“““CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 7/98

FEDSURE LIFE ASSURANCE LTD	First Appellant
HOLDING 24 STRATHAVON (PTY) LTD	Second Appellant
J D B BELEGGINGS (EDMS) BPK	Third Appellant
LIBERTY LIFE ASSOCIATION OF AFRICA LTD	Fourth Appellant
MOMENTUM PROPERTY INVESTMENTS (PTY) LTD	Fifth Appellant
100 GRAYSTON DRIVE PROPERTY (PTY) LTD	Sixth Appellant
RIVONIA ANNEX (PTY) LTD	Seventh Appellant
RYCKLOF-BELEGGINGS (PTY) LTD	Eighth Appellant
TERAMA (PTY) LTD	Ninth Appellant
CLEARSTREAM PROPERTIES (PTY) LTD	Tenth Appellant
versus	
GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL	First Respondent
EASTERN METROPOLITAN SUBSTRUCTURE	Second Respondent
NORTHERN METROPOLITAN SUBSTRUCTURE	Third Respondent
WESTERN METROPOLITAN SUBSTRUCTURE	Fourth Respondent
SOUTHERN METROPOLITAN SUBSTRUCTURE	Fifth Respondent

Heard on : 18-20 August 1998

Decided on : 14 October 1998

JUDGMENT

CHASKALSON P, GOLDSTONE J AND O'REGAN J:

Introduction

[1] This matter arises out of the substantial increase in the general rate which, in June 1996, was levied on property and rights in property situated within the area of the Eastern Metropolitan Substructure, one of the four transitional substructures which, together with the Greater Johannesburg Transitional Metropolitan Council (the TMC), constitute local government in the greater Johannesburg municipal area. The lawfulness of the increase was attacked by ten ratepayers in the Witwatersrand High Court.

[2] It may be helpful at the outset to sketch the political and legal context within which the present dispute has arisen. The transformation of South Africa from a society rooted in discrimination and disparity to a constitutional democracy founded upon freedom, dignity and equality posed, and continues to pose, particularly profound challenges at local government level. It is here that acute imbalances in personal wealth, physical infrastructure and the provision of services were and are often most patent. The greater Johannesburg region is no exception. The thirteen local government bodies which formerly exercised powers and duties within this, South Africa's largest and most developed urban area, were of two sorts. Those in historically "White" areas were

characterised by developed infrastructure, thriving business districts and valuable rateable property.[1] Those in so-called "Black", "Coloured" and "Indian" areas, by contrast, were plagued by underdevelopment, poor services and vastly inferior rates bases.

[3] The interim Constitution,[2] which came into force on 27 April 1994, sought to break from this state of affairs by establishing a new framework for local government in South Africa. It did not, however, prescribe the specific manner in which this transformation was to occur. Instead, it stipulated in section 245 that the complex restructuring of local government should take place in accordance with the Local Government Transition Act[3] (the LGTA).

[4] The LGTA contemplates that the transformation of local government will take place

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1 These councils were established under and governed by the provisions of the Local Government Ordinance 17 of 1939 (T) (the LGO).

2 Constitution of the Republic of South Africa Act 200 of 1993.

3 Act 209 of 1993.

in three distinct stages. During the "pre-interim" phase, negotiating forums were established and charged with appointing temporary councils to discharge local government responsibilities. This period extended from the commencement of the LGTA, on 2 February 1994, until the first democratic local government elections. The "interim" phase commenced on the date of such elections and witnessed the introduction of a series of transitional local government structures. The third phase, to be initiated and regulated by new legislation, is yet to come into effect.

[5] During the course of the pre-interim period, Premier's Proclamation 24 of 1994 (Proclamation 24) was enacted under section 10 of the LGTA for the purpose of unifying local government structures within the greater Johannesburg area. It dissolved the thirteen existing local government bodies and created a transitional metropolitan council and seven transitional metropolitan substructures.

[6] In terms of Proclamation 24 the TMC was to be the dominant local government body within the region and the engine for driving the early transformation towards democratic local government. It was vested with the powers, functions, assets and liabilities of the dissolved authorities and charged inter alia with winding down these bodies, creating administrative capacities within itself and its substructures, and determining a minimum level of service delivery within the metropolitan area.[4] It also

[4] Section 15 of Proclamation 24 provided that:

"(1) The functions, powers and duties of the Greater Johannesburg Transitional

bore a duty to devolve its authority and responsibility, gradually and by means of negotiation, upon the substructures.[5] All finances were initially to flow through the TMC. It was required to approve a consolidated budget, to ensure that the substructures had

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Metropolitan Council shall be as follows:

(a) The powers and duties set out in Schedule 2 to the Local Government Transition Act, 1993.

(b) As set out in sections 12(1)(b), 10A, 12(1)(a) and (10) and 14 of the Regional Services Councils Act, 1985 (Act No. 109 of 1985).

(c) All other local government functions, powers and duties of the dissolved local government bodies mentioned in section 2, subject to the provisions of section 16.

(d) The determination of an overall policy framework for the metropolitan area.

(e) The Reconstruction and Development Programme for the metropolitan area.

(f) The management of the process of winding down the dissolved local government bodies mentioned in section 2, with the objective of achieving an equitable utilisation of the asset base and infrastructure of the entire metropolitan area, including the transfer of assets and liabilities, administrations and employees and officers of the dissolved local government bodies.

(g) The management of the whole transition process and the creation of the necessary administrative capacities at the Council and the Metropolitan Substructure levels.

(h) The determination of minimum levels of service and delivery.

(i) Ensuring that the Metropolitan Substructures have adequate finances.

(j) The approval of the overall budget for the metropolitan area in consultation with the Metropolitan Substructures.

(k) The determination of the contributions to be paid by the Metropolitan Substructures, to enable it *inter alia* to fulfil its Reconstruction and Development Programme redistribution responsibilities.

(2) The Greater Johannesburg Transitional Metropolitan Council shall appoint Administrator Bodies consisting of between two and eight persons on a 50/50 statutory/non-statutory-basis for each of the dissolved local government bodies mentioned in section 2, in order to -

(a) undertake any duties delegates [sic] to them to give effect to the vesting of staff, assets, liabilities, rights and obligations in the Greater Johannesburg Transitional Metropolitan Council and the Metropolitan Substructures;

(b) undertake such duties and execute those powers delegated to them by the Greater Johannesburg Transitional Metropolitan Council and which were previously executed by the administrated [sic] of the said dissolved local government bodies, in order to ensure the continuation of efficient rendering of services; and

(c) to carry onto [sic] the winding down process as contemplated in subsection (1)(f) under the management and policy control of the Greater Johannesburg Transitional Metropolitan Council."

[5] Section 16.

adequate finances, and to make provision for the reconstruction and development priorities of the entire region.[6]

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[6] Section 20 provided that:

> "(1) The budget for the metropolitan areas shall, notwithstanding the provisions of section 58 of the Local Government Ordinance, 1939, be made up of both the Greater Johannesburg Transitional Metropolitan Council's and Metropolitan Substructures' budgets.
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> (2) The budget mentioned in subsection (1) shall be formulated by the Greater Johannesburg Transitional Metropolitan Council based on the 1994/95-budgets of the dissolved local government bodies mentioned in section 2 in consultation with the Metropolitan Substructures.
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> (3) The inability of a Metropolitan Substructure to make an input regarding the budget mentioned in subsection (2) shall not delay the process: Provided that -
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> (a) the budget shall be approved by the Greater Johannesburg Metropolitan [sic] Transitional Metropolitan Council in consultation with the Metropolitan Substructures;
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> (b) the Greater Johannesburg Transitional Metropolitan Council shall make allocations to the seven Metropolitan Substructures to enable the Metropolitan Substructures to exercise the functions, powers and duties mentioned in section 4 or delegated or allocated in terms of section 16;
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> (c) expenditure may be authorised by the Greater Johannesburg

Transitional Metropolitan Council in respect of expenses incurred by the dissolved local government bodies mentioned in section 2 and by the Metropolitan Substructures in respect of their functions, powers and duties.

(4) The 1995/96-Metropolitan Substructures' budgets shall be prepared on the basis of guidelines developed by the Greater Johannesburg Transitional Metropolitan Council and shall be subject to the approval of the Greater Johannesburg Transitional Metropolitan Council."

[7] The substructures were initially to be funded by means of inter-governmental grants, TMC contributions, and other grants or donations.[7] As they developed and had functions delegated or assigned to them by the TMC, these sources of revenue were to be supplemented by powers to impose property rates and service charges. Before functions could be assigned or delegated to the substructures, the TMC had to be satisfied that they were in a position to budget for themselves and to manage their own affairs.[8] The manner in which functions passed from the TMC to the substructures was to be the subject of negotiation, and mechanisms were provided for the resolution of disputes that might arise.[9] Hence Proclamation 24 conferred powers and functions on the TMC during the pre-interim phase which were necessary for these purposes and which exceeded the minimum powers prescribed by schedule 2 of the LGTA.[10]

[8] Premier's Proclamation 35 of 1995 (Proclamation 35) was promulgated on 4 August 1995. It was to come into effect on the date of the first democratic local government elections. Its express purpose was to set out the powers and duties which the TMC and its substructures would have during the interim phase of local government transformation. Annexure A of the Proclamation defined the "powers and duties" of the TMC. These were, in effect, those specified in schedule 2 of the LGTA[11] as being the

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7 Section 19(1)(b)(ii), (iii) and (iv).

8 Section 17.

9 Sections 16 and 18.

10 Below para 8.

11 Annexure A was in essence a reproduction of the second schedule to the LGTA. Only two differences are discernible. First, item 23(a) of schedule 2 contained the additional words "or section 16(1)(a)

minimum powers required to be vested in the transitional metropolitan councils during the pre-interim and interim phases.[12] The powers were:

28 Bulk supply of water.

2. Bulk supply of electricity.

3. Bulk sewerage purification works and main sewerage disposal pipelines for the metropolitan area.

4. Metropolitan co-ordination, land usage and transport planning.

5. Arterial metropolitan roads and stormwater drainage.

6. Passenger transport services.

7. Traffic matters.

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of the KwaZulu and Natal Joint Services Act, 1990 (Act No. 84 of 1990), as the case may be" which were not included in the corresponding provision of annexure A. Secondly, unlike item 23(c) in schedule 2, the equivalent provision in annexure A did not contain an "or" between the terms "gross" and "rates". In the Afrikaans text, the corresponding phrase was "die bruto of belastingsinkomste". It was common cause between the parties that the omission in the English text was made in error and that the word "or" should thus be read into the provision. This was accepted by both the Witwatersrand High Court and the Supreme Court of Appeal.

12 Sections 7(1)(b)(aa) and 8(2)(b)(ii)(aa) of the LGTA.

8. Abattoirs.
9. Fresh produce markets.
10. Refuse dumps.
11. Cemeteries and crematoriums.
12. Ambulance and fire brigade services.
13. Hospital services.
14. Airports.
15. Civil defence.
16. Metropolitan libraries.
17. Metropolitan museums.
18. Metropolitan recreation facilities.
19. Metropolitan environment conservation.
20. Metropolitan promotion of tourism.
21. Metropolitan promotion of economic development and job creation.
22. The establishment, improvement and maintenance of other metropolitan infrastructural services and facilities.
23. The power to levy and claim -
    (a) the regional services levy and the regional establishment levy referred to in section 12(1)(a) of the Regional Services Councils Act, 1985 (Act No. 109 of 1985);
    (b) levies or tariffs from any transitional metropolitan substructure in respect of any function or service referred to in items 1-22; and
    (c) an equitable contribution from any transitional metropolitan substructure based on the gross [or] rates income of such transitional metropolitan substructure.
24. The receipt, allocation and distribution of intergovernmental grants.
25. The power to borrow or lend money, with the prior approval of the

> Premier, for the purposes of or in connection with the exercise or performance of any power or duty."

[9] Annexure B of the same Proclamation set out the powers and duties of the transitional metropolitan substructures in the following terms:

> "The powers and duties pertaining to local government, excluding local government powers and duties to be executed by Transitional Metropolitan Councils."

[10] On 1 September 1994 a further proclamation, Premier's Proclamation 42 of 1995 (Proclamation 42), was issued by the Premier. In terms of its date of commencement, it was stipulated that:

> "[Proclamation 42] shall for the purposes of the Local Government Elections come into operation on the date of the local government elections determined in terms of section 9(1) of the Local Government Transition Act, 1993 and for all other purposes on the day thereafter."

Proclamation 42 reduced the number of transitional metropolitan substructures from seven to four and repealed several provisions of Proclamation 24, including sections 15 and 20. This effectively narrowed the functions, powers and duties conferred on the TMC by Proclamation 24 during the pre-interim phase.

[11] The four substructures are the Eastern Metropolitan Substructure (the EMS) which is the second respondent, the Northern Metropolitan Substructure (the NMS) which is the

third respondent, the Western Metropolitan Substructure (the WMS) which is the fourth respondent, and the Southern Metropolitan Substructure (the SMS), which is the fifth respondent. The combined areas of the four substructures coincide with the area of the TMC.

[12] The rates which are attacked in these proceedings were levied in consequence of the budgets for the financial year from 1 July 1996 to 30 June 1997 of each of the five respondents. Those budgets were approved by their respective councils during June 1996.

[13] The five budgets were the consequence of a policy determined and calculations made jointly by the TMC and the four substructures. According to that policy the expenditure of the TMC and each of the four substructures was determined and agreed to jointly, taking into account the requirements of each of the entities concerned. These requirements were trimmed and prioritized so as to ensure that the expenditure represented an increase of no more than 10% over the expenditure which had been incurred during the previous financial year. The respective estimates of these entities, produced in this manner and on the basis that uniform tariffs would be charged for services throughout the metropolitan areas, indicated that if a uniform rate of 6,45 cents in the Rand was levied on land and rights in land situated in the areas of the four substructures, the total income produced would be sufficient to balance the budgets of the TMC and the substructures. In other words the combined income of all of these bodies would be equivalent to their total

expenditure. The policy of applying a uniform rate would also mean that, in the final analysis, the budgets of some of the entities would reflect deficits and those of others, surpluses; and the policy determined in this regard was that those who had surpluses would be required to pay levies while those that did not would receive subsidies. The net result of the application of this policy and the implementation of the uniform rate was that there were surpluses in the budgets of EMS and NMS and deficits in the budgets of the TMC, WMS and SMS. The effect of adopting a uniform rate had different implications for ratepayers in each of the substructures because of different rates which had been imposed in the past. Some ratepayers faced an increase and others enjoyed a decrease.[13]

[14] The effect of the joint policy, as far as this appeal is concerned, emerges from resolutions passed by the respective five councils as follows:

(a) sums of R 438 330 000 and R 4 223 000 were levied by the TMC as contributions from the EMS and the NMS respectively;

(b) an amount of R 162 482 000 was to be retained by the TMC to fund its own deficit;

(c) the balance was to be paid by the TMC as subsidies to the WMS and SMS

[13] The effective change in rates as far as the appellants were concerned was an increase from 2,65 cents in the Rand to 6,45 cents in the Rand. Residents in areas which were previously black local authorities had not previously been required to pay any rates at all.

in the amounts of R 92 126 000 and R 187 945 000 respectively; the amounts referred to in (b) and (c) equalled the amount of the levies referred to in (a);

(d) the four substructures resolved to impose a general rate of 6,45 cents in the Rand on land and rights in land.[14]

[15] The ten appellants are all ratepayers in the area of the EMS. They applied to the Witwatersrand High Court for relief which, in effect, was to declare unlawful and set aside the resolutions of the TMC and the EMS which made provision for the levies on the EMS and the NMS and for the subsidies in favour of the TMC, the WMS and the SMS. They also sought to have declared unlawful and set aside the resolution of the EMS in terms of which a general rate of 6,45 cents in the Rand was levied upon land and rights in land within the area of the EMS.

[14] The judgment of the High Court includes the following table which helps to explain the effect of the resolutions:

	Expenditure	**Income**	**Surplus**	**Deficit**
TMC	2 856 777 000	2 694 295 000		162 482 000
NMS	549 859 000	554 082 000	4 223 000	
EMS	678 305 000	1 116 635 000	438 330 000	
SMS	1 242 809 000	1 054 864 000		187 945 000
WMS	341 701 000	249 575 000		92 126 000
TOTAL	5 669 451 000	5 669 451 000	442 553 000	442 553 000

[16] The resolutions were attacked on the following grounds:

(a) (i) The resolution of the TMC concerning the levy was ultra vires thepowers conferred upon it by item 23(c) of annexure A to Proclamation 35, in which the powers and duties of the TMC were redefined. Item 23(c) grants to the TMC the power to levy and claim:

> "an equitable contribution from any transitional metropolitan substructure based on the gross [or] rates income of such transitional metropolitan substructure."[15]

(ii) The resolution concerning the levy was also ultra vires section 178(2) of the interim Constitution which provides that a local government can levy and recover, inter alia, property rates only:

> " . . . as may be necessary to exercise its powers and perform its functions: Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction."

The appellants argued that the levies imposed by the TMC on the EMS and NMS were not in accordance with the provisions of section

15 Above n 11.

178(2) in that they were not necessary in order to enable the TMC to exercise its powers and perform its functions, and that, in any event, the levies were not based on a uniform structure for its area of jurisdiction.

(b) The resolution of the EMS imposing a rate of 6,45 cents in the Rand was ultra vires section 178(2) of the interim Constitution because its purpose was to raise funds which were not necessary for the exercise of the powers and performance of the functions of the EMS itself but rather to pay the contributions levied by the TMC.

(c) Alternatively, the budgets of the EMS and the TMC were irregularly considered and approved in that their finance committees had not first drawn up and presented a detailed estimate of the revenue and expenditure for the following financial year as was required by the provisions of sections 29 and 58 of the LGO.

[17] In the Witwatersrand High Court, Goldstein J rejected the arguments of the appellants and dismissed the application with costs, including the costs of two counsel employed by the first respondent and by the second to fifth respondents respectively. On 17 June 1997, the learned Judge granted leave to the appellants to appeal against his

judgment and order to the Supreme Court of Appeal (the SCA).

[18] The hearing of that appeal was set down for four days commencing on 2 March 1998. On the first day, however, the Court questioned whether it possessed jurisdiction under the interim Constitution to hear the appeal. At the time that the impugned resolutions were adopted by the respective respondents and at the time that the proceedings were instituted in the Witwatersrand High Court, the interim Constitution was in operation.[16] The parties accepted that the resolutions constituted "administrative action" under section 24 of the interim Constitution. The SCA proceeded on the basis of the correctness of that approach and held that it did not have jurisdiction to consider the merits of the appeal because they raised constitutional issues which, under section 98(2) of the interim Constitution, fell within the jurisdiction of this Court. Under section 101(5) of the interim Constitution the Appellate Division (the predecessor of the SCA):

> " . . . shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court."

As appears from the judgment of the SCA, it was argued that some of the attacks made by the appellants were founded upon the common law right to administrative justice and that, under the interim Constitution, the Appellate Division continued to have "some kind of parallel jurisdiction with the Constitutional Court where the relevant attack is founded on

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[16] On 4 February 1997, prior to the delivery of judgment by Goldstein J, the interim Constitution was superseded by the Constitution of the Republic of South Africa, 1996 (the 1996 Constitution).

common-law grounds."[17] Mahomed CJ expressed doubt as to whether that argument was sound but held that its resolution would also require an interpretation of the interim Constitution which also fell outside its jurisdiction.

[17] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1998 (2) SA 1115 (SCA) at 1124B; 1998 (6) BCLR 671 (SCA) at 678B.

[19] Counsel for the appellants argued unsuccessfully that the interests of justice required that the appeal should be adjudicated by the SCA under the 1996 Constitution.[18] It appears from the judgment of Mahomed CJ that all the counsel involved in the appeal conceded that, if the interim Constitution applied, it precluded the SCA from exercising jurisdiction to adjudicate the appeal.

[20] On 23 March 1998 the SCA made the following order:

> "1. In terms of s 102(6) of the interim Constitution, the Republic of South Africa Constitution Act 200 of 1993, this matter is referred to the Constitutional Court of South Africa to decide:
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> *(a)* whether or not the administrative actions constituted by the resolutions identified and impugned in the notice of motion were consistent with the interim Constitution, and
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> *(b)* if they were, whether or not the interim Constitution preserved for the predecessor of the Supreme Court of Appeal any residual or concurrent jurisdiction to adjudicate upon any attack made by the appellants on the administrative actions referred to in subpara *(a)* above on the grounds that such administrative actions fell to be set aside, reviewed or corrected at common law.

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[18] Section 17 of schedule 6 to the 1996 Constitution provides that:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

Each party is to bear its own portion of the wasted costs occasioned by the hearing before this Court on 2 March 1998.

The costs of the proceedings in the court *a quo* are reserved for decision by the Constitutional Court in the proceedings referred to in para 1 above."[19]

"Administrative Action" under Section 24

[21] In the SCA, as stated above, counsel for all the parties were agreed that the passing of each of the resolutions constituted "administrative action" within the meaning of section 24 of the interim Constitution. This is referred to by Mahomed CJ in his judgment[20] and we were advised by counsel that no argument to the contrary was addressed to the SCA. In the argument before us, however, the respondents contended that the resolutions constituted legislative not administrative action and, accordingly, were not subject to the provisions of section 24.

[22] It thus becomes necessary to determine what is meant by "administrative action" in section 24 of the interim Constitution, whether the passing of the resolutions constituted

19 Above n 17 at 1127D-G and 681C-F respectively.

20 Id at 1123B-C and 677B-C respectively.

such action and, if not, whether this Court has the jurisdiction to determine their validity.

[23] Prior to the enactment of the interim Constitution, our superior courts asserted a power to review subordinate legislation as well as administrative and executive action. The jurisdiction to do so was said to lie in the inherent jurisdiction of the courts.[21] The legal principles and the body of law developed by the courts in the application of this power were often referred to as "administrative law". At one time the courts sought to distinguish between rules applicable to different types of action subject to review by giving them labels such as legislative, administrative, quasi-judicial and judicial. The labelling, however, was problematic and led Schreiner JA to say:[22]

> "The classification of directions and functions under the headings of 'administrative', '*quasi*-judicial' and 'judicial' has been much canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, as to the proper basis of classification, and even some disagreement as to the usefulness of the classification when achieved. I do not propose to enter into these interesting questions to a greater extent than is necessary for the decision of this case; one must be careful not to elevate what may be no more than a convenient classification into a source of legal rules.

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21 *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111 at 115.

22 *Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd* 1953 (3) SA 1 (A) at 11A-C.

What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context."

[24] In recent times there has been a tendency to avoid such classifications.[23] Even the

23 In *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231A-B; 1997 (4) BCLR 531 (A) at 541G-H, it was said that for the purpose of applying the rules of natural justice, the classification of decisions as "quasi-judicial" or "administrative" has "in effect been abandoned".

broader classification, distinguishing between legislative and administrative action, has given rise to problems. In *South African Roads Board v Johannesburg City Council*[24] Milne JA held:

> "The categorisation of statutory powers into those which are executive or administrative, on the one hand, and those, on the other hand, which when exercised give rise to delegated legislation is not always an easy one. As explained by Gardiner J in *R v Koenig* 1917 CPD 225 at 241-2, laws are general commands which place general obligations on persons; whereas a special command enjoining only particular action constitutes an administrative act (see also *Byers v Chinn and Another* 1928 AD 322 at 329; *Mabaso v West Rand Administration Board and Another* 1982 (3) SA 977 (W) at 987A-B). These broad criteria, however, do not, as Gardiner J conceded (at 242), afford any precise test by which in every instance the distinction between laws, or legislative acts, and non-legislative, administrative acts can be determined."

[24] 1991 (4) SA 1 (A) at 12B-D.

[25] In the *Roads Board* case[25] Milne JA refers to Canadian, New Zealand and Australian cases in which courts have applied the rules of natural justice to the exercise of legislative functions by public bodies. The only case amongst those referred to which was concerned with the acts of a deliberative legislative body was *Homex Realty & Development Co Ltd v Village of Wyoming.*[26] The decision in that case was given in November 1980, prior to the passing of the Canada Act of 1982 under which the Constitution of Canada, including its Charter of Rights, became the supreme law. The case concerned the validity of a municipal by-law which was not of general application, but was directed against the property rights of a particular owner. It was held that in the circumstances of that case the owner should have been given notice and the opportunity to make representations to the council before the by-law was passed. The majority of the court held that:

> "the action taken by the council was not in substance legislative but rather quasi-judicial in character so as to attract the principle of notice and the consequential doctrine of audi

25 Id at 13-16.

26 (1980) 116 DLR (3rd) 1.

alteram partem".[27]

[27] Estey J at 23.

The minority held that it was not particularly important whether the action of the municipality was classified as legislative or quasi-judicial. What was important was the nature of the function that was being performed. They based their decision on the fact that the by-law was "aimed deliberately at limiting the [property rights] of one individual" who was accordingly entitled to some procedural safeguards.[28] All the cases referred to in this part of the judgment of Milne JA were concerned with the exercise of delegated legislative powers by public authorities, and arose in jurisdictions in which the doctrine of parliamentary sovereignty applied. The distinction between legislative and administrative or quasi-judicial acts of such authorities was then not always of importance. What was more important was the nature of the power being exercised and whether it was of a character which required the public authority to adhere to the requirements of natural justice. This was the only way in which courts in such jurisdictions could control the exercise of legislative powers by public bodies who acted within the scope of the powers delegated to them. This is not the case under our constitutional order where all legislation has to comply with the Constitution and the standards set by the bill of rights.

[26] Under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself. Whilst it might not have served any useful purpose under the previous legal order to ask

[28] Dickson J at 11.

whether or not the action of a public authority was "administrative", it is a question which must now be asked in order to give effect to section 24 of the interim Constitution and section 33 of the 1996 Constitution. The cases referred to by Milne JA are of little assistance in dealing with this question.

[27] In addressing this question it is important to distinguish between the different processes by which laws are made. Laws are frequently made by functionaries in whom the power to do so has been vested by a competent legislature. Although the result of the action taken in such circumstances may be "legislation", the process by which the legislation is made is in substance "administrative". The process by which such legislation is made is different in character to the process by which laws are made by deliberative legislative bodies such as elected municipal councils. Laws made by functionaries may well be classified as administrative; laws made by deliberative legislative bodies can seldom be so described.

[28] Prior to the enactment of the interim Constitution, courts adopted a more deferential attitude to laws made by elected legislatures than they did to laws made by administrative functionaries. Judicial review was developed and applied by South African courts against the background of a legal order which recognised the supremacy of parliament. Legislation duly passed by parliament in accordance with the then existing constitution

was not subject to judicial review, and the power of the courts was confined to interpreting such laws and applying them to the facts of the particular case. However, a distinction was drawn between parliamentary legislation and other legislation enacted by "subordinate legislatures" which was subject to judicial review. The true basis on which courts were entitled to review subordinate legislation was a matter of some dispute. Some commentators saw it as implicit in the empowering legislation which was said to be subject to certain implied provisions applicable to the delegation of legislative powers unless expressly excluded by the empowering statute. Others, and this is the prevailing view, saw it as an inherent power of the court, existing independently of the statute, which would be applied unless excluded by the empowering legislation.[29]

[29] The jurisdiction of the courts to review legislation made by subordinate legislatures was not, however, a disputed issue. In broad terms the legislation was reviewed for "legality". The subordinate legislatures were not entitled to exceed their powers, nor to exercise them in a manner inconsistent with the limitations ordinarily attaching to the delegation of legislative power. If they did so, their laws would be struck down by the courts as being invalid.

[30] When there were elected Provincial Councils, their legislation (though in a sense legislation of a subordinate legislative body) was treated differently. The legislative power

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29 *Du Preez* above n 23 at 231C-E and 541I-542B respectively.

was characterised as original and not delegated, and the only question open on judicial review was whether the legislation fell within the scope of the powers vested in the councils. If so it could not be challenged on the ground of unreasonableness or on any of the other grounds on which the exercise of delegated legislative power could be reviewed by the courts.[30] A similar approach was later adopted for the legislation passed by homeland legislatures.[31]

30 *Middleburg Municipality v Gertzen* 1914 AD 544 and the cases referred to in *Makhasa v Minister of Law and Order, Lebowa Government* 1988 (3) SA 701 (A) at 720B-E.

31 *Makhasa* above n 30 at 707G-H.

[31] Legislation enacted by municipalities was treated differently. Their power to make laws was characterised as a delegated power and municipal by-laws were exposed to judicial review. But, as Baxter points out,[32] where:

> ". . . by-laws are enacted by elected councils, the courts do tend to construe them 'benevolently' when determining their reasonableness and validity. In this respect, therefore, municipal by-laws have some resemblance to [provincial] ordinances."

[32] The introduction of the interim Constitution has radically changed the setting within which administrative law operates in South Africa. Parliament is no longer supreme. Its legislation, and the legislation of all organs of state, is now subject to constitutional control.

[33] It is within this context that consideration has to be given to the proper interpretation of the words "administrative action" in section 24, and in particular, to whether they apply to the adoption of a budget by the council of an elected local government, and to the imposition of rates and levies by such councils. Counsel for the appellants contended that "administrative action" includes all action taken pursuant to delegated powers, including legislation made pursuant to such powers. They contended further that local governments have only delegated powers and that when they impose

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32 Baxter *Administrative Law* (Juta, Cape Town 1984) at 193.

rates or make by-laws their action in doing so falls within the purview of section 24.

[34] In our view this gives too broad a meaning to "administrative action" in the context of section 24. To begin with, the term "delegated legislation" is no longer an appropriate way of describing laws made by municipal councils under the new constitutional order introduced by the interim Constitution.

[35] The interim Constitution recognises and makes provision for three levels of government - national, provincial and local. Each level of government derives its powers from the interim Constitution although, in the case of local government, the powers are subject to definition and regulation by either the national or the provincial governments which are the "competent authorities" for enacting such legislation.

[36] Under the interim Constitution there is, however, a constitutional obligation on the "competent authority" to establish local government,[33] which has to be "autonomous and, within the limits prescribed by or under law . . . entitled to regulate its affairs".[34] It is specifically provided that:

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33 Section 174(1).

34 Section 174(3).

> "Parliament or a provincial legislature shall not encroach on the powers, functions and structure of a local government to such an extent as to compromise the fundamental status, purpose and character of local government."[35]

The competent authority is also obliged to assign to a local government:

35 Section 174(4).

> " . . . such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction."[36]

[37] The interim Constitution specifically provides that:

> "[a] local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law."[37]

Moreover, section 178(2) gives local government a taxing power subject to certain conditions. One of the contentions in the present matter is that the rate levied by the EMS and the levy imposed by the TMC upon the EMS were inconsistent with the provisions of this section. The provisions of section 178(2) are considered in more detail in paragraph 87 of this judgment.

[38] The constitutional status of a local government is thus materially different to what it was when parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected

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36 Section 175(2).

37 Section 175(4).

local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.

[39] It is correct, as counsel for the appellants pointed out, that the detailed powers and functions of local governments have to be determined by laws of a competent authority.[38] This does not mean, however, that the powers they exercise are "delegated" powers. Provincial Councils, for instance, exercised powers which were vested in them by the South Africa Act,[39] by Acts of Parliament, and by Proclamations made under the Financial Relations Act[40] and subsequent legislation. As Grosskopf JA pointed out in *Makhasa's* case,[41] this did not prevent the powers from being regarded as "original" and not "delegated".

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38 Section 175(1).

39 Act 9 of 1909.

40 Act 10 of 1913.

41 Above n 30 at 720H-721F.

[40] It is not necessary in the present case to attempt to characterise the powers of local government under the new constitutional order, or to define the grounds on which the exercise of such powers by an elected local government council itself can be reviewed by the courts. The exercise of such powers, like the exercise of the powers of all other organs of state, is subject to constitutional review which, as we describe later, includes review for "legality". Whether they are also subject to review on other grounds need not now be decided.

[41] Whilst section 24 of the interim Constitution[42] no doubt applies to the exercise of powers delegated by a council to its functionaries, it is difficult to see how it can have any application to by-laws made by the council itself. The council is a deliberative legislative body whose members are elected. The legislative decisions taken by them are influenced by political considerations for which they are politically accountable to the electorate. Such decisions must of course be lawful but, as we show later, the requirement of legality exists independently of, and does not depend on, the provisions of section 24(a). The

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[42] Section 24 provides that:

"Every person shall have the right to -

(a) lawful administrative action where any of his or her rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened."

procedures according to which legislative decisions are to be taken are prescribed by the Constitution,[43] the empowering legislation and the rules of the council. Whilst this legislative framework is subject to review for consistency with the Constitution, the making of by-laws and the imposition of taxes by a council in accordance with the prescribed legal framework cannot appropriately be made subject to challenge by "every person" affected by them on the grounds contemplated by section 24(b). Nor are the provisions of section 24(c) or (d) applicable to decisions taken by a deliberative legislative assembly. The deliberation ordinarily takes place in the assembly in public where the members articulate their own views on the subject of the proposed resolutions. Each member is entitled to his or her own reasons for voting for or against any resolution and is entitled to do so on political grounds. It is for the members and not the courts to judge what is relevant in such circumstances. Paragraphs 24(c) and (d) cannot sensibly be applied to such decisions.

[42] The enactment of legislation by an elected local council acting in accordance with the Constitution is, in the ordinary sense of the words, a legislative and not an administrative act. There is no "fit" between the exercise of such powers by elected councillors and the provisions of section 24.

Whether the Resolutions Dealing with the Rates, Levies and Subsidies Constitute

43 Sections 175 and 176 of the interim Constitution.

Administrative Action

[43] The question that arises for consideration is whether the action taken by the EMS in resolving to set the general rate at 6,45 cents in the Rand and the action by the TMC to levy a contribution from the EMS and the NMS and to pay the subsidies to the WMS and SMS constituted "administrative action" as contemplated by section 24 of the interim Constitution.

[44] Under the interim Constitution, as under many other constitutions,[44] the power of taxation and appropriation of government funds is reserved for legislatures. Chapter 12 of the interim Constitution establishes a National Revenue Fund into which all revenues raised or received by the national government shall be paid. Appropriations may only be made from the Fund where they are authorised by an Act of Parliament or the Constitution. Section 60 provides special procedures for bills in the national legislature that are concerned with the appropriation of revenue or imposition of taxation. The executive has

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44 In England, article 4 of the Bill of Rights of 1689 provided that the raising of taxes was a matter for Parliament only and not the Crown. See *Bowles v Bank of England* [1913] 1 Ch 57 at 84 and *Attorney-General v Wilts United Dairies* (1922) 91 LJKB 897; 38 TLR 781. Similarly it is accepted that the Crown may not spend public funds without the authority of Parliament. See *Auckland Harbour Board v The King* [1924] AC 318 at 326-7. See also section 22 of the New Zealand Constitution Act 114 of 1986. In the USA, Article I, section 8, of the Constitution confers upon Congress the "power to lay and collect taxes, duties, imposts and excises". The executive has no independent taxing power. In Australia, section 51(ii) of the Commonwealth of Australia Constitution Act of 1900 provides that the power of taxation is a legislative power reserved for the Parliament. The position is the same in Namibia in terms of article 63(2)(b) of the Constitution of the Republic of Namibia. In accordance with article 34 of the French Constitution of 1958 the French parliament must pass a law determining the rules concerning "the basis of assessment, rates, and means of recovery of taxes of all kinds". Bell *French Constitutional Law* (Clarendon Press, Oxford 1992) at 86 writes that it is "well established that the legislature alone could act in matters involving the levying of taxation".

no power to raise taxes itself. The power of taxation is also strictly regulated by the Constitution in respect of the provincial and local spheres of government. Section 156 of the interim Constitution provides that a provincial legislature shall be competent to raise taxes, levies and duties in certain circumstances. Section 159(2) provides that the appropriation of public funds must be made in accordance with a law of the provincial legislature concerned. Section 178(2) of the interim Constitution provides that a local government shall have the power to raise property rates, levies, fees, taxes and tariffs, although these must be based on a "uniform structure for its area of jurisdiction". This power, as in the case of other powers of local government[45] may also be subjected to conditions imposed by a competent legislature in certain circumstances.

[45] Below paras 53-59.

[45] It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation. There is no dispute that the rate, the levy and the subsidy under consideration in this case were determined in such a way. It does not seem to us that such action of the municipal legislatures, in resolving to set the rates, to levy the contribution and to pay a subsidy out of public funds, can be classed as administrative action as contemplated by section 24 of the interim Constitution. In the past, of course, the action of a municipal council in setting rates was considered to be an action that was subject to judicial review on the principles of administrative law,[46] but the principles upon which that jurisprudence was based are no longer applicable as we have outlined above. It follows that the imposition of the rates and the levies and the payment of the subsidies did not constitute "administrative action" under section 24 of the interim Constitution.

[46] Counsel for the appellants contended that the resolution of the TMC to raise the levy and to pay the subsidies did not constitute legislative action. Their argument was that the resolution had none of the ordinary characteristics of legislation in that the levy was

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46 See, for example, *Sehume v Atteridgeville Town Council* 1989 (1) SA 721 (T); *Sehume v Atteridgeville City Council and Another* 1992 (1) SA 41 (A) at 57I-58B. See also the approach of the New Zealand Court of Appeal in *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA), especially at 552 where the considerations of the democratic nature of local government animated the decision of the court, and in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA).

not of general application, applied for a limited period of time, and did not have to be promulgated. We have already decided that the resolutions to adopt the budget were not administrative actions. The resolution of the TMC taken for the purpose of raising the levy and paying the subsidies formed an integral part of the adoption of the budget and, as such, constituted the exercise of taxing and spending powers. Such powers are constitutionally vested in the legislature and their exercise is accordingly not administrative action.

Interpretation of the First Question Referred by the SCA

[47] The question which now arises is whether this Court may properly consider and decide the issues between the parties even though we have held that they do not fall within the ambit of section 24 of the interim Constitution.

[48] In their argument before us counsel for the applicants and the respondents accepted that, whether the resolutions in issue constituted a step in the legislative process or administrative action, the challenge to the validity of the rates and the levy based on section 178(2) of the interim Constitution was within the jurisdiction of this Court. They also accepted that in view of the provisions of section 101(5) of the interim Constitution[47] the SCA had no jurisdiction under the interim Constitution to interpret or apply section

[47] Above para 18.

178(2).

[49] They contended that this Court should dispose of the issues that are within its jurisdiction whether or not they are strictly covered by the terms of the referral order. Bearing in mind that the language of that order was determined by what was common cause at the time of the hearing before the SCA, this is clearly a practical approach to the problem that has arisen. If this Court has jurisdiction to decide whether the resolutions are inconsistent with the Constitution, no purpose would be served by declining jurisdiction to do so. The issues have been traversed fully in the judgment of the High Court and in the argument addressed to us. If they are within the jurisdiction of this Court, it would be putting form above substance if we were to refuse to deal with such issues on the grounds that the referral is limited to "administrative actions" inconsistent with the interim Constitution, and does not refer to the exercise of legislative functions inconsistent with such Constitution.

[50] Mahomed CJ in his judgment on behalf of the SCA held that:[48]

> ". . . this Court must dispose of this appeal as if the new Constitution had not been enacted, and as if its jurisdiction to adjudicate upon constitutional matters is excluded by virtue of the relevant provisions of the interim Constitution to which I have previously referred. The merits of this appeal cannot therefore be considered by this Court.
> It is, however, clearly in the interests of justice that the dispute between the parties must

[48] Above n 17 at 1126B-E and 680B-D respectively.

> be resolved by a Court of competent jurisdiction. The issues involved are issues of considerable public importance and the *quantum* of moneys in dispute are equally substantial. The matter must for these reasons be referred to the Constitutional Court for adjudication . . . ."

[51] When it ordered the referral the concern of the SCA was to ensure that the disputes, which it considered to be important but beyond its jurisdiction under the interim Constitution, should be determined by this Court. The phrase "administrative actions" was the description given to the disputed resolutions by the parties. The SCA was not called upon to consider whether this description was accurate or inaccurate.

[52] What is of importance in the present matter is whether the resolutions, and the rates and levy imposed pursuant to them, were inconsistent with the Constitution; not whether they were correctly described as administrative actions. In the circumstances the words "administrative actions" in paragraph (a) of the referral[49] should be construed as descriptive and not as limiting the constitutional challenges referred to this Court for its determination.

Constitutional Control of Local Government Legislatures

[53] As the rate, levy and subsidy do not constitute administrative action as

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49 Above para 20.

contemplated by section 24 of the interim Constitution, the question now to be considered is the extent of the constitutional controls on the exercise of the powers of local government legislatures. The primary provisions of the interim Constitution regulating local government are contained in chapter 10. To the extent, therefore, that a local government acts in breach of one of the direct and mandatory provisions of chapter 10, it is clear that that infringement will be in breach of the Constitution and subject to constitutional challenge. Local government is also subject to chapter 3 of the interim Constitution.[50]

[50] Section 7(1).

[54] It is also clear from chapter 10, as mentioned above, that the powers, functions and structures of local government provided for in the Constitution will be supplemented by powers, functions and structures provided for in other laws made by a competent authority.[51] There is no provision in the interim Constitution which expressly states that where a local government acts ultra vires its empowering statutes it acts unconstitutionally, but it seems that the proposition must be correct for the following reasons.

[55] There are a series of provisions in chapter 10 itself which make it plain that a local government's powers to act are limited to the powers conferred by the Constitution or laws of a competent authority. For example, section 174(3) provides that:

> "A local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs."

And section 175(4) provides that:

> "A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law."

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51 Section 175(1).

[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law,[52] recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In *The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada*[53] the Supreme Court of Canada held that:

> "Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen,* [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source."[54]

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52 See Dicey *Introduction to the Study of the Law of the Constitution* 10 ed (Macmillan Press, London 1959) at 193, in which Dicey refers to this aspect of the rule of law in the following terms:
"We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.
. . . .
With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." [Footnotes omitted.]

53 An as yet unreported judgment of the Canadian Supreme Court delivered on 20 August 1998 at para 72.

54 See too, for example, *Reference Re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th)

1 at 24, where the Supreme Court of Canada held that:
"Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982, the principle is clearly implicit in the very nature of a constitution. The Constitution, as the supreme law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution."

In Germany, article 20(3) of the Basic Law confirms the *rechtstaatprinzip* which is related to the concept of the rule of law.[55] The importance attached to this principle is underscored by the fact that article 79(3) prohibits any amendment of it. It is a principle which applies also to the Länder or provinces.[56]

[57] The principle is also expressly recognised in the 1996 Constitution. Section 1 provides that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a

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55 Article 20(3) provides that:

> "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

56 By virtue of article 28(1), which provides in relevant part that:

> "The constitutional order in the Länder shall conform to the principles of the republican, democratic and social state governed by the rule of law ('Rechtsstaates') within the meaning of this Basic Law."

See the discussion in Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2ed (Duke University Press, London 1997) at 36-7 and Currie *The Constitution of the Federal Republic of Germany* (University of Chicago Press, Chicago 1994) at 18-20.

> multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[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 section 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.

[60] It remains for us to consider whether in this case the EMS in fixing the rates payable, and the TMC in levying a contribution from the EMS and NMS and resolving to pay subsidies to the WMS and SMS, acted within their powers.

The Levying of Rates

[61] Section 178(2) below clearly does apply to the rates levied by the EMS upon land situated within its area of jurisdiction.

[62] The increase in rates levied by the EMS lay at the heart of the dispute between the parties. It was submitted on behalf of the appellants that the rate failed to comply with the provisions of section 178(2) because it was not necessary in order for it to exercise its powers or perform its functions. More particularly, it was submitted that the amount of the rate was calculated with regard to the needs not of the EMS but of the TMC, the WMS and the SMS.

[63] The answer to the submission of the appellants is that the budget of the EMS was drafted on the assumption that during the financial year in question (1 July 1996 to 30 June 1997) the EMS would have to pay to the TMC the contribution of R 438 330 000. The budget of any local authority reflects items of anticipated expenditure. In a given year any such item might turn out to have been unnecessarily included. A claim threatened may be withdrawn or successfully contested, or it may turn out to be for a lower (or higher) amount. Where an amount has been incorrectly but reasonably included as an item of expenditure the fact that it turns out not to be payable at all would in no way invalidate the

budget or decisions taken in consequence of its adoption.[57] It follows that where it turns out that the rate levied on property was unnecessarily high, the levy of such a rate would in no way be invalid or subject to attack. The surplus in revenue that the rate might then yield would be a source which the local authority could use to defray any lawful payments which might have to be made during the financial year in question; it could be brought forward to the ensuing financial year; or it could also be used to allow a rebate to ratepayers. That the contribution would become payable was accepted by the members and officials of the EMS. There is no suggestion on the papers and it was not argued that this belief that it was payable by the EMS to the TMC was anything but bona fide and reasonable. In the circumstances, the EMS had no option but to provide for the expenditure and levy a rate sufficient to enable it to make the payment. If the contribution was not validly levied by the TMC, that fact would in no way render the determination and imposition of the rate by the EMS in this case subject to attack.

[64] It follows, in our view, that the attack on the validity of the levying of the general rate of 6,45 cents in the Rand by the EMS must fail.

The Attack on the Budgets of the TMC and EMS Based on Sections 29 and 58 of the LGO

[57] It is not necessary to decide whether a decision taken in good faith but not reasonably would lead to the setting aside of a rate. In the present case it could not be said that the EMS acted unreasonably in making provision for payment of the contribution.

[65] Section 29 of the LGO provides, inter alia, that:

> "[t]he council shall from time to time appoint a finance committee for regulating and controlling the finances of the council."

And section 58 reads thus:

> "(1) Before the expiry of any financial year the finance committee shall draw up and present at any ordinary or special meeting of the council a detailed estimate of the revenue and expenditure of the council for the next financial year. A copy of such statement shall be recorded in the minutes of the council.
>
> (2) No expenditure shall be incurred by the council otherwise than in accordance with the estimate of revenue and expenditure, referred to in sub-section (1), which has been approved by the council: Provided that expenditure additional to that authorized by such estimate may be incurred upon the recommendation of the finance committee and with the approval of the council."

[66] It was common cause between counsel, and correctly so, that these provisions apply to both the TMC and substructures, all of which are deemed by the LGTA to be local authorities to which the relevant provisions of the LGO apply.[58]

[67] The attack on the manner in which the budget of the EMS was approved is based on the following facts:

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[58] Section 16(2) of the LGTA provides that:

> "Subject to the provisions of this Act and any proclamation issued thereunder, the provisions of the laws applying to local authorities in the province concerned shall *mutatis mutandis* apply to any transitional council or transitional metropolitan substructure referred to in subsection (1)."

(a) The functions of a finance committee were conferred by the EMS council on its executive committee;

(b) On 19 June 1996, at a meeting of the executive committee, a report of the Metropolitan Finance Services, a department of the TMC, was tabled. It reflected the expenditure by the EMS of the amount of R 678 305 000, income of R 1 116 635, and a surplus of R 438 330 635. In respect of expenditure there were no line items, that is individual items describing what money was to be spent on them. There were similarly no line items in respect of income.

(c) At the meeting of 19 June 1996, the executive committee resolved to recommend to the EMS council that the amounts referred to above be approved and that the EMS pay to the TMC the levy of R 438 330 000 "to be adjusted at the end of the 1996/97 financial year".

(d) Notice was given on 21 June 1996 of a special meeting of the EMS council to be held on 24 June 1996. One of the items on the agenda related to the estimates for the 1996/97 financial year. It was recorded that the detailed breakdown of the budget would be circulated separately in book form.

(e) That book contained the line items in respect of expenditure and income for the 1996/97 financial year. It became available to members of the EMS council on Saturday, 22 June 1996, that is two days prior to the council meeting.

[68] On behalf of the appellants it was submitted that there was no compliance by the executive committee with the provisions of section 58 of the LGO in that it failed to "draw up and present" to the council a "detailed estimate of the revenue and expenditure" of the EMS for the following financial year.

[69] A similar attack was directed against the manner in which the budget of the TMC was dealt with by its executive committee to which were also delegated the powers of a finance committee. The budget book containing the relevant line items was made available to members of the TMC council on the Saturday prior to the meeting at which its 1996/97 budget was approved. That meeting was held on Wednesday 26 June 1996.

[70] The respondents did not dispute the facts set out in paragraphs 67 and 69 above. They referred, however, to the following additional undisputed facts:

(a) Each of the four substructures had two representatives on the Budget Advisory Committee of the TMC and all of the executive committees participated in the Joint Executive Committee.

(b) On 20 May 1996, the Budget Advisory Committee considered the detailed allocation of income and expenditure of the various old local government administrations.

(c) On 5 June 1996, after the work of the Budget Advisory Committee had been completed, the executive committees of the TMC and the four substructures met and considered the detailed allocation of income and expenditure of the old administration.

(d) Prior to the meetings of the executive committees of the EMS and TMC, respectively, the detailed estimates of expenditure and income were available to all the members on computer. Members of the respective executive committees were able to examine the line items and were entitled to printouts thereof.

(e) The globular amounts approved by the executive committees of the EMS and TMC respectively were based upon the amounts which had been available and debated at the meeting of the Budget Advisory Committee on 20 May 1996 and which were, as aforesaid, available on computer.

(f) In the case of both the EMS and TMC, the detailed estimates of expenditure and income were prepared at the instance of the respective executive committees.

(g) The detailed budget books were not prepared prior to final approval of the estimates by the committee in order to avoid wasted printing costs.

[71] We have no doubt that on the facts stated above, which were common cause, there was effective compliance by the executive committees of both the EMS and TMC with the

provisions of section 58 of the LGO. That provision in no way required the executive committee itself to draw up and consider every item in the estimates. As appears from the documents which form part of the record, those estimates run to over a hundred pages of closely typed figures. Indeed, it was not disputed by the appellants' counsel that the expression "draw up" used in section 58 means "have drawn up". The duty of the finance committee (in this case the respective executive committees) was no more than to "present" the budget to the council; in effect that is what was done by each of them. It is the council and not the finance committee which must approve the budget including the detailed financial estimates. The manifest purpose of section 58 is to ensure that when it considers the budget the council has before it all the information it requires to make an informed decision.

[72] In the light of this conclusion it becomes unnecessary to consider the further submission on behalf of the respondents that even if there was non-compliance by the executive committees with the provisions of section 58 of the LGO that would not have been fatal to the resolutions of the two councils adopting the estimates for the 1996/97 financial year.

Conclusion on the Validity of the Rate

[73] It follows from the conclusions expressed above that we are of the view that the

general rate of 6,45 cents in the Rand was validly levied by the EMS.

The Lawfulness of the Levy of Contributions by the TMC on the EMS and the NMS

[74] The respondents sought to justify the lawfulness of the levy of the contributions on the EMS and NMS on two grounds. The first was that the EMS had the power to make the grant to the TMC and the other three substructures under the powers granted to local authorities by section 79(15)(i) of the LGO. The second was the power conferred upon it by the provisions of item 23(c) of annexure A to Proclamation 35. We shall consider both grounds in turn.

The Reliance on Section 79(15)(i) of the LGO

[75] In his judgment,[59] Goldstein J found as a source of the power for the EMS to make the payment of the contribution to the TMC the provisions of section 79(15)(i) of the LGO. It is there provided that:

> "79. The council may do all or any of the following things, namely -
>
> (15) make a grant or donation -
>
> (i) to another local authority".

59 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1997 (5) BCLR 657 (W) at 663D-G.

The learned Judge held that this section did in fact empower the EMS to make the payment of the contribution to the TMC. He came to this conclusion on the basis that the TMC is deemed to be a local authority.[60]

[60] Above n 58; and section 1 of annexure J to Proclamation 42, substituting section 1 of Proclamation 24.

[76] We agree with Kriegler J[61] that section 79(15)(i) of the LGO is applicable to the TMC and the substructures. In our judgment, however, section 79(15)(i) of the LGO cannot assist the respondents. Even if there were officials of the EMS who would have been prepared to make a grant or donation of R 438 330 000 to the TMC for its benefit and that of the WMS and SMS, that is not the decision which was taken by the council of the EMS. The members of the council considered the draft budget on the assumption that it fell within the powers of the TMC to levy a contribution upon it for the purpose of subsidising itself and for paying subsidies to the WMS and SMS. What the attitude of the members of the EMS council would have been had they been faced with a decision to make a donation or grant of the amount in question is not known. The consideration of that question was never before them.

[77] There is consequently no room for an argument that the difference is one of form and not of substance. The difference between a decision to make provision in a budget for a contribution assumed to be validly levied, on the one hand, and a decision whether or not to make a grant or donation, on the other, is clearly one of substance.

[78] It follows, in our opinion, that the reliance upon section 79(15)(i) of the LGO cannot succeed.

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61 Below paras 138-141.

A Divided Court

[79] In the next section of this judgment we consider the second ground relied on by the respondents to support the lawfulness of the levies made by the TMC on the EMS and NMS. As will emerge, we come to the conclusion that this ground of justification must also fail. This conclusion is supported by two of our colleagues. However five other of our colleagues have reached a contrary conclusion. As we are evenly divided on this issue, there is not a majority in favour of reversing Goldstein J's refusal to declare the levy and subsidies inconsistent with the Constitution. That makes it unnecessary for us to consider the effect which an unlawful levy might have on the lawfulness of the subsidies paid by the TMC to the WMS and SMS.

The Reliance on Item 23(c) of Annexure A to Proclamation 35

[80] We are all in agreement that it is a legitimate aim and function of local government to eliminate the disparities and disadvantages that are a consequence of the policies of the past and to ensure, as rapidly as possible, the upgrading of services in the previously disadvantaged areas so that equal services will be provided to all residents. Our disagreement lies in whether the TMC, in seeking to achieve this objective in the present case, acted in accordance with the requirements of item 23(c). Counsel for the appellants argued that the levy imposed by the TMC was unlawful on the ground that, contrary to the

express language of item 23(c) of annexure A, it was not an equitable contribution based on the gross or rates income of the EMS and NMS. This submission was rejected in the judgment of the High Court. On the basis of the reasoning set out below, Goldstein J found that the TMC levy had been both equitable and based on gross or rates income:

> "In deciding the contribution the TMC may consider the gross income and then levy a portion thereof depending upon what is equitable in the circumstances. And there is no reason why one of such circumstances should not be the budgeted expenditure of the EMSS."[62]

[81] The appellants challenged the legality of the levy imposed by the TMC on the EMS and the NMS. They contended that the levy had to comply with two requirements. First, with section 178(2) of the interim Constitution which meant that it had to "be based on a uniform structure for its area of jurisdiction". Secondly, with item 23(c) of annexure A which meant that it had also to be "based on gross or rates income". Neither of these requirements, so it was contended, was met.

[82] The respondents argued that section 178(2) and item 23(c) were independent sources of power on which the levy could be "based". In their submission the levy in the present matter complied with both provisions. They went on to argue, however, that if the levy complied with either provision, it would be a sufficient answer to the appellants'

62 Above n 59 at 662E.

claim.

[83] In order to deal with these arguments it is necessary to interpret the provisions of section 178(2) and item 23(c). For this purpose we considered it necessary after the conclusion of oral argument to call for further written argument on the interpretation of section 178(2), and asked the parties to consider whether, on a proper construction of the section, it in fact applied to the compulsory contribution levied by the TMC on the EMS and the NMS. In their supplementary argument both parties stuck to the contentions that had been advanced by them in oral argument, and neither contended that the levy fell outside the purview of section 178(2).

[84] We will consider first the respondent's argument that item 23(c) and section 178(2) are independent sources of power and that reliance can be placed on either to justify the TMC's levy. For the purposes of this argument we will assume that this levy was in fact a levy within the meaning of section 178(2).

[85] Item 23(c) is included in schedule 2 of the LGTA which prescribes the minimum powers that must be vested in any TMC. Its meaning in Proclamation 35 must therefore accord with its meaning in schedule 2. In order to deal with the respondents' argument it is therefore necessary to consider the provisions of the LGTA, and this must be done in the light of the provisions of the interim Constitution. The LGTA established the framework

for transition to democratic local government. It was drafted at approximately the same time as the interim Constitution[63] and formed part of the transitional "package" agreed upon during the multi-party negotiation process.[64]

[86] The interim Constitution recognises that the transition is to be made in terms of the LGTA[65] and the LGTA recognises that the transition must be carried out in accordance with the requirements of the interim Constitution. There are also references in the LGTA

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63 The LGTA was assented to by the President on 20 January 1994 and came into effect on 2 February 1994. The interim Constitution was assented to on 25 January 1994 and commenced on 27 April 1994, the date on which the first democratic elections were held.

64 *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 181.

65 Section 245 of the interim Constitution.

to the interim Constitution as originally drafted.[66] If possible the LGTA should be construed so as to be consistent with the interim Constitution.

[87] Section 178(2) of the interim Constitution serves two purposes. First, it guarantees sources of income to local governments. It is clear that one of these sources of income is rates on property. Secondly, it offers protection to local government residents against the imposition of differential property rates, levies, fees, taxes and tariffs in ways which might be prejudicial to ratepayers, consumers or other persons subject to such charges. Hence the proviso that all taxes and charges should be based on a uniform structure. The proviso limits the powers of local authorities and other competent authorities. It is not open to a competent authority to vest in a local authority the power to raise taxes or impose charges which are subject to section 178(2) in a manner inconsistent with its requirements. If item 23(c) constitutes a "levy" within the meaning of section 178(2) then the contribution exacted from the substructures must comply with both the requirements of item 23(c) itself and the requirements of section 178(2).

[88] The respondents' argument that item 23(c) is a source of power independent of

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66 See for instance the definition of "Administrator" in section 1(1) and the reference to section 124 of the interim Constitution in section 3(1)(a).

section 178(2) is only tenable if the compulsory contribution is not a "levy" within the meaning of section 178(2). It follows that whether item 23(c) is construed as a condition for raising a levy prescribed in the LGTA by a competent authority as contemplated by section 178(2), or as a power vested in the TMC independently of section 178(2), the "levy" has to comply with the provisions of item 23(c).

[89] The respondents contended that:

(a) the purpose of item 23(c) was to enable the TMC to act as the vehicle for redistribution of resources between developed and underdeveloped substructures and that the dominant requirement of item 23(c) was therefore that the levy be "equitable";

(b) it was not seriously contended by the appellants that the requirement of "equitability" had not been met;

(c) the phrase "based on gross or rates income" served to qualify the term "equitable" by identifying the source of funds from which the levy might properly be drawn. That requirement, so the respondents contended, had been met because the source of levy on the EMS and the NMS was their surplus income;

(d) if a closer relationship between the levy and the gross or rates incomes is required, such relationship had been established;

(e) the rates of the substructures had been determined in a way which produced a surplus, and this surplus was exacted by the TMC as the contribution; and

(f) the surpluses, and thus the contributions, were therefore based on rates or gross income.

[90] Item 24 of schedule 2 to the LGTA empowers a TMC to deal with "the receipt, allocation and distribution of intergovernmental grants". Neither the schedule nor the LGTA itself, as it stood at the time relevant to these proceedings, vested any other specific power of redistribution in the TMC. The LGTA has since been amended to make provision for this, but we must deal with the Act as it was at the time the levy was exacted.[67]

67 Section 10C of the LGTA and the amended schedule 2 introduced by section 8 of the Local Government Transition Act Second Amendment Act 97 of 1996.

[91] It is not clear why the LGTA tied the power of a TMC to exact a contribution from a substructure to one based on gross or rates income.[68] Possibly it was done to provide a "uniform structure" for the levies. The fact that a levy could then be imposed on "any" substructure[69] is not necessarily inconsistent with this. The uniform structure could be one which, when applied, results in a levy being imposed on some but not all the substructures in a metropolitan area. Like income tax, a platform of gross or rates income could, for instance, be set and the levy imposed only on those substructures whose gross or rates income, as the case may be, is above the level of the platform. If item 23(c) has to be consistent with section 178(2) this construction would achieve that purpose. There may possibly be other "uniform structures" based on gross or rates income which also yield results leading to a levy being imposed on one or more, but not all, of the substructures.

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68 This has now been amended by Act 97 of 1996. Section 1(c) of the new schedule 2 empowers a TMC to:
"determine and claim an equitable contribution from all metropolitan local councils: Provided that such contribution shall be determined, and the utilisation of the sum thereof shall be, as prescribed."

69 Section 1(c) of the new schedule 2 now refers to a "contribution from *all* metropolitan local councils". [Emphasis added.]

[92] Whatever the reason for the formulation of item 23(c) might be, the fact remains that a TMC has to comply with its provisions if it wishes to exact a contribution from a substructure. The respondents' argument fails to attribute meaning and significance to the distinct requirements of item 23(c). The mere fact that a levy may be said to be equitable in all the circumstances does not, in our view, dispense with or detract from the stipulation that it must also be based on gross or rates income. Rates income is part of gross income. If all that was required by item 23(c) was that the levy should be paid out of income and not out of capital there would be no purpose in providing for alternative sources on which the levy could be based. Nor would it be appropriate to refer to the levy being based on such incomes. "Based" implies that there should also be some relationship between the calculation of the levy and the incomes referred to.

[93] The levy imposed by the TMC on the EMS and the NMS was not fixed as a proportion or a percentage of either gross or rates income, nor was it related directly in any way to either gross or rates income. This is apparent from the following table:

	Gross Income	**Rates Income**	**Levy**	**Subsidy**	**Expenditure**
EMS	1 116 635 000	655 529 000	438 330 000		678 305 000
NMS	554 082 000	246 641 000	4 223 000		549 859 000

SMS	1 054 864 000	432 230 000		187 945 000	1 242 809 000
WMS	249 575 000	74 506 000		92 128 000	341 701 000

The evidence shows that the levy was not "based on" gross or rates income. It was a surplus produced from the total income after agreement had been reached as to the expenditure to be incurred by the two substructures.

[94] To read "gross or rates income" as meaning "net income after allowing for all expenses of the substructure" is to ignore the inclusion of the words "gross or rates" in the phrase and thereby to do violence to the provision as a whole.

[95] We are accordingly of the opinion that even if item 23(c) is treated as an independent source of power, the levy imposed by the TMC on the EMS and the NMS was not based on gross or rates income. It is therefore not necessary to decide whether, if the levy was subject to section 178(2), the proviso to that subsection was met.

The Second Question Referred by the SCA

[96] The second question referred to this Court by the SCA is whether, if the "administrative actions" are consistent with the interim Constitution:

> " . . . the interim Constitution preserved for the predecessor of the Supreme Court of

> Appeal any residual or concurrent jurisdiction to adjudicate upon any attack made by the appellants on the administrative actions referred to in subpara *(a)* above on the grounds that such administrative actions fell to be set aside, reviewed or corrected at common law."[70]

[97] If this question is literally construed, it would fall away since we have found that the actions were not "administrative actions" within section 24 of the interim Constitution. However, it follows from our interpretation of the first question referred to us by the SCA that a literal interpretation of this second question would not give effect to the intention of the SCA.

[98] What the SCA wished to have determined by this Court is whether, if any of the impugned resolutions of the TMC and EMS are in fact consistent with the interim Constitution, that Constitution preserved for the predecessor of the SCA any residual or concurrent jurisdiction to adjudicate upon any such attack made by the appellants on such resolutions.

[99] This question arises because of the provisions of section 101(5) of the interim Constitution which provides:

> "The Appellate Division shall have no jurisdiction to adjudicate any matter within the

[70] Above n 17 at 1127E-G and 681D-F respectively.

jurisdiction of the Constitutional Court."

[100] In dealing with the implications of section 101(5) Mahomed CJ said:[71]

> "It could conceivably be argued that the interim Constitution did not exclude the jurisdiction of the Appellate Division to adjudicate on the cogency of any attack on administrative actions where such attacks are based on common-law grounds, and that the Appellate Division continues to enjoy some kind of parallel jurisdiction with the Constitutional Court where the relevant attack is founded on common-law grounds. I have some doubt as to whether this would be a sound argument. But in any event, this would also involve an interpretation of the relevant provisions of the interim Constitution. This falls within the jurisdiction of the Constitutional Court and for that reason outside the jurisdiction of the Appellate Division in terms of the provisions of s 101(5). This was indeed the approach which commended itself to this Court in the case of *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 (2) SA 886 (A) at 891B-C in which this Court accordingly referred the matter to the Constitutional Court for adjudication."

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71 Id at 1124B-D and 678B-D respectively. In a footnote to this passage Mahomed CJ noted that in the subsequent hearing of *Rudolph's* case the question was not answered because the action in that case had been taken before the interim Constitution had come into force.

In *Rudolph's* case[72] Plewman AJA also expressed doubt as to whether the Appellate Division had a parallel common law jurisdiction to deal with matters within the purview of section 24 of the interim Constitution. Because of the importance of section 24 in the overall constitutional scheme it seems to us that in answering the second question put to us by the SCA we should pay particular attention to the problems arising from that section.

[101] Section 7 of the interim Constitution lays down that the bill of rights (of which section 24 is part) binds all legislative and executive organs of state,[73] that it applies to "all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution",[74] and that a person whose rights entrenched under chapter 3 have been infringed or threatened is entitled "to apply to a competent court of law for

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72 *Rudolph and Another v Commissioner for Inland Revenue and Others* 1996 (2) SA 886 (A) at 891C.

73 Section 7(1).

74 Section 7(2).

appropriate relief".[75]

[102] If section 24 is read with section 7 it follows that all law regulating administrative actions, and all administrative decisions taken, which affect the rights and interests of persons, must now be consistent with section 24. Such decisions must therefore be lawful and procedurally fair. If they are not, they will be inconsistent with the Constitution.

[75] Section 7(4)(a).

[103] Counsel for the respondents contended in their argument that section 101(5) should not be construed as depriving the Appellate Division of its common law jurisdiction to review administrative action, a jurisdiction which existed prior to the enactment of the Constitution. Section 24, so the argument went, laid down minimum standards to which all administrative action had to comply. The Appellate Division would have regard to this and would develop the common law of administrative action in accordance with the "spirit, purport and objects" of the Constitution, including the provisions of section 24. The Constitutional Court would retain a jurisdiction which would be limited to ensuring that the law was developed consistently with these provisions. In support of these contentions reliance was placed on the judgments of this Court in *Du Plessis and Others v De Klerk and Another*[76] and *Gardener v Whitaker*.[77]

[104] In *Du Plessis* this Court held that the bill of rights in chapter 3 of the interim Constitution was directly applicable to organs of state only. The provisions were, however, indirectly applicable to persons other than organs of state. The indirect

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76 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

77 1996 (4) SA 337 (CC); 1996 (6) BCLR 775 (CC).

application would be effected by developing the common law with "due regard to the spirit, purport and objects" of chapter 3 in accordance with the requirements of section 35(3) of the interim Constitution. In *Gardener* it was held, following *Du Plessis*, that the bill of rights was not directly applicable to a private law dispute concerning an alleged defamation. This distinction between the direct application of the bill of rights to organs of state and its indirect application to private law disputes through the development of the common law under section 35(3) allowed the Appellate Division a jurisdiction which, in the view of the majority of this Court, would have been denied to it if the bill of rights had been directly applicable to such matters. This was one of the reasons which led the majority of this court in *Du Plessis* to distinguish between the direct and indirect application of the bill of rights, and to hold that the direct application of chapter 3 ordinarily applied only to claims against organs of state. The passages in the judgments on which counsel for the respondents relied dealt with the indirect application of the bill of rights. They cannot be removed from that context and made to apply to cases in which the direct application of the bill of rights is in issue.

[105] It is clear that section 24 establishes a right to lawful and procedurally fair administrative action. It is clear also that section 7(1) has the effect that section 24 is directly binding on members of the executive and the legislature to the extent that they perform "administrative actions". In addition, section 7(2) applies the provisions of section 24 to administrative decisions taken and acts performed while the interim

Constitution is in force. Section 98 vests jurisdiction in this Court as the court of final instance in respect of the "interpretation, protection and enforcement of the Constitution, including alleged violations or threatened violations" of section 24. In the circumstances, there can be no doubt, as is implicit in the formulation of the question, that persons denied lawful or procedurally fair administrative action can look to the courts to enforce rights vested in them by section 24,[78] and that in terms of the Constitution this Court is the court of final instance in respect of any such dispute. Whether the direct application of the provisions of section 24 of the interim Constitution means that the common law must meet the requirements of the section, or that the section grounds a cause of action independent of the common law need not be decided. In either event the direct application of the interim Constitution is a matter over which this Court has jurisdiction. If that is so, it is hard to avoid the conclusion that has been reached by the Appellate Division, that under the interim Constitution it has no jurisdiction over matters concerning "administrative action" as contemplated by section 24 of the interim Constitution. Similarly in this case, in the light of the conclusions to which we have come, section 101(5) of the interim Constitution would effectively have deprived the SCA of jurisdiction to determine the legality of the disputed resolutions.

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78 *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (C).

[106] The jurisdictional scheme laid down by the interim Constitution and its implications were clearly unsatisfactory. It meant that in many important areas of law the courts would be denied the benefit of the experience and expertise of the Appellate Division. It also led to uncertainty, particularly in cases in which constitutional and other issues were raised, as to the court to which an appeal should be noted. Fortunately the position has been changed by the 1996 Constitution. The SCA has been given jurisdiction to interpret and enforce the Constitution, and the Constitutional Court has been given the jurisdiction to develop the common law in matters within its jurisdiction.

[107] Item 17 of schedule 6 to the 1996 Constitution provides as follows:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

This provision was considered by this court in *S v Pennington and Another*.[79] Applicants in that case argued that the provisions of the 1996 Constitution should be applied to a case in which the trial had been concluded before the 1993 Constitution came into force. Chaskalson P, for a unanimous Court, rejected this argument as follows:

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[79] 1997 (4) SA 1076 (CC); 1997 (10) BCLR 1413 (CC).

> "The fallacy in this argument is that even if the appeals were to be disposed of under the 1996 Constitution there would be no reason why the decisions in *Mhlungu* and *Du Plessis v De Klerk* should not be followed. The appellants were tried and convicted at a time when there was no Bill of Rights. According to the Supreme Court of Appeal they were fairly tried in accordance with the law then in force and they were correctly convicted in accordance with that law. The subsequent introduction of a Bill of Rights in the interim Constitution and the 1996 Constitution did not convert what were regular proceedings at the time of their trial, into irregular proceedings; nor could it give rise to a right to claim that the conduct of the trial at a time when the new constitutional order was not in force impaired the appellants' constitutional right to dignity."[80]

The general principle asserted in *Mhlungu* and *Du Plessis* therefore remains applicable. As Mahomed DP held in a concurring judgment in *Du Plessis*:[81]

> "The lawfulness or unlawfulness of any conduct at the time it took place is determined by the applicable law at that time."

[108] In *Pennington* we were not concerned with the question whether item 17 could be applied to the procedural and jurisdictional provisions of the 1996 Constitution that were pending when the 1996 Constitution came into force.[82] In his judgment in the SCA, Mahomed CJ considered this possibility and came to the conclusion that:[83]

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80 Id at para 35.

81 Above n 76 at para 68.

82 See the Court's reliance on item 17 of schedule 6 in the case of *S v Ntsele* 1997 (11) BCLR 1543 (CC).

83 Above n 17 at 1125C-D and 679C-D respectively.

> "[t]here is no room in the language of the section for giving to the interim Constitution only a limping applicability: operative when substantive provisions are in issue but inoperative when jurisdictional issues are involved."

[109] We appreciate the force in this argument. It seems to us, however, that there are compelling interests of justice that the SCA should not continue to be denied jurisdiction to deal with constitutional matters which fall to be determined under the interim Constitution.

[110] Item 17 of schedule 6 serves the important purpose of ensuring that matters will ordinarily be decided in accordance with the law in force when the alleged infringement of the Constitution occurred. The SCA now has jurisdiction under the 1996 Constitution to deal with constitutional matters which are instituted after the date on which the 1996 Constitution came into force. If, in any such matter, the alleged constitutional infringement occurred at a time when the interim Constitution was in force, then in accordance with the rule in *Du Plessis* the matter would ordinarily fall to be dealt with in terms of the interim Constitution. In such matters the SCA has jurisdiction to interpret and apply the interim Constitution and would be obliged to do so in order to discharge its appellate functions. There is no logical reason why the SCA should be considered competent to enforce the interim Constitution in proceedings which were not pending on 4 February 1997, but precluded from doing so if the proceedings were pending.

[111] Matters continue to come before the SCA in which there is doubt as to its jurisdiction under the interim Constitution. The jurisdictional and procedural difficulties that arise in such cases are considerable. Grave doubts may be raised as to whether it is possible to seal hermetically the jurisdiction of the two courts as section 101(5) seems to contemplate. Even if it is possible, no purpose would be served by continuing to do so in the light of the jurisdictional changes brought about by the 1996 Constitution. The continued application of the jurisdictional provisions of the interim Constitution to cases pending before the SCA leads to disruptions, delays and unnecessary costs in the process of disposing of appeals. Equally important is the fact that the expertise of the SCA is not being brought to bear in "constitutional matters". The present case affords an illustration of both these propositions.

[112] If the SCA were to deal with pending matters under the 1996 Constitution, no injustice would be done to the litigants in such cases. In applying the 1996 Constitution the SCA would have regard to the date on which the alleged infringement of the Constitution occurred (and unless the interests of justice required otherwise) it would deal with the matter under its constitutional jurisdiction by applying the law in force at the time the infringement occurred.[84] In other words, it would deal with such matters in exactly the same way as it would have dealt with them if the proceedings had commenced after 4 February 1997.

[113] Reverting to the question put to us by the SCA, our view is that it is in the interests of justice that in respect of constitutional issues under the interim Constitution which may in future come before it, the SCA, as the successor of the Appellate Division, should exercise the jurisdiction conferred upon it over constitutional matters by chapter 8 of the 1996 Constitution. Its exercise of that jurisdiction, however, will not affect the principle articulated in *Mhlungu* and *Du Plessis* in terms of which the constitutionality of an act is to be determined by the substantive provisions applicable at the time.

The Order

[114] Formally this matter comes before this Court as a referral from the SCA under the provisions of section 102(6) of the interim Constitution. The referral arose in the light of the finding by the SCA that it did not have jurisdiction to decide the issues between the parties. That followed from its categorisation of the resolutions impugned by the appellants as "administrative actions". The issues clearly fall within the jurisdiction of this Court and all the parties have requested that we should dispose of the matter as if it were an appeal from the High Court to this Court. That this Court should, if possible,

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84 *Pennington* above n 79 at paras 35 and 36.

finally dispose of the matter was also the intention of the SCA. As it was put by Mahomed CJ:

> "It is, however, clearly in the interests of justice that the dispute between the parties must be resolved by a court of competent jurisdiction."[85]

In these circumstances we have concluded that, as this Court has jurisdiction to determine all the issues between the parties, it should exercise its appellate jurisdiction to do so.

[115] In the light of the decision reached in the appeal from the judgment of Goldstein J the answer to the first question is that the resolutions identified and impugned by the appellants cannot be declared to be inconsistent with the interim Constitution. This Court is unanimous that the rates levied by the EMS were lawful and that the attack made on them by the appellants must be dismissed. It is in respect of the lawfulness of the contributions levied by the TMC on the EMS and the NMS that we are evenly divided. The effect in this case is that the appeal on those issues against the judgment of Goldstein J is not successful and must be dismissed. In the result the appeal as a whole stands to be dismissed. The Court is also unanimous in respect of the answer to the second question which was referred to it by the SCA.

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85 Above n 17 at 1126C-D and 680C respectively.

[116] The following order is made:

(1) The questions referred to this Court by the SCA are answered as follows:

(a) The resolutions identified and impugned in the notice of motion are not declared to be inconsistent with the interim Constitution.

(b) The SCA has no residual jurisdiction to adjudicate upon the lawfulness of the impugned resolutions. However, in respect of constitutional issues under the interim Constitution which may in future come before the SCA, including matters within the purview of section 24 of the interim Constitution, it is in the interests of justice for that Court to exercise the jurisdiction conferred upon it by chapter 8 of the 1996 Constitution.

(2) The appeal against the order in the Witwatersrand High Court is dismissed with costs, including those costs occasioned by the employment of two counsel by the first respondent and the second to fifth respondents, respectively.

CHASKALSON P, GOLDSTONE J AND O'REGAN J

Ackermann J and Madala J concur in the judgment of Chaskalson P, Goldstone J and O'Regan J.

KRIEGLER J:

[117] The joint judgment of Chaskalson P, Goldstone J and O'Regan J shows that this case raises many difficult questions of law. The factual context in which those questions have to be determined is no less complex. With regard to the bulk of the issues there is unanimity among the members of the Court. On one aspect there is disagreement, however. That is whether the disputed levy is invalid on the grounds set out in paragraph 16(a) of the joint judgment. My colleagues' judgment articulates their conclusion that the levy is indeed invalid on one of those grounds. This judgment serves to explain why I have come to a different conclusion on that question.[1] Although the difference is relatively narrow,

[1] For the sake of clarity the terminology and abbreviations used in the joint judgment are retained.

its resolution to one side or the other is crucial to the outcome of the case.[2] For the rest, I am in respectful agreement with the reasons and conclusions expressed with such clarity in the joint judgment.

[2] Because we are agreed that the rate cannot be set aside, the practical difference, as far as the appellants are concerned, is small.

[118] In essence the conclusion of my colleagues is that the levy imposed by the TMC on the EMS fell foul of the provisions of item 23(c) of annexure A to Proclamation 35.[3] Their conclusion is that the levy was not "based on the gross or rates income" of the EMS, thus constituting non-compliance with one of the requirements of item 23(c). My conclusion, on the other hand, is that the levy did indeed comply with that requirement.

[119] The attack on behalf of the appellants was more broadly based but, because of their conclusion relating to the particular requirement of item 23(c), my colleagues did not have to address the other grounds of alleged invalidity. My conclusion, however, renders it necessary to address those grounds as well. They are, first, that the levy was not "an equitable contribution" as prescribed by item 23(c) and, second, that it did not comply with the requirements of section 178(2) of the interim Constitution.[4] The section 178(2) requirements on which counsel for the appellants focused, were that the levy had to be "based on a uniform structure for [the TMC's] area of jurisdiction" and that it had to

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[3] The item reads as follows:

> "23. The power to levy and claim -
>
> (c) an equitable contribution from any transitional metropolitan substructure based on the gross [or] rates income of such transitional metropolitan substructure."

[4] Section 178(2) of the Constitution of the Republic of South Africa Act 200 of 1993 reads as follows:

> "A local government shall, subject to such conditions as may be prescribed by law of a competent legislature after taking into consideration any recommendations of the Financial and Fiscal Commission, be competent to levy and recover such property rates, levies, fees, taxes and tariffs as may be necessary to exercise its powers and perform its functions: Provided that within each local government such rates, levies, fees, taxes and tariffs shall be based on a uniform structure for its area of jurisdiction."

have been "necessary to exercise its powers and perform its functions".

[120] Before turning to a discussion of each of the contentions outlined above, it is necessary to sketch in more detail the historical context in which this case has to be determined. The bare bones appear in the introduction to the joint judgment[5] and it is necessary to put some flesh on them.

5 Above paras 2-15.

[121] As the joint judgment points out,[6] the impact of the apartheid system is particularly evident in the area of local government. Nowhere is the contrast in existential reality more stark then in the residential areas of the cities, towns and villages of South Africa. In this case we are concerned with the vast conurbation that developed in the economic heartland of the country. More specifically we are concerned with the consequences, primarily socio-economic but ultimately political, of the vastly inferior living conditions imposed on the majority of residents, merely by reason of their skin colour.

[122] The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas. The results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by vanguards of informal settlements and guarded by towering floodlights, out of stonethrow reach. Even if only a short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities . . . we find white suburbia. How did it happen? Quite simply: ". . . in reality the economic relationship between the white and black (African, coloured and Indian) halves of the city was similar to a

6 Above para 2.

colonial relationship of exploitation and unequal exchange."[7]

[7] Swilling and Boya "Local governance in transition" in *Managing Sustainable Development in South Africa* FitzGerald et al (eds) (Oxford University Press, Cape Town 1995) at 171.

[123] The genius lay in the system of apartheid zoning: major commercial and industrial areas were located in the white areas, and fell within the jurisdiction of white local authorities. Not only did this impose a cost burden on those who had to commute the distance to and from these centres of economic activity, but the bulk of the tax base was located in the white city. Black people came and went, and worked and spent, leaving behind their labour and money. Despite the racial segregation "[t]his . . . exploitative logic . . . held the apartheid city together as a single interdependent urban system."[8]

[124] The transformation of local government that we are experiencing today preceded and in part anticipated even the constitutional negotiations:

> "The form and function of the apartheid city was resisted and challenged in numerous ways during the 1980s. While one-off demonstrations, stayaways, strikes and collective violent crowd action against specific targets were commonplace, it was sustained mass action that tended to have a more decisive effect. Consumer and rent boycotts were mounted by communities across the country. Although success depended on the strength of grassroots organization and the capabilities of leadership, these localized collective actions created stalemates that neither the targets of these actions (white shopkeepers, Black Local Authorities), nor the social movements behind them, could tolerate for very

[8] Id.

long. The targets were deprived of money, and the constituencies of the social movements were deprived of services. So-called local-level negotiations were frequently the result. By the early 1990s, hundreds of local-level negotiations had broken out across the length and breadth of the country. Inevitably, the parties involved were representatives of the various local government structures, business, municipal service providers, civic associations and residents organizations, political parties, trade unions and numerous community organizations. These interactions resulted in the creation of local negotiating forums.

. . . .

[By] 1992-93 the national negotiators realized that a national framework was needed to guide the local government transition via the local forums. The result was the establishment of the National Local Government Negotiating Forum (NLGNF) in early 1993. . . . [which] very rapidly negotiated a framework for guiding the local government transition. This . . . was eventually enacted as the Local Government Transitional Act in late 1993. This Act provided for the transformation of the local forums into statutory forums with prescribed structures and procedures. The local forums were then mandated to negotiate locally appropriate solutions consistent with the principles of non-racialism, democracy, accountability and one tax base. Their first task was to appoint new local government structures. . . . In metropolitan areas a two-level system was provided for, namely a Transitional Metropolitan Council (TMC) for the whole metropolitan area, underpinned by Metropolitan Sub-Structures (MSSs).

. . . .

Finally, it should be noted that the Local Government Transitional Act and its implications were written into Chapter 10 of the constitution. This meant, therefore, that locally-driven negotiated transformation of local governance across the country was protected by both the constitution and by legislation."[9]

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[9] Id at 173-6.

[125] It is clear that the socio-economic and political dynamics in metropolitan areas during the decade preceding the adoption of the LGTA and the dawning of the new constitutional era in South Africa, not only played a pivotal role in breaking the political deadlock that had loomed ever larger, but gave impetus to and informed the thinking underlying both the LGTA and chapter 10 of the interim Constitution. The singular difficulties and unique challenges of restructuring the basic structure of urban existence were - and still are - infinitely complex and appropriate responses will require decades of endeavour.

[126] This complex restructuring had, of course, to begin in the context of, and in a manner which complies with, the reconstruction and development of South African society mandated and required by the interim Constitution as a whole, and the duties imposed by that Constitution on local government structures in particular, by chapter 10. In the first instance, chapter 10, the constitutional charter for local government in South Africa, prescribed in section 174(1) that "[l]ocal government shall be established for the residents of areas demarcated by law of a competent authority". In terms of subsection (2) provision could be made "for categories of metropolitan, urban and rural local governments with differentiated powers, functions and structures", while subsection (3) demanded that "[a] local government shall be autonomous and, within the limits prescribed by or under law, shall be entitled to regulate its affairs"; and sub-section (4) expressly prohibited Parliament and provincial legislatures from encroaching on

the powers, functions and structures of local government "to such an extent as to compromise the fundamental status, purpose and character of local government." Thus, for the first time in our history, provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.

[127] One of the most important elements of chapter 10 is represented by section 175 which provides:

> "(1) The powers, functions and structures of local government shall be determined by law of a competent authority.
>
> (2) A local government shall be assigned such powers and functions as may be necessary to provide services for the maintenance and promotion of the well-being of all persons within its area of jurisdiction.
>
> (3) A local government shall, to the extent determined in any applicable law, make provision for access by all persons residing within its area of jurisdiction to water, sanitation, transportation facilities, electricity, primary health services, education, housing and security within a safe and healthy environment, provided that such services and amenities can be rendered in a sustainable manner and are financially and physically practicable.
>
> (4) A local government shall have the power to make by-laws not inconsistent with this Constitution or an Act of Parliament or an applicable provincial law.
>
> (5) A local government shall have such executive powers as to allow it to function effectively."

Subsection (6) permits the assignment of specified functions by local government

and need not here be quoted.

[128] Consistently with the express injunction to establish autonomous local government, section 178(2) of the interim Constitution[10] prescribes, subject to certain conditions, for local government to have an independent revenue base, while subsection (3) says that it is entitled to "an equitable allocation by the provincial government of funds."

[129] At the same time, and in tandem with chapter 10 of the interim Constitution, the transformation of local government continued under the LGTA. It was, as mentioned before, a discrete aspect of the transition process which brought its own problems and proposed solutions. The essence of the exercise was put as follows in *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others*:[11]

> "The Transition Act was intended and drafted to govern the reconstruction of local government from A to Z. (In many areas of the country 'reconstruction' was a euphemism for creation.) Its principles and terms were separately negotiated. It was then passed by the 'old' Parliament as part of the statutory scaffolding agreed upon by the negotiating parties as necessary before, during and after the transition of national and provincial government.
>
> The Transition Act represents a 'turn-key operation', commencing with tentative

10 Above n 4.

11 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 162(e) and (f).

> negotiating forums for local councils, continuing with temporary local government structures, and carrying on until new structures have been democratically elected and put in place."

[130] The relevant provisions of the LGTA and details of the various steps taken under those provisions are so crisply and clearly identified and explained in the joint judgment,[12] that it would be pointless to repeat the exercise. Suffice it to say that the upshot was that when the TMC and its four substructures came to budget for the 1996/97 financial year there were no less than seven separate legislative sources of power to do so. These were section 178(2) of the interim Constitution, the LGTA, the three Premier's Proclamations promulgated under the LGTA, the Local Government Ordinance 17 of 1939 (T) and the Local Authorities Rating Ordinance 11 of 1977 (T). The two ordinances were, of course, applicable by virtue of the fact that, in terms of the proclamations the TMC and the substructures were clothed with the powers and functions of local authorities.

[131] I revert to the specific issues that need to be addressed in this judgment. It is of course fundamental to the argument on behalf of the appellants relating to the non-compliance with section 178(2), that the levy in question is governed by that section. The argument was that where the subsection speaks of "levies", it included levies of the kind in issue in this case. I have serious reservations about

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[12] Above paras 3-14.

the soundness of that contention. There is indeed much to be said for the contention that section 178(2), relating as it does to the revenue base that had to be allowed to local government in future legislation, had nothing to do with inter-governmental payments of the kind in issue in this case. In the interests of brevity, however, I am prepared to accept for the purposes of this judgment that the provisions of section 178(2) of the interim Constitution are indeed applicable to the levy in issue in this case. Such assumption does not affect my conclusion regarding the validity of the levy.

[132] The crux of the appellant's challenge in so far as it related to section 178(2) was that the TMC had no power to take from one substructure in order to give to another. In broad terms, as I understood the challenge, the fundamental objection to a TMC taking from one substructure to enable it to give to another, was leveled at what has come to be called cross-subsidisation. That is an emotionally laden term, broadly used to characterise governmental measures whereby previously advantaged communities are taxed for the benefit of the previously disadvantaged.[13] Although it would be foolish to ignore such sentiments it would be even more unwise to allow them to cloud this analysis. If the TMC had the power to make a grant to a substructure and, what is more, to make that grant out of money which it had taken from another substructure, would there be any merit in the

[13] In South African parlance these are politically correct euphemisms for "white" and "black" respectively. See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) at paras 57-63.

objection to the lawfulness of the disputed levy? The answer is clearly no. The validity of the challenge based on this provision of section 178(2) can therefore be determined by paying attention to two separate but interrelated sub-questions. First, did the TMC have the power to make a grant to a substructure? If so, could it make that grant from a contribution levied from another substructure? I address each of these questions in turn.

[133] On the assumption of the applicability of section 178(2), I turn to a consideration of the powers and duties of the TMC to raise the levy in question. It will be convenient to address next the question whether the levy complies with the provisions of section 178(2) in the sense that it was necessary for the exercise of the powers and performance of the functions of the TMC. As the joint judgment makes clear, the levy was intended and used for two purposes viz: for the performance of the functions of the TMC itself and to enable it to pay grants to the WMS and SMS in order to enable these entities in turn to exercise their powers and perform their functions. No argument was advanced to us, nor could any have been, to the effect that the first of these purposes did not fall fairly and squarely within the ambit of section 178(2).

[134] The "powers and duties" vested in the TMC by annexure A to Proclamation 35 should in the main be understood as "functional competences", that is matters in regard to which the TMC can pass by-laws and discharge executive functions under section 175(4) and (5) of the interim Constitution. The same is true of the

"powers and duties" conferred on the substructures by annexure B. Item 23 of annexure A does, however, confer "powers" in the strict sense of the term since it empowers the TMC to levy and claim regional services levies, service charges and contributions of the kind in issue in this case.

[135] The listing of the functional competences in annexures A and B of Proclamation 35 does not mean that the TMC and the substructures were not entitled to exercise powers vested in them by other laws. They did, for instance, have the constitutional power to raise certain monies under section 178(2) of the interim Constitution.[14] The EMS therefore had the power to raise rates in terms of section 178(2) read with the Rating Ordinance 11 of 1977.

[136] Moreover, section 16(2) of the LGTA provides that:

> "Subject to the provisions of this Act and any proclamation issued thereunder, the provisions of the laws applying to local authorities in the province concerned shall *mutatis mutandis* apply to any transitional council or transitional metropolitan substructure referred to in subsection (1)."

[14] Above n 4.

A TMC is a transitional council within the meaning of the LGTA.[15] The words "subject to" mean that the laws referred to in section 16(2) exist alongside the LGTA and any proclamations issued thereunder, and can be relied on unless they clash with such provisions. If they do, the provisions of the LGTA or of a proclamation prevail. But if they do not clash, "the phrase does nothing".[16] Two questions therefore arise. Can a legislative provision be identified in these laws which empowered the TMC to subsidise one or more of its substructures? And if so, was such a power in conflict with any provision of the LGTA or applicable proclamation?

[137] In respect of the first question, both the TMC and the substructures are deemed to be local authorities for purposes of the LGO. This has certain consequences. The LGO makes provision for the way in which a local authority is to function. Some of its provisions are purely procedural, some place constraints on the behaviour of councillors and employees and, importantly, some deal with financial and other powers.

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15 Section 1(1) of the LGTA.

16 *C & J Clark Ltd v Inland Revenue Commissioners* (1973) 2 All ER 513 at 520e-f, cited with approval in *S v Marwane* 1982 (3) SA 717 (A) at 747H-748D. See also *Zantsi v Council of State, Ciskei, and Others* 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 27, *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) at para 8, and *Ex Parte Speaker of the Western Cape Provincial Legislature: In re Certification of the Constitution of the Western Cape, 1997* 1997 (4) SA 795 (CC); 1997 (9) BCLR 1167 (CC) at para 32.

[138] Amongst the powers vested in local governments under the LGO are powers which are necessary for performing certain specific functional competences vested in councils. Where appropriate, these powers can be relied upon by either the TMC or its substructures to justify legislative and executive action necessary for the implementation of the functional competences vested in them by Proclamation 35. The TMC may, for example, exercise the power granted by section 79(1)(a) of the LGO to:

> "make, construct, alter, keep clean and in repair the roads, streets, squares and open spaces, dams, canals, reservoirs, water-courses, furrows, ferries, culverts, and bridges vested in [each of them] . . . or situated or to be situated on land of which the council is the owner".

This power is relevant to its functional competences in respect of arterial metropolitan roads and stormwater drainage, and possibly also to other competences in annexure A.

[139] The fact that the TMC has such a power, does not mean that annexure B must be construed as denying a similar power to the substructures. The substructures clearly have that power, which can be exercised in respect of roads, bridges, etc, which are situated or to be situated on land of which they are the owners or which are under their control. And the same applies to other specific powers relevant to the functional competences of the TMC and the

substructures referred to in section 79 and in other provisions of the LGO.

[140] There are also certain powers set out in section 79 of the LGO which are "general" in the sense that they are unrelated to specific functional competences. These include the powers to provide financial assistance to persons affected by disaster, to establish and maintain public lavatories, to guarantee loans required by employees for particular purposes, to establish housing schemes for employees and to grant loans to corporations erecting houses for employees, to pay employees' medical or funeral expenses in certain circumstances, to promote and oppose legislation in the interest of the municipality, and to establish bursary and loan funds to assist students (whether or not related to an employee) in attending approved colleges.[17] Like any other local authority, the TMC and its substructures are entitled to exercise general powers of this sort, provided of course that they are not inconsistent with the LGTA or any proclamation issued thereunder.

[17] Sections 79(17A), (27), (28)bis, (28)ter, (28)quat, (31), (48) and (51) of the LGO.

[141] The power to make grants falls within this category of general powers. Sections 79(15), (16) and (17)[18] all deal with the power to make grants and donations. Once regard is had to the detailed provisions of these sections and the various purposes for which grants and donations can be made, it becomes clear that the powers are in many instances expressed in general terms and thus not tied to a particular functional competence of a council. Perhaps the clearest example of such a power is contained in section 79(15)(i), which authorises a local government to "make a grant or donation to another local authority."

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[18] The relevant provisions of section 79(15), (16) and (17) read as follows:

"The council may do all or any of the following things, namely -

(15) make a grant or donation -
  (i) to another local authority;

(16) (a) make a grant or donation . . . where such grant or donation would, in the opinion of the council, be in the interest of the council or the inhabitants of the municipality . . . ;

(17) (a) subject to the provisions of this subsection, donate land to -
  (vii) another local authority".

[142] It has not been suggested, nor do I see any reason for concluding, that sections 79(15), (16) and (17) are in conflict with the provisions of the LGTA or of any proclamation to which our attention has been drawn.

[143] Counsel for the appellants contended that the history of the relevant legislative instruments revealed an intention on the part of the drafters to exclude the power of a transitional metropolitan council to make grants to its substructures. The argument proceeds on the basis that the TMC had previously been specifically empowered by Proclamation 24 to manage the whole transition process, and for that purpose it had the power and duty to ensure that its substructures had adequate finances. It also had the power to determine contributions to be paid to it by substructures "to enable it inter alia to fulfil its Reconstruction and Development Programme redistribution responsibilities."[19] There was to be one budget for the TMC and its substructures to be determined by the TMC in consultation with the substructures.[20] The levying of the rates and taxes was to depend on the allocation of responsibilities to be made by the TMC.[21] The fact that those powers were repealed by Proclamation 42, so the argument went, demonstrated an

19 Section 15(1)(k) of Proclamation 24.

20 Section 20(1) and (2) of Proclamation 24.

21 Section 19(2) of Proclamation 24.

intention to deprive the TMC of the power to make grants to the substructures.

[144] The inference which counsel for the appellants seeks to draw from the repeal of the provisions to which I have referred, seems to be too sweeping. During the pre-interim phase the TMC was charged with managing and directing the transition process within the metropolitan region. It accordingly had a duty to ensure that sound administrative capacities were established in its fledgling substructures, and was given specific power for this purpose. Once the various substructures had found their feet, the TMC was relieved of this responsibility and the specific powers were no longer necessary. Nevertheless the repeal of those provisions of Proclamation 24 which had previously concentrated power and responsibility in the hands of the TMC did not deprive the TMC of its powers under the LGO to make grants to its substructures.

[145] At the material time, therefore, the TMC no longer had a direct duty to ensure that its substructures enjoyed adequate finances, nor a power to take charge of the budgeting process for the metropolitan area. Nevertheless this did not entail that the TMC could not make grants or donations to them under the general powers conferred by the LGO, or that it could not be party to a voluntary arrangement whereby the TMC and its substructures agreed to draft their budgets in consultation with each other, and to ensure that services within the metropolitan area were provided on an overall and equitable basis.

[146] In effect what the appellants ask us to hold is that the repeal of certain provisions in Proclamation 24 limits the purposes for which TMC grants may be made. The fact that the TMC was no longer obliged to make such grants, did not mean that it was no longer entitled to do so.

[147] The relationship of interdependence which exists between a metropolitan council and its substructures provides every reason for the TMC to make a grant to enable a substructure to meet the needs of persons within its area of jurisdiction. Services provided by a substructure not only benefit the metropolitan area as a whole but also lessen the burden on the TMC itself to assume responsibility for such matters. If regard is had to the overlap between the respective functional competences of the TMC and its substructures, and the fact that improved health, housing and roads in the substructures would reduce the burden on the TMC to provide ambulance and hospital services, it is difficult to see how the making of a grant could be said to be beyond the TMC's power. This relationship of interdependence is reinforced by section 175(2) of the interim Constitution[22] which imposes a duty on the TMC to provide for the "well-being of all the persons within its area of jurisdiction." In the light of this constitutional duty, and the interdependence of the TMC and its substructures, it would make no sense to hold that the TMC may not make grants to its substructure but that all other local authorities may do so.

[22] See also sections 175(3) and (6).

[148] One further consideration should be mentioned in relation to the question of grants by a metropolitan council to a substructure, a factor so immanent and pervasive that it is prone to being overlooked. It is that the genesis, the very reason for the creation of metropolitan areas, was to promote, facilitate and expedite the eradication of the inequalities of the past. A single city without a single tax-base achieves little. A single tax-base without the power to prioritise and direct expenditure is equally ineffective. In order to fulfil its essential purpose, a metropolitan council needs to be able to re-allocate budgetary benefits. One would therefore not readily conclude that the drafters of the interim Constitution, the LGTA and the three proclamations built a transitional vehicle but didn't give it an engine.

[149] In my view the question whether the TMC had the power to make a grant to a substructure must therefore be answered in the affirmative.

[150] The question which then arises is whether the TMC was entitled to impose a levy on one substructure and use funds derived from that levy not only to meet its own direct expenses, but also for the purpose of making a grant to another. In other words, can it be said that, although the TMC had a general power to make grants to its substructures, it acted unlawfully in making the grants in the present case since it did so pursuant to a scheme inconsistent with Proclamation 35? This contention underlies the argument of counsel for the appellants. It is, in substance, an objection to the TMC and its

substructures agreeing to arrange their affairs in a manner which the appellants contend is consistent with the repealed proclamation but inconsistent with what is contemplated by Proclamation 35.

[151] Proclamation 35 must be construed in the light of what is implicit in the concept of metropolitan government. The relationship between a TMC and its substructures, and the interdependence of the substructures themselves, call for co-operation in the governance of the metropolitan area. What is more, the concept inherently entails a substantial degree of balancing of needs and means throughout the metropolitan area.

[152] There seems to be no reason why the TMC and its substructures should not agree that it is in the interests of them all to co-ordinate their revenue and expenditure in ways which would be advantageous to the metropolitan area as a whole. Provided this is permissible, and I know of no reason why it should not be so, it follows that it is legitimate for a TMC to make grants to one or more of its substructures to enable them to implement decisions that are taken.

[153] If such a decision is taken, the making of such grants becomes part of the TMC's expenditure. In such circumstances it can exercise its revenue raising powers under item 23 of annexure A for the purpose of meeting that expenditure.

[154] If the TMC has this power, it cannot be "unlawful" for it to negotiate with its substructures before exercising its power under item 23(c). Hence there is no reason why the TMC should not ascertain from its substructures whether there is any objection to its imposing a levy on them for such expenditure and, in the absence of objection, negotiate the amount of the levy or even how it is to be calculated and used.

[155] In my view the TMC was entitled to make grants to the WMS and SMS. The funds required to enable it to do so could be derived from its revenue sources, which included the power to levy contributions from any substructure. It could thus impose a levy to raise funds which it required for its budgeted expenditure, including expenditure to be incurred in respect of grants to the WMS and the SMS.

[156] One last contention raised on behalf of the appellants has to be considered. The contention was that the levy was not "based on a uniform structure" for the TMC's area of jurisdiction. Before dealing with this issue it is necessary to supplement the background information by supplying salient details which are immediately relevant to this part of the judgment.

[157] In the early 1990's, when the then black local authorities and their white counterparts commenced discussing the possibility of establishing a unified tax

base, the vivid slogan was born: “one city, one tax base.” It aptly encapsulated the fundamental objective of the ongoing discussions that commenced between the Johannesburg City Council and its southern neighbours and subsequently extended to Sandton and its neighbours. The pre-interim phase introduced by the LGTA and Proclamation 24 was the first step towards the attainment of that ultimate objective. During that phase, the whole of local government in the relevant area was effectively collapsed into the then TMC. Effectively the whole of the metropolitan area not only had one tax-base, but a single administration using the pooled human and material resources of the original thirteen local authorities for the benefit of the whole metropolitan area.

[158] Then, when the first democratic elections were due to be held, the interim phase commenced. The process was infinitely complicated. All that need be mentioned for present purposes is that the affairs of the new TMC and the four new substructures were inextricably intertwined - territorially, financially and functionally. Therefore, the political and administrative masters of the TMC and the substructures had no choice but to work in close co-operation with each other. A problem that loomed large was the preparation of budgets for each of the five local authorities that came into being with the commencement of the interim phase on 1 November 1995.

[159] Although from that date onwards each local authority was nominally and

legally empowered and obliged to conduct and manage its own financial affairs, in reality none of the substructures had the capacity to do so. There remained a great deal of overlapping and commingling of staff and equipment and indeed there was no clarity as to what property belonged to which structure. Inevitably, because only the TMC possessed the requisite administrative capacity, it took the lead in the early budgetary planning for all five of the new structures. Whereas in the pre-interim phase the TMC legally had complete control of the finances of the metropolitan area and its administration, for sound practical reasons it continued to play the dominant role, especially in the early days of the interim phase. In fact, the Metropolitan Finance Department acted as the financial administration for the TMC and each of the substructures, which had to prepare their respective budgets for the 1996/97 financial year not later than the end of June 1996. To that end the substructures had no option but to rely exclusively on the capacity of the TMC.

[160] Predictably and wisely, early in April 1996 the TMC and the four substructures created a budgetary liaison body, the Budget Advisory Committee (the BAC), in order to co-ordinate and jointly plan their business plans and budget strategies. From at least that stage onwards they worked in close harmony with one another. Each substructure commenced by inviting "wish lists" for the ensuing year from its departments and from the public at large. The BAC then proceeded to trim and prioritise each rudimentary estimate of expenditure prepared on the basis of the "wish lists". Acting as a team dealing jointly with

each budget, the BAC applied uniform methods in establishing the "wish lists" and in the subsequent sifting, prioritising, trimming or omission of items listed. This they did by applying uniform criteria in the preparation of each budget. The BAC worked on the basis of several principles agreed upon unanimously. The first was that, for budgetary purposes, it had to recognise that it was dealing with one single metropolitan area, although previously disadvantaged areas were to enjoy priority. The second principle, like the first to apply uniformly throughout the metropolitan area, was that resources would be directed in the first place towards the provision of municipal services rather than towards institutional expenditure. The third principle was that a growth constraint of 10% as compared with the previous year, imposed by the national fiscus, would be applied uniformly throughout the metropolitan area as best this could be done.

[161] The process followed by the BAC led to the preparation of a set of co-ordinated expenditure budgets for the TMC and the substructures. Indeed, it constituted more than co-ordination. The territorial and functional commonality of all five structures and their consequent jurisdictional overlapping made it impossible to demarcate with any precision or finality which particular local authority had to allow for a specific item of expenditure in the ensuing year. Moreover, none of the substructures had any historical framework for the preparation of its budget. Notwithstanding the difficulties and uncertainties, an expenditure budget had to be, and indeed was, prepared for each substructure as

well as for the TMC.

[162] The next step was to devise ways and means of financing the expenditure envisaged in each structure's expenditure budget. Once again the exercise was performed in close harmony and on the basis of agreed uniform principles. The first was that each budget, and therefore all of them combined, had to balance. The second was that, wherever feasible, uniform service tariffs would apply throughout the metropolitan area. The third, harking back to the first principle of the early 1990's relating to a common tax base, was that a uniform structure of property rating would apply throughout the metropolitan area. That meant that a uniform basic rate and a uniform system of rebate percentages and criteria would apply.

[163] Giving priority to the needs of the previously disadvantaged communities within the metropolitan area, while insisting on balanced budgets throughout, inevitably entailed an equalisation process. It was accordingly part and parcel of the BAC strategy that, ultimately, balanced budgets would be achieved by the TMC imposing levies on surpluses and subsidising deficits. Absent any realistic prospect of significant funding from outside the metropolitan area, this was the only solution. The policy decided on by the BAC - and subsequently endorsed by the executive committees and full councils of the TMC and each of the substructures - was uniform and did not relate to any specific contributor or

beneficiary. Irrespective of their identities, substructures with deficits would be subsidised and those with surpluses would be levied.

[164] The BAC realised that the TMC could not reasonably hope for government approval of Regional Service Council rates increases and that outside funding for municipal activities was likely to be minimal. The committee examined the various service tariffs with a view to possible increases and determined a uniform service tariff structure for the entire metropolitan area. It then turned its attention to property rates. In adherence to the principle that there had to be a uniform revenue production structure within the entire metropolitan area, and therefore within each substructure, it was decided that a uniform basic rate of 6,45 cents in the Rand would be applied in the 1996/97 financial year.

[165] In the result there was a uniform service tariff structure throughout the metropolitan area; there was also a uniform property rating structure with a uniform basic rate, uniform rebate percentages and uniform rebate criteria. No user of services nor any ratepayer would be liable for municipal imposts on a discriminatory basis. No substructure was singled out for a discriminatory levy. Whether a levy was to be imposed or a subsidy to be awarded, was determined by objectively determined and uniformly applicable criteria. It follows that the contention that the levies exacted by the TMC from the EMS and NMS were not based on a uniform structure for its area of jurisdiction, is manifestly unfounded.

[166] The thrust of the complaint, however, is that because the levy was imposed by the TMC in order to effect the transfer of the EMS's surplus to the TMC in order to enable it in turn to subsidise both its own deficit and the deficits of the WMS and the SMS, it nevertheless fell foul of the "uniform structure" requirement of section 178(2) of the interim Constitution and the "based on rates or gross income" requirement of item 23(c) of Proclamation 35.

[167] I cannot understand how it can be said that anything other than a uniform structure was applied in this case. The very purpose of the co-ordination, and the eminently desirable result it produced, was to apply a uniform method of estimating both the income and the expenditure of each substructure. It was an express component of that method that each budget would be balanced and that such balance would be attained uniformly by taking away any excess and supplementing any deficit. What section 178(2) requires is a uniform structure on the basis of which revenue was to be raised, not identical rates or tariffs. In this regard the comments made by Langa DP in *Walker's* case[23] concerning municipal tariffs, apply with equal force to the kind of levy in issue in this case:

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[23] Above n 13 at para 85.

> "The constitutional requirement that the rates and tariffs charged by a local government shall be based on a 'uniform structure' needs to be interpreted within the context of local government as it exists. There are enormous disparities in the quality of facilities and services provided by local government authorities to users within their municipal areas. Particularly important is the fact that there are for historical reasons enormous differences in the overall quality of services provided to what were formerly white suburbs and black townships. In addition, it should be borne in mind that local governments provide services to widely different categories of users, such as industrial, commercial and agricultural users as well as to domestic consumers in formal and informal settlements. Section 178(2) does not stipulate that a uniform tariff be established but that it be based on a 'uniform structure'. It should not be interpreted therefore to mean that the tariff must provide for identical rates to be charged to all consumers regardless of the quality of service or the type or circumstances of the user. That could produce a highly inequitable result. The section requires instead that local governments establish a 'uniform structure' for tariffs. In my view, this requirement compels local governments to have a clear set of tariffs applicable to users within their areas. The tariffs themselves may vary from user to user, depending on the type of user and the quality of service provided. As long as there is a clear structure established, and differentiation within that structure is rationally related to the quality of service and type or circumstances of the user, the obligation imposed by s 178(2) will have been met."

In this case there was indeed a uniform basis for charging all municipal imposts throughout the metropolitan area.

[168] It follows that the challenge based on the non-compliance with section 178(2) fails.

[169] It remains to consider whether the challenge based on the perceived non-

compliance with the requirements of the item 23(c) holds water. It will be recalled that the challenge was two-pronged, targeting the words "equitable contribution" and the words "based on gross or rates income". With regard to the first point, little need be said. It was but faintly argued, and rightly so. The word "equitable" is well known to lawyers and connotes a broad value judgment based on what is fair. In the present context that value judgment had to be made by the TMC and there is no warrant to second-guess its decisions in question. On the contrary, the continuing legacy of discrimination clearly justified the imposition of a levy on the richer areas to assist in upgrading the services of the poorer. There has been no suggestion of bad faith, and if the other bases for attack on the levy fail, there is no ground for suggesting that it was not fair and should be set aside on the ground of inequity.

[170] Turning then to the question of whether the levy was or was not based on the gross or rates income of the EMS, the first point to be noted is that item 23(c) uses a phrase of wide generality to link the contribution to the income, namely, "based on". In the case of such a protean phrase a resort to dictionary definitions is futile. Colourless words must derive their meaning from their context. What is significant, is that the drafters of item 23(c) used such a vague term and did not specify that a levy had to be, for instance, a fraction or percentage of income.[24]

[24] For the sake of brevity I use the word "income" instead of repeating the term "gross or rates income".

All that item 23(c) requires, is some relationship between contribution and income. It does not even require that the contribution should be based on the income alone.

[171] Here there was, as I have concluded, a uniform structure for the raising of levies in the TMC area, which resulted in a levy being imposed on some substructures but not on all. That uniform structure entailed accepting a platform above which a levy would be imposed upon a substructure. The common platform above which the levy was payable was a substructure's estimated expenditure. To suggest (and there was understandably no such suggestion) that such a platform could be constituted only by a specific amount, is to be over mechanical.

[172] The amount of the levy was also directly related to a substructure's gross income. The excess of such gross income over and above expenditure constituted the levy. It may be that the levy was based on both expenditure and gross income or that, more broadly speaking, the levy was based on a proper consideration of the budget of the substructure as a whole, but this does not matter. There is no suggestion that the contribution should be based only on gross income, nor could there be, for such a limitation would fly in the face of the requirement of equity.

[173] The levy equalled the surplus. That does not - and cannot in logic - mean

that the levy is not related to the gross income. On the contrary, that is the very basis for its calculation. When the estimated expenditure is subtracted from the gross income, the balance equals the amount of the levy. Put differently, the amount of the levy is based on two variables, one of which is the substructure's gross income (and the other its expenditure).

[174] The circumstance that there was agreement between the respective executive committees and in the BAC (on which the TMC and all substructures were represented) that the budgets to be recommended to the respective councils for adoption would reflect a rate of 6,45 cents in the Rand, because the gross income of the EMS would then make provision for the levy, does not result in that levy not being based on the gross income. What in fact happened pursuant to agreements reached between the executive committees of the TMC and EMS in relation to the levy to be imposed, was the following. On Monday 24 June 1996, the EMS substantially accepted the recommendations of its executive committee and passed resolutions levying a general rate of 6,45 cents in the Rand on land and rights in land situated within its area. That yielded a surplus which made it possible to make provision for the payment of a levy which, it was thought, was to be exacted by the TMC. Two days later, on Wednesday 26 June 1996, the TMC met and resolved to impose the levy which is at issue in this case.

[175] The question that arises for determination is not concerned with the basis upon

which the EMS decided on the general rate of 6,45 cents in the Rand. It is clear that that decision was, to a large extent, based on the need to provide for the payment of the anticipated levy. The true question for determination is this: on what did the TMC base its determination of the levy to be payable by the EMS?

[176] Broadly speaking, it is undoubtedly true that the TMC based its decision on the amount of the levy to be paid by the EMS, on the budget of the EMS which was before it and which had been passed two days earlier. If that budget had reflected a much smaller gross income, which would have yielded a surplus in an amount less than R 438 330 000, no surplus at all or a deficit, the decision of the TMC would undoubtedly have been different. That budget demonstrated that the levying of a general rate of 6,45 cents in the Rand had produced a gross income which was in excess of it's budgeted expenditure. It was clearly the fact that the gross income had produced a surplus which would have motivated that decision.

[177] It is with respect not correct, as my colleagues would have it,[25] that this conclusion entails reading "gross or rates income" as meaning "net income after allowing for all expenses of the substructure". The contribution was not based on net income; it was indeed the net income based on gross income and expenditure. The levy on each of the substructures was clearly a surplus

[25] Above para 94.

produced after account had been taken of the expenditure budgeted for by that substructure. That surplus was based on gross income. I am accordingly satisfied that the levy was clearly based on the gross or rates income of each of the substructures.

[178] In the result, the appellants' attacks based on the alleged non-compliance with the requirements of section 178(2) of the interim Constitution and item 23(c) of annexure A of Proclamation 35 fall to be dismissed.

[179] There may be an argument that the power of a TMC to take from one substructure and give to another, is a power which is, by necessary implication, grounded in the provisions of section 175 of the interim Constitution on the basis that the duties imposed upon the TMC (as local government) can only be effectively performed if the powers which facilitate cross-subsidisation have been impliedly conferred. There is no need to consider this aspect because of the conclusions to which I have come. It is clear though, that the duties imposed on the TMC by section 175 of the interim Constitution are an integral part of the contextual setting in which all of us have interpreted the various legislative provisions which had to be considered.

[180] In the result I concur in the order made in the joint judgment.

Langa DP, Mokgoro J, Sachs J and Yacoob J concur in the judgment of Kriegler J.

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