards, overlaps with the illegality challenge. The succession of policies are non-compliant with the regulations, and there is no scope for the statutory recognition of a category described as 'commercial and business', when categories of property were required to be referred to by the municipalities.

[18] Mr *Dodson* submitted that even if one interpreted the use of the word 'may' in s 8 (of the pre-2014 statute) as being permissive rather than peremptory, the municipalities were still required to categorise entities according to the use of the property as opposed to categories of persons or owners. This is a clear direction in the MPRA.

[19] Mr *Singh* SC, who appeared for Ethekwini Municipality together with Mr *Gani*, submitted that the following questions need to be answered by this court (I exclude the procedural matters referred to below):

(1) Does s 8 of the MPRA require municipalities to include a category of properties in its rates policies, if legislation requires it?

(2) Can regulations be reviewed when a court order requires such regulations to be promulgated?

(3) Are the regulations which were promulgated in 2010 valid?

(4) Is s 19 (1)(b) of the MPRA unconstitutional and invalid?

[20] Mr *Singh* submitted that the proposed invalidity of s 8 of the MPRA turns on an interpretation of that section together with the other sections of the MPRA. He submitted that two judgments support the relief sought, namely *Kalil* and *City of Tshwane v Marius Blom & GC Germishuizen Inc & another* 2014 (1) SA 341 (SCA).

[21] Mr *Singh* submitted that the municipalities have autonomy and the freedom of choice to include or omit any category of rate payers they deem fit. This choice given to municipalities is in accordance with the provisions of s 152(1)(a) of the Constitution, which records that the object of local government is to provide democratic and accountable government for local communities. Part of that democratic process is where municipalities make decisions with regard to local taxes pursuant to a participatory process instigated by the municipality concerned. He accepted that municipalities should strive to achieve the objects set out in the preamble to the MPRA. Mr *Singh* submitted that the use of the word 'may' in the pre-2014, s 8 provisions of the MPRA, determines the categories which may include those set out in that section. This section is not designed to be prescriptive, and the degree of autonomy afforded to the municipalities is very wide. Mr *Singh* submitted that *Blom* was supportive of the submission that the list of categories set out in s 8 (2) is not intended to be exhaustive, and it is competent for municipalities to add a category of 'non permitted use' to that list. The court a quo in *Blom* was of the view

that additional categories had to be of a similar nature, or of the same genus as those listed in s 8 (2).

[22] In *Blom*, Zondo J found that the list of rateable properties in s 8 (2) is not exhaustive and that it is competent for a municipality to add categories to that list. The court held that municipalities were entitled to make policy choices, and that there can be no basis for questioning the choices it makes with regard to properties that may be differentially rated with respect to different categories of property. However, he referred to properties that may be deferentially rated with respect to different categories of property – not different categories of owner. In addition the challenge in *Blom* was to a category which was deemed to be unfair. In this regard, Mr *Dodson* argued that Ethekwini Municipality's reliance on *Blom* is misplaced, as the municipality in question added on a category. Whilst the list of categories in s 8 (2) may not be finite, they must be determined according to the use or permitted use of the property or a combination of those two.

[23] In *Kalil* an interdict was sought prohibiting a municipality from adopting a council resolution concerning municipal rates. The applicants complained that the decision to increase rates on business properties required community participation which had not occurred: the ratio between the proposed rate for commercial properties and that on residential properties exceeded the permissible ratio prescribed under s 19(1)(b) of the MPRA.

[24] The court held that although there had not been proper consultation, it did not follow that the budget resolution of the previous year should be set aside. The principal point of the case then became the determination of the rates ratio between residential and commercial properties, and whether that determination offended the principle of legality. Ultimately the court had to consider whether the conclusion reached by Southwood AJA in *South African Property Owners Association v Johannesburg Metropolitan Municipality & others* 2013 (1) SA 420 (SCA) ('Sapo''), meant that s 19(2) prohibits the imposition of a rate on any category of non-

residential property higher than the rate levied on residential property. In *Sapoa* the court found that there was insufficient consultation, and in addition that the increased rate on business properties had no rational basis. Thus the views of Southwood AJA regarding the attack upon the decision under s 19(1)(b) was his view alone. It was also not part of the ratio of his judgment. In addition the point had not been argued because the appellant had abandoned reliance upon it. In *Kalil* the majority pointed out that s 19(1)(b) provides that the municipality may not levy a rate on non-residential properties that exceeds a prescribed ratio to the rate on residential properties. It did not find that a rate levied on non-residential properties may not exceed that imposed on residential properties. The court disagreed with the conclusion of Southwood AJA and found that the rate which the municipality sought to impose in respect of business properties was in any event not shown to have offended the principle of legality.

[25] Mr *Singh* submitted that a municipality was entitled to have a category of property as 'business and commercial', and even though that category may include schools, even schools operating not for profit, is a policy choice by the municipality. That policy choice is part of its autonomy and the powers given to municipalities to frame their own policies.

[26] Mr *Singh* conceded that after the 2014 amendment, if the provisions of s 8 are constitutionally valid, municipalities have no option but to include the listed items in their rates polices. He submitted that nonetheless, the change of interpretation was a ministerial decision indicating a change of mind, and not an explanation or reinforcing of the previous legislation. He submitted that a municipality was not obliged to include a category of rate payers in its policies if the regulations already prescribed a rate for it.

[27] Mr *Singh* conceded that if the interpretation point was decided in favour of ISASA in the main application, the rest of the application would fall away with regard

to the pre-2014 situation. With regard to the post-2014 situation the municipalities had a moratorium for seven years.

[28] In reply to the question whether a court could review regulations where a court order compelled promulgation of them, he submitted that the municipalities were not reviewing the order of the North Gauteng High Court. This court was required to review the regulations and their validity in order to decide whether they could stand alone. He submitted that the court order cannot stop me from setting aside the regulations.

[29] Mr *Singh* also submitted that the regulations were not valid because the ministers did not publish the regulations for public comment in terms of s 84(a) of the MPRA. This section requires that the minister must consult organised local government on the substance of regulations to be promulgated and publish the draft regulations in the Government Gazette for public comment. He submitted that it was a *non-sequitur* to suggest that since substantial compliance took place in 2007 for the publication of the 2008 regulations, there was also substantial compliance with the provisions of notice for the 2010 regulations. In this regard he submitted that the 2007 consultations were a completed process and a final decision was made in respect of them.

[30] It was common cause that during 2007, SALGA was concerned that many municipalities had not implemented proportional policies, or completed valuations to anticipate the effect of doing so. It had wanted to postpone the ratio process, and the regulations regarding them until the municipalities had implemented the provisions of the MPRA. In those circumstances it was unfair to draw the positive statement contended for by Mr *Dodson* that no one had objected to the inclusion of public benefit organisations and the policy that the rate of such an organisation should bear a proportion to the residential rates.

[31] In addition Mr *Singh* submitted that even though the signed letter containing the complaints of SALGA was only delivered in April of 2010, an unsigned letter had been sent in February of 2010, which was an indication that the municipalities were opposed to the inclusion of public benefit organisations. When ISASA challenged the 2009 regulations the Minister was placed on notice prior to the promulgation of the regulations in 2010. He submitted that it was common cause that no notice had been published in terms of s 84(b) of the MPRA and the regulations were therefore not properly promulgated. He conceded that SALGA should have attended to matters more promptly, but that there had nevertheless been no substantial compliance.

[32] With regard to constitutionality of s 19(1)(b), Mr Singh submitted that the section takes away the autonomy of municipalities to determine the various categories of property and the rates leviable on those categories of property. He submitted that s 229(2)(b) of the Constitution provided that the levying of rates by municipalities may be regulated by national legislation. He submitted that the word ‘regulated’ is notionally different to the language used introductory phrase in s 229(1)(a) which is:

‘Subject to subsections (2),(3) and (4), a municipality may impose –

(a) rates on property …’

In this regard he referred to *Maccsand (Pty) Ltd & another v City of Cape Town & others* 2011 (6) SA 633 (SCA), para 12, where the court dealt with the manner in which powers are distributed among, and in some cases reserved, to the different spheres of governments. The necessary corollary of this is that one government sphere may not usurp the functions of another, although interference by one sphere in the affairs of another is permitted in limited circumstances.

[33] Mr *Singh* relied upon the approach of Jafta J in the minority judgment in Merafong City v AngloGold Ashanti Ltd 2017 (2) SA 211 (cc) paras 171 and 177. That approach provides that a minister cannot impose upon or limit or direct

municipal powers. The majority in Merafong decided that case upon a different point and referred the collateral challenge back to the high court.

[34] Mr *Singh* submitted that s 19(1)(b) of the MPRA is invalid and should be set aside *ab initio.* Thereafter, Ethekwini Municipality should be allowed to recover the outstanding rates due by ISASA schools in terms of its original policy. It follows in those circumstances that the regulations promulgated pursuant to s 19(1) will be set aside and that there will no capping of the ratio of rates.

[35] Mr *Singh* also addressed me on the aspect of bias which was alleged to have been exhibited on the part of Ethekwini Municipality. In my view there is no proper basis for such an allegation, when there are other explanations which may as equally justify the approach of Ethekwini Municipality. I accordingly do not find it necessary to deal with those suggestions.

[36] Mr *Mokhare* SC, who appeared for the two ministers together with Ms *Lithole*, submitted that Ethekwini Municipality was correct in submitting that if the ISASA application succeeds, that is the end of the matter. The submission, however, that if the court finds in favour of ISASA, it should still consider the counter-application is incorrect. This is because if an interpretation of the court is accepted in favour of ISASA, it cannot be one where the interpretation could be made in isolation, and it is not possible to interpret s 8 without interpreting the provisions of s 19(1) as well.

[37] Mr *Mokhare* referred to the North Gauteng High Court order and said it was not a settlement agreement which was made an order of court, but rather an order which was given by agreement between the parties. He drew my attention to the provisions of s 165 of the Constitution dealing with the judicial authority of courts, and submitted that the court order had to be given effect to until it was set aside. However, no party had approached that court to appeal or in any way deal with the order.

[38] That order was specific, and directed only one change to the regulations as previously published. It provided only for an upper limit rate-ratio for properties described as public benefit organisations as defined. No party has at any stage since 2010 invoked the provisions of Uniform rule 42 in order to rescind, vary or amend the order.

[39] Mr *Mokhare* drew attention to the fact that the court order provided at prayer 2 that the regulations be published by the 30th March 2010. At that stage Ethekwini Municipality would have been well aware of its own view that the process of consultation had to be restarted. Accordingly it would be untenable to suggest that the provisions of s 84 of the MPRA had been violated to the extent that the court order or the regulations could be set aside because of non-compliance with that section. The North Gauteng High Court had given effect to the wishes of the parties, and the court order stands until it is set aside. Mr *Mokhare* submitted that the question posed by Mr *Singh* as to whether the regulations could be reviewed when the court order did not require the regulations to be published, was the incorrect question, and the correct question was whether this court can set aside the regulations in light of the court order.

[40] In addition, Mr *Mokhare* drew attention to the provisions of s 163 of the Constitution and submitted that SALGA was the recognised organisation which represented the interests of municipalities. Mr *Singh* admitted that SALGA did not act as it should have done and there is accordingly no basis for Ethekwini Municipality to raise a case of no consultation, or submit that any serious procedural shortcoming was present. The fact that the ministers had not taken into account the unsigned submissions delivered in February 2010 did not assist SALGA or Ethekwini Municipality because the credibility of the communication was in doubt.

[41] The focus by Mr *Singh* on non-compliance in terms of s 84(b) of the MPRA could not succeed in the light of the North Gauteng High Court order. Mr *Mokhare* submitted that the only two matters to be resolved by me with regard to Ethekwini Municipality's counter-application was the reviewing and setting aside of the decision of the ministers to amend the regulations of the 1st March 2010, and the declaration sought by Ethekwini Municipality that s 19(1)(b) of the MPRA is unconstitutional and invalid because it restricts the powers of municipalities to levy rates at ratios determined by the municipality.

[42] Mr *Mokhare* referred to the fact that in his heads of argument Mr *Singh* sets out in paragraphs 166 to 172 thereof, the reasons why s 19 (1)(b) should be regarded as unconstitutional. Ms *Singh* dealt with the provisions of ss 40 and 41 of the Constitution dealing with the different spheres of government, and their separate functions. In addition s 151 to 154 of the Constitution deals with the restrictions on national government from impeding a municipality's autonomy. He referred to judgments of the court a quo in *Merafong*, which was overturned.

[43] Mr *Singh* also submitted that any restriction on the imposition of rates results in the two ministers concerned exercising the municipality's power which is unlawful and at odds with the constitutional scheme. Mr *Mokhare* referred to chapter 7 of the Constitution and the concept of local government autonomy. He pointed out that that does not provide blanket autonomy, with s 229 (1)(a) being the starting point. It is necessary, as stated in the Constitution, for the exercise of local authority power to be uniform across the board. This concept is expressed in s 16 of the MPRA, which makes it clear that the autonomy of local governments is not seen in isolation. Similarly, s 19 must be seen within the scheme of the MPRA which starts with the preamble setting out, inter alia, that the purpose of the act is to enhance certainty, uniformity and simplicity across the nation. It is necessary to interpret the provisions of s 19 in the context of the other provisions of the MPRA, in particular sections 2,3 and 8.

[44] Mr *Mokhare* submitted that s 19 of the MPRA must be seen in the context of the operations of the three spheres of government, and the first approach of a court should be that it should be read to be constitutional, rather than to seek to strike it down. He further identified his case with the arguments of Mr *Dodson* with regard to the provisions of the MPRA. In the circumstances he submitted that the declarations sought by ISASA should be granted, and the counter-claim by Ethekwini Municipality and Stellenbosch Municipality dismissed.

[45] Mr *Potgieter* SC, who appeared for Stellenbosch Municipality together with Mr *Papier*, focused on the procedural challenge to the regulations which were promulgated pursuant to the court order of the 15th March 2010. He submitted that it was unconstitutional if the Minister ignored the provisions of s 84(b) of the MPRA – the requirement for the publication of a draft for comment in the Government Gazette. In addition, regulations are never promulgated pursuant to a court order. It appears, in any event, from the documents, that they were promulgated on the 12th March 2010, and that the court order was only handed down on the 15th March 2010. The agreement, however, was concluded between ISASA and the ministers prior to the 21st December 2009. He submitted that the agreement included the promulgation of the regulations, which was done without the strict compliance with a court order.

[46] Mr *Potgieter* submitted that the 2009 amendment had dealt only with agriculture and public service infrastructure matters. Just as ministers were entitled to change their minds, so could other affected parties in the process. What had been followed was a process of promulgation in motion, and only consultation with the Minister of Finance and SALGA had taken place.

[47] Mr *Potgieter* drew my attention to the fact that there was no suggestion that the complaints raised by SALGA which were unsigned, were any different to those that were delivered in April, 2010. The important thing to note was that the Minister was aware that SALGA had objected. The Minister must have been aware that

others had an interest, and there was no justification for him to assume that no one would complain because of the consultations which had taken place in 2007. Public participation was indicated, and the provisions of s 84 of the MPRA are peremptory. He pointed that it is not the case of the ministers that there was substantial compliance with that section, but rather they did not have to comply with it. The 2007 consultation process did not mean that publication was unnecessary. They excluded those who were interested in the excluded categories, and who had a direct and substantial interest and should have been consulted.

[48] Mr *Potgieter* submitted that the court order could not operate as a shield because it was granted after the fact, as it were. In saying that, he concedes the status of the court order. However, the court order was not pursuant to a considered judgment and could be viewed differently from an order given after a fully reasoned judgment. Nothing in the court papers in the North Gauteng High Court made out a case of exemption from complying s 84( ) of the MPRA. Although there was no indication in that section that it should have been complied with in this instance, there was nothing to gain say it either.

[49] Anything done in terms of s 83 of the MPRA must be consistent with the Act, and compliance with s 84 then becomes obligatory. For the ministers to have adopted an interpretation that there was compliance with that statutory obligation, the order should clearly have said so. In addition, the Minister proceeded as if he was required to comply with s 84(a), but only dealt with SALGA, and failed to comply with s 84(b). Mr *Potgieter* submitted that non-compliance with s 84(b) was the nub of the application and that he would not argue for a retrospective order. He recorded that the Stellenbosch Municipality concurred with the proposed order sought by Mr *Singh* for the Ethekwini Municipality.

[50] <u>My reasoning:</u>

The Constitution very clearly sets out that municipalities, although authorised to impose rates on immovable property, may not do so in a manner which materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour. The Constitution clearly sets out that the power to levy rates may be regulated by national legislation. The national legislation is to be found in the MPRA. It is a comprehensive piece of legislation, the purpose of which is set out in the preamble to the Act, which enjoins municipalities to exercise a power to impose rates within a statutory framework that enhances certainty, uniformity and simplicity across the nation. It is also required to take into account historical imbalances and the rates burden on the poor. This application centres around the levying of rates on public benefit organisations. All the members of ISASA are public benefit organisations, as that concept is defined in s 30 of the Income Tax Act, 1962 read with item 4 of the ninth schedule to that Act.

[51] The category of properties against which rates may be levied by municipalities is a political decision. Political decisions become ultimately translated into legal instruments, setting out the manner in which desired policy objectives are to be achieved. Provided that the Acts issued pursuant to the Constitution are constitutionally sound, it is not for courts of law to interfere with the policy decisions themselves. Those decisions are made by the other two arms of government.

[52] Promulgating national legislation in order to achieve desired policy decisions is not the kind of intervention by national or provincial governments which is referred in s 151(4) of the Constitution: compromising or impeding a municipality’s ability or right to exercise its powers or perform its functions. The municipal level of government is not given c*arte blanche* to make any policy decision which it chooses. The guidelines are set out in the MPRA. That is the piece of legislation which the legislature chose to be the directing hand behind the levying of rates.

[53] It is important to note that when the 2007 draft regulations were published for comment, no municipality cited the public benefit organisations as a source of concern. Nor did SALGA, which is the authorised and recognised representative of local government throughout the Republic of South Africa.

[54] Accordingly, Ethekwini Municipality was not at large to make a policy decision which is directly at odds with the MPRA. To suggest that it could include non-profit making schools in the category 'business and commercial' makes no sense where a category had already been provided for in the MPRA. This is because, to the knowledge of Ethekwini Municipality, all those schools were public benefit organisations, and the municipality was, in terms of s 19 read with s 8 of the MPRA, obliged to categorise public benefit organisations accordingly. It is surely incorrect to re-categorize an organisation such as a public benefit organisation in contravention of the MPRA, simply because it suits the municipality to do so. That this was a contravention of the MPRA was pointed out in correspondence addressed to the Ethekwini Municipality employees at an early stage of the dispute. Their response was simply to ignore the truth of what the schools were, and to continue with the incorrect categorisation. In my view their conduct in doing so was ill-advised.

[55] In addition, to suggest that Ethewkini Municipality has a seven-year moratorium to deal with the post-2014 situation is unreasonable when it has already taken steps to abide by the amendments.

[56] I cannot agree with the suggestion by Mr *Singh* that a municipality which had already categorized an entity, was not obliged to change the categorisation if the regulations already prescribed a rate for it. This simply ignores the legislative intent that municipalities are required to follow the spirit and import of the MPRA.

[57] The suggestion that this court could review the regulations which had been published pursuant to the North Gauteng High Court order is implausible. The

judgment stands, and it has not been appealed or set aside. Notionally, perhaps, a situation may arise where an error could have occurred in the publication of the regulations. That however is not the position with which I am faced, and there is no need to consider it.

[58] With regard to the complaints by Mr *Singh* and Mr *Potgieter* that there was insufficient consultation in terms of s 84(b) of the MPRA, I believe that the process adopted was both sufficient and fair. ISASA has brought an application against the two ministers and SALGA. SALGA had every opportunity to comment on the proposed amendments, which were extremely limited in scope. They did not do so properly and timeously.

[59] It is incorrect to suggest that the Minister ought to have accepted the unsigned objections delivered in February 2010. The correspondence in this regard demonstrates the fact that the Minister was not obliged to take notice of objections in a document where the provenance of that document was in doubt.

[60] I agree generally with the submissions made by Mr *Mokhare*. In particular I agree that the process of interpreting the provisions of the MPRA as constitutionally valid requires a reading of both s 19 and 8 of the MPRA. I also agree that the question to be answered is whether I am able to set aside the 2010 regulations in the light of the North Gauteng High Court order.

[61] I have set out my views above on the need for publication in terms of the s 84(b) of the MPRA. I disagree with the submission of Mr *Potgieter* that publication was peremptory in the circumstances in which the ministers found themselves. No one was excluded in the publication of the regulations pursuant to the order. Indeed, SALGA was a party to the application, and the Ethekwini Municipality was notified on two occasions of the existence of the dispute.

[62] In all the circumstances, and observing the caveat by Mr *Mokhare* that I should be inclined to uphold subsidiary legislation as being constitutional unless it is clearly not so, I cannot find that the provision of s 19 and s 8 of the MPRA, either prior to, or after 2014, were unconstitutional. Similarly, I do not find the 2010 regulations namely, Amended Municipal Property Rates Regulations on the rate ratios between Residential and Non-Residential Properties, GN R.195, *GG 33016*¸12 March 2010 to be unconstitutional and invalid.

[63] I should mention that most of the 1 818 pages comprising this application are composed of various applications which were brought after Ethekwini Municipality had introduced its counter-application. ISASA sought to amend its notice of motion from time to time, using the expedient of uniform rule 28. In order to explain the reactive challenge contained in the continuing amendments to its notice of motion, ISASA used the expedient process of what it refers to as an 'explanatory affidavit'. This attracted a great deal of criticism both in the application papers and in the heads of argument. Indeed ISASA continued to seek to have the succeeding rates policies of Ethekwini Municipality reviewed and set aside up to the 2017/18 years.

[64] Ethekwini Municipality takes the point that the causes of action in relation to all the policies after 2010 had not yet accrued when those amendments were made, and the cause of action of ISASA was impermissibly widened. One of the problems is that Ethekwini Municipality did not, as it could, and perhaps should, have done, was to have its objections and applications dealt with expeditiously over the nine years during which this application has taken to reach this stage. This included: an application by Ethekwini Municipality to strike out three affidavits, an application by ISASA to extend the time period in the Promotion of Administrative Justice Act, 2000, and requests by Ethekwini Municipality for the delivery of further affidavits. This last category could have been avoided by the simple expedient of pleading over – something the Ethekwini Municipality could easily have done – but, contrary to the weight of authority, chose not to do.

[65] Given the conclusion at which I have arrived at in this judgment, there is no need for me to enter into the debates regarding those applications. This is because they all become irrelevant in the circumstances. I accordingly do not deal with them.

[66] With regard to the question of costs, the parties are *ad idem* that I should follow the approach adopted in *Trustees, Biotech Trust v Registrar: Genetic Resources, & others* 2005 (4) SA 111 (T). The principles set out in that case, however, were designed to shield unsuccessful litigants in legal proceedings against the state, from having to pay the costs of the state in constitutional challenges. The principle would apply as between the ministers and Ethekwini Municipality and Stellenbosch Municipality. The principle is not, however, applicable to the costs of ISASA. In my view Ethekwini Municipality and Stellenbosch Municipality should not have opposed the relief sought by ISASA, and it was unreasonable of them to have done so.

[67] I accordingly make the following order:

(1) It is declared that Ethekwini Municipality may not henceforth (and was not, with effect from the 1st July 2010 permitted to) levy a rate in excess of 25 per cent of the rate levied by it on residential property, on:

(a) Non-residential properties owned by public benefit organisations as contemplated in terms of s 30 of the Income Tax Act, 1962 (‘the Act’) and used for the specified public benefit activity of education and development as contemplated in item 4 of the ninth schedule to the Act.

(b) Property owned by the rate payers whose names are listed in the schedule annexed hereto marked ‘X’ and used for the specified public benefit activity of education and development as contemplated in item 4 of the ninth schedule to the Act, provided that they retain their status as public benefit organisations in terms of s 30 of the Act.

(2) Ethekwini Municipality is directed to levy a rate on the property of public benefit organisations, such rate as defined in Regulation 1, with effect from the 1st July 2010 in compliance with the Local Government: Municipal Property Rates Act, 2004, and with Regulation 2 of the amended regulations promulgated pursuant thereto.

(3) Ethekwini Municipality and Stellenbosch Municipality, the one paying, the other to be absolved, are directed to pay the applicant's costs, such costs to include those consequent upon the employment of two counsel.

(4) Ethekwini Municipality, Stellenbosch Municipality, the National Minister for Cooperative Government and Traditional Affairs, and the National Minister of Finance shall each bear their owns costs.

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Lopes J

Date of hearing:	5th June 2019.
Date of Judgment:	28th June 2019
For the Applicant:	Mr A Dodson SC and Mr L Sisilana (instructed by Shepstone & Wylie Attorneys).
For the First Respondent:	Mr N Singh SC and Mr H S Gani (instructed by Linda Mazibuko and Associates).
For the Second and Third Respondent:	Mr W R Mokhare SC and Ms C Lithole

(instructed by The State Attorney)

Intervening Party:	Mr D Potgieter SC and Mr Pieper (instructed by Webber Wentzel)