THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 90/2023

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**APPELLANT**

and

MALVIGENIX NPC T/A WECANWIN	**FIRST RESPONDENT**
PIETER NICOLAAS GROBLER	**SECOND RESPONDENT**
ANNA ELISABETH GROBLER	**THIRD RESPONDENT**
ETHEL MARGARET COETZEE	**FOURTH RESPONDENT**
MARTHA MARGARETHA DU PLESSIS	**FIFTH RESPONDENT**
JOHANNES JACOBUS LOMBARD	**SIXTH RESPONDENT**
RESEANE KAIZER HUMPHRY MAKOLE	**SEVENTH RESPONDENT**
YVONNE GOOD	**EIGHTH RESPONDENT**
LYNN EAST PROP (PTY) LTD	**NINTH RESPONDENT**
DIANA EDITH GEORGIADES	**TENTH RESPONDENT**
FREDERIK JACOBUS VAN DER SANDE	**ELEVENTH RESPONDENT**
JEANNE LOUISE VAN DER SANDE	**TWELFTH RESPONDENT**
EDMOUR MARCHAND	**THIRTEENTH RESPONDENT**

NADIA MARCHAND **FOURTEENTH RESPONDENT**

MARC RICHARD TRUMAN N O **FIFTEENTH RESPONDENT**

GREGORY JOHN BOUWER **SIXTEENTH RESPONDENT**

CORNELIA JOHANNA BOUWER **SEVENTEENTH RESPONDENT**

CHARLES KGOMOTSO TSOKU **EIGHTEENTH RESPONDENT**

Neutral Citation: *City of Tshwane Metropolitan Municipality v Malvigenix NPC t/a Wecanwin and Others* (90/2023) [2024] ZASCA 76 (16 May 2024)

Coram: SCHIPPERS, NICHOLLS and MOTHLE JJA and TOLMAY and MBHELE AJJA

Heard: 5 March 2024

Delivered: 16 May 2024

Summary: Local government – Municipal Property Rates Act 6 of 2004 – valuation rolls – setting aside of valuation rolls – consequence – appeal against the judgment and order of the High Court in favour of the respondents, which sought to declare unlawful the refusal by the appellant to comply with an order of the Gauteng Division of the High Court, Pretoria, as confirmed by an order of the Supreme Court of Appeal (SCA) – whether the invalidation of the appellant's 2012 supplementary valuation roll and 2013 general valuation roll, as a judgment *in rem,* required the appellant to reverse the property rates imposed in terms of the invalid valuation rolls in respect of properties owned by the respondents.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill J sitting as court of first instance):

The appeal is dismissed with costs, including costs of two counsel.

JUDGMENT

Mothle JA (Schippers and Nicholls JJA and Tolmay and Mbhele AJJA concurring)

Introduction

[1] The appellant, the City of Tshwane Metropolitan Municipality (the City) appeals against the judgment and order of the Gauteng Division of the High Court, Pretoria (the high court), granted in favour of the first respondent, Malvigenix NPC t/a Wecanwin (Wecanwin), and the second to eighteenth respondents. The high court essentially ordered the City to reverse the rates levied on properties in Lombardy Estate and Health Spa (Lombardy Estate), in terms of invalid valuation rolls. Lombardy Estate is a privately owned housing development, situated within the jurisdiction of the City. The second to eighteenth respondents are current and former property owners in the Estate.

[2] The genesis of the dispute between the City and Wecanwin is an application instituted in 2016 by the Lombardy Development (Pty) Ltd and 13 property owners in the high court, namely *Lombardy Development (Pty) Ltd and 13 Others v The City of Tshwane Metropolitan Municipality*[1] (*Lombardy*). In that case the high court declared invalid and set aside the City's 2012 supplementary valuation roll and 2013 general valuation roll (the valuation rolls), which unlawfully recategorised as 'vacant' certain properties which had until then been categorised as residential in Lombardy Estate.

---

[1] *Lombardy Development (Pty) Ltd and others v City of Tshwane Metropolitan Municipality and Another* [2021] ZAGPPHC 521.

The 13 applicants in *Lombardy* and the 17 members of Wecanwin in this appeal, were and some still are, property owners and ratepayers in Lombardy Estate.

[3] The declaration of invalidity of the 2012 SVR and the 2013 GVR was confirmed by this Court on appeal, in *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd and Others (City of Tshwane).*[2] This appeal is a sequel to *Lombardy* and *City of Tshwane*. I am thus constrained to frequently refer to these two judgments.

Background

[4] Section 229 of the Constitution empowers a municipality to impose rates on property, including other taxes, levies and duties appropriate for local government. National legislation promulgated to exercise that authority is the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act). Section 8 of the Rates Act authorises the municipality to levy different rates for different categories of properties. The categories of properties for levying rates are determined according to the actual or permitted use of that property such as use for agriculture, residence or vacant and its location within the municipality. The Regulations as published by the Minister in terms of s 19 of the Rates Act, determines the effective rate to be levied on the properties. The rates are based on the market value of the property, determined by a valuer appointed by a municipality. The valuations of the properties are published in the valuation roll in terms of s 30, 33(1) and 49(1) of the Rates Act.

[5] The City, acting in terms of the Rates Act, published the valuation rolls, promulgated for the City's newly incorporated geographic area, which previously fell under the disestablished Kungwini Local Municipality (Kungwini). In terms of the valuation rolls, the City categorised the properties in Lombardy Estate as 'vacant'. These properties were previously categorised by Kungwini as 'residential'. The rates charged on vacant properties attract far greater revenue for the City, than those categorised as residential. Consequently, the ratepayers received invoices from the

[2] *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd and Others* [2018] ZASCA 77; [2018] 3 All SA 605 (SCA).

City, reflecting massive increases in their liability for imposed rates, by as much as 700% of what they originally paid under Kungwini.[3]

[6] The Lombardy Development (Pty) Ltd and 13 property owners in Lombardy Estate, instituted review proceedings in the high court, wherein they sought a declaration of invalidity and the setting aside of the City's valuation rolls in terms of which the City had unlawfully categorised their properties as 'vacant'. The unlawfulness of the categorisation was as a result of the City failing to comply with the public consultation process provided for in s 49 of the Rates Act, when preparing the valuation rolls. On 31 May 2016, the high court declared invalid and set aside the impugned valuation rolls, in terms of which the properties were categorised as vacant.

[7] Three of the *Lombardy* orders relevant to the issues raised in this appeal, read as follows:[4]

'1 . . .

2 The respondent's [the City's] 2012 supplementary valuation roll is declared invalid and set aside to *the extent that it recategorises as "Vacant" properties situated in the municipal area of the former Kungwini local municipality formerly categorised as "Residential" (the affected properties).*

3 The respondent's 2013 general valuation roll, and all subsequent valuation rolls of the respondent are *declared invalid and set aside to the extent that they categorise the affected properties as "Vacant" unless and until the affected properties are lawfully re-categorised as such.* (Own emphasis.)

4 The imposition of the assessment rate applicable to vacant land on those of the affected properties which belonged to the applicants on 28 June 2013, the date upon which this review application was instituted, is declared invalid and set aside.'

[8] Paragraph 4 of the order concerned the assessment rate of vacant land that was imposed as a result of the categorisation introduced by the impugned valuation rolls. Tuchten J limited paragraph 4 of the declaratory order to the property rates of the applicants before him. In its judgment the court reasoned that the declaration of invalidity of the assessed rates would not extend to all affected properties in the

[3] Ibid para 5.
[4] Ibid para 10.

area, because the court knew nothing of the circumstances of the property owners who were not before it.

[9] This Court in the *City of Tshwane* confirmed the invalidity and the setting aside of the valuation rolls. It also considered whether the judgment granted by Tuchten J was confined to the properties owned by the *Lombardy* applicants. It held that it was not, and stated in paragraph 28 of its judgment:

'. . . What is more, *the City's complaint misconstrues the nature and effect of the high court's judgment.* For, whilst a judgment *in personam* relates only to the rights *inter se* the parties before the court and binds only the parties to the proceedings, one *in rem* fixes the status of the matter in the litigation. A Judgment *in rem* has effect against the whole world – *inter omnes* and not merely as between parties to the litigation before the court. *As the judgment pronounced upon the status of the particular subject-matter of the litigation in this case, it is one in rem and is conclusive against all persons whether parties or strangers to the litigation.'*[5] (Own emphasis.)

Wecanwin's case

[10] Emboldened by the success of the property owners in *Lombardy*, Wecanwin and its members demanded that the City place them in the same position as the applicants in *Lombardy* concerning the relief granted in paragraph 4 of the order. That included claims for refunds of overcharged rates. The City declined to do so, on the ground that paragraph 4 read with paragraphs 7 and 9 of the *Lombardy* order, related only to the applicants before the high court in that application. Correspondence exchanged between Wecanwin and the City on this issue failed to yield a mutually acceptable solution.

[11] In 2017, Wecanwin approached the high court, seeking a declaratory order that the City's refusal to comply with Tuchten J's judgment and order, read with *'City of Tshwane*, was unlawful. In support of this relief, Wecanwin contended that since the judgment by Tuchten J in *Lombardy*, was accepted by this Court as one *in rem*, it applied to all affected properties in Lombardy Estate. Therefore the setting aside of the valuation rolls affected the categorisation of all properties in Lombardy Estate.

---

[5] *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (t) at 368H-369A; *Pattni v Ali* [2007] 2 AC 85 para 21.

Consequently, the declaration of invalidity of the valuation rolls reversed the categorisation of the properties from 'vacant' to 'residential'. Wecanwin contended that the City was obliged to charge rates on the basis that the properties were categorised as residential until the situation was regularised.

[12] The City in response contended in essence that it is bound by the '*Oudekraal*'[6] principle that 'an unlawful act can produce legally effective consequences, is constitutionally sustainable, and indeed necessary. Therefore, the imposition of the vacant land rates for Wecanwin stands with legal consequences up until it is successfully challenged in the right proceedings and set aside by a court of law'.

[13] Wecanwin did not seek relief in the form of a review. It sought a declaratory order that the City refused to comply with the orders in *Lombardy,* which this Court characterised as a judgment *in rem*. It appears from paragraph 3 of the Wecanwin judgment of Potterill J, that the crux of the matter as she understood the declaratory relief sought, was not an attack on the imposed vacant land rates charged by the City. In that instance, Wecanwin would have had to institute an application to review and set aside the imposition of the rates. The high court understood the question posed in the Wecanwin application as being 'whether the Tuchten [J] order, *as confirmed by the SCA-order*, is applicable to the applicants before me as non-parties to the Tuchten [J] order and can be extended to Wecanwin'. Potterill J extended paragraph 4 of the *Lombardy* orders, essentially directing the City to refund Wecanwin the overcharged rates of the vacant land categorisation. (Own emphasis.)

[14] Therefore, the issue in this appeal turns on whether it was necessary for Wecanwin to institute review proceedings for the relief they sought, despite the finding made by this Court in paragraph 28 of *City of Tshwane*. In this appeal, the City persisted in characterising paragraph 4 of the *Lombardy* order*,* as *a* judgment *in personam* and not *in rem*. Consequently, they contended, that for Wecanwin to obtain the appropriate relief as in *Lombardy*, it had to institute review proceedings.

---

[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA).

For the reasons that follow, I find the City's contentions to be unmeritorious and misplaced.

[15] First, the City in the present appeal, again inexplicably misconstrued or ignored paragraphs 28 and 29 of *City of Tshwane.* In paragraph 28 of that judgment quoted above, this Court stated unequivocally that the Lombardy judgment was one *in rem.* The Court further stated:

'…*As the judgment pronounced upon the status of the particular subject-matter of the litigation in this case, it is one in rem and is conclusive against all persons whether parties or strangers to the litigation.*' (Own emphasis.)

[16] This Court went on to explain in paragraph 29 of *City of Tshwane*:

'The high court's order must be interpreted contextually and not by peering at words in a paragraph of the order in isolation. The context includes the application papers and the judgment of the court as a whole. Such an approach solves any ostensible difficulties in interpreting and implementing paragraph 7 of the order. *It is plain from the context that the respondents' grievance was not concerned with the particular level of the rate levied against their properties (in the sense of the rate of cents in the rand made applicable to vacant property) but with the re-categorisation of these properties as 'vacant', thereby attracting the higher vacant land rate. Until properly re-categorised, the respondents contend that the City's residential rate should be charged in respect of their properties, and they tendered to pay that rate. That, as the judgment makes clear, is what the high court means by its order that the "rate" previously applicable must be levied in the former Kungwini area until the City remedies the defects in its process of re-categorisation. In other words, the Kungwini vacant properties must be rated at the rate that in terms of the City's current rates resolution is applicable to residential properties, whatever that rate is from time to time.*' (Own emphasis.)

[17] *Lombardy*, therefore, adjudicated a complaint against the categorisation of the properties in Lombardy Estate as vacant. The high court in *Lombardy* had, in paragraphs 2 and 3 of its order, declared invalid and set aside the categorisation in the valuation rolls, of the properties as 'vacant', which concern *all affected properties in Lombardy Estate,* including those of Wecanwin members*.* The last sentence of paragraph 29 of *City of Tshwane,* (as quoted in the preceding paragraph of this judgment) accurately captures the essence of the declaratory relief sought by

Wecanwin. In the circumstances, it is unnecessary for Wecanwin to institute a review application to invalidate that which has already been declared invalid.

[18] Second, it seems there is a growing trend by some parties in litigation, to irresistibly seek refuge in the *Oudekraal*[7] principle, and in the process distort the court's reasoning in that seminal judgment. The City in this appeal did exactly that, by contending that the imposition of vacant land rates on the respondent's properties stands until set aside by a court. This principle is not applicable in this case and therefore this contention is not correct.

[19] This Court in *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others*[8] (*Seale*) held as follows*:*

'Thus, the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act, then the consequent act will have legal effect initial *for so long as the act is not set aside by a competent court.*

…

(T)he reliance by counsel on the decision in Oudekraal, [is] misplaced. As appears from the italicized part of the judgment just quoted, the analysis was accepted by this court as being limited to a consideration of the validity of a second act performed consequent upon a first invalid act, pending a decision whether the first act is to be set aside or permitted to stand. This court did not in Oudekraal suggest that the analysis was relevant to the latter decision.

…I think it is clear from *Oudekraa*l, and it must in my view follow, that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent…' (Footnotes omitted.)

[20] In *Corruption Watch NPC v President of the Republic of South Africa*[9] (*Corruption Watch*), the *Oudekraal* principle as clarified in *Seale*, was cited with approval and accepted by the Constitutional Court. The Court held as follows:

---

[7] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222.

[8] *Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* [2008] ZASCA 28; [2008] 3 All SA 245 (SCA); 2008 (4) SA 43 (SCA) para 13.

[9] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23; 2018 (10) BCLR 1179 (CC) para 34.

'In *Kirland* this court accepted what was decided in *Seale.* Writing for the majority, Cameron J had this to say: "In *Seale*… the court, applying *Oudekraal*, held that acts performed on the basis of the validity of a prior act are themselves invalid if and when the first decision is set aside…(T)he court rightly rejected an argument, in misconceived reliance on *Oudekraal*, that the later (second) act could remain valid despite the setting aside of the first." "it is clear from *Oudekraal*…that if the first act is set aside, a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent.'

[21] Construed in its proper context, *Oudekraal* addresses a situation where the substantive validity of the one act is a necessary pre-condition of the validity of the consequent second act, in two instances. The first is where a court declares conduct invalid but *does not set aside that conduct*.[10] In such a case, the consequent conduct whose validity is dependent on the conduct declared invalid, remains valid. A challenge to the validity or otherwise of the consequent conduct, would require review proceedings. In the second instance where the court declares conduct invalid *and sets it aside*, the consequent conduct dependent on the invalidated conduct also becomes invalid and is set aside. (Emphasis added.)

[22] Applying this principle to the issue in this appeal, as dealt with in *Lombardy*; the imposed rates were determined on the basis of the categorisation of the properties in Lombardy Estate as 'vacant'. The validity of the imposed rates depended on the categorisation. When the court in *Lombardy* declared the categorisation invalid *and set it aside*, the imposed rates as a consequence of the categorisation also became invalid. There is thus no need for an application to review and set them aside again, as the City contends. (Emphasis added.)

[23] Third, the City has a misconceived notion of its duty and role as a sphere of local government. Despite being a constitutional structure, the City supinely assumes that the duty to correct its unlawful conduct lies with those adversely affected by that conduct, in this instance, the property owners. The Constitutional Court has, in at least three cases, addressed this misconception.

---

[10] In such an instance, the court may decide to invoke the provisions of s 172(1)*(b)* of the Constitution Act 1996, to make any order that is just and equitable, as an alternative to setting aside the invalid conduct.

(a) In *Njongi v Member of the Executive Council, Department of Welfare, Eastern Cape*[11] (*Njongi*), the Constitutional Court stated:

'…Indeed, the Provincial Government should have taken proactive measures to fully reinstate every improperly cancelled social grant. This is a necessary consequence of the duty of every organ of State to "assist and protect the courts to ensure the … dignity … and effectiveness of the courts." It would also be mandated by the constitutional injunction that an order of court binds all organs of State to which it applies acceptable. The Provincial Government had every right to appeal the order in *Bushula*. Once it did not do so however, it had the duty in my view to ensure full redress for every person in the position of Mr Bushula…'

(b) In *Khumalo and Another v MEC for Education, KwaZulu-Natal*,[12] the Constitutional Court held thus:

'Section 195 provides for a number of important values to guide decision-makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be*, to correct any unlawfulness through the appropriate avenues*. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a). Read in the light of the founding value of the rule of law in section 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.' (Emphasis added.)

(c) In *Merafong City Local Municipality v Anglo Gold Ashanti Limited,*[13] the Constitutional Court held:

'. . . state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty "to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to

---

[11] *Njongi v Member of Executive Council, Department of Welfare, Eastern Cape* [2008] ZACC 4; 2008 (6) BCLR 571 (CC); 2008 (4) SA 237 (CC) paras 16-18.
[12] *Khumalo and Another v MEC for Education, KwaZulu-Natal* [2013] ZACC 45; 2014 (3) BCLR 333 (CC); (2014) 35 ILJ 613 (CC) 2014 (5) SA 579 (CC) paras 35 and 36.
[13] *Merafong Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) para 61.

those on whose behalf it exercises power". Public functionaries "must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it". Not to do so may spawn confusion and conflict, to the detriment of the administration and the public. A vivid instance is where the President himself has sought judicial correction for a process misstep in promulgating legislation.'

[24] More pointedly, this Court in *City of Tshwane* remarked at the end of paragraph 21 as follows:

'. . . It cannot plausibly be so that the City proceeded to arrange its affairs in the confident expectation that ratepayers would not challenge its conduct. Indeed, the City does not even attempt to suggest what other remedy might be preferable from *the standpoint of justice and equity* other that the court should decline to set aside the 2012 valuation roll.' (Own emphasis.)

The duty to correct the invalidation and setting aside of the unlawful conduct and its consequences, rests with the City and not with the Lombardy Estate ratepayers. Where necessary, it is the City that must approach courts for appropriate relief, in order to self-correct,[14] and not wait to be challenged.

[25] Tuchten J's reasons to exclude all affected property owners in paragraph 4 of his order in *Lombardy*, were based on the absence of the factual circumstances of Wecanwin members before him, and not on a point of law. The City is in possession of the records of accounts and information as to the circumstances of *all* property owners in Lombardy Estate. As such, it is in a position to adjust the accounts and give effect to the high court's order in relation to all affected properties. Wecanwin members are, for reason of equity, entitled to the same relief as the applicants in *Lombardy*. Section 3(1) of the Rates Act provides that '(T)he council of a municipality must adopt a policy consistent with this Act on the levying of rates on rateable property in the municipality.' Sub-section (3)*(a)* thereof provides that 'A rates policy must treat persons liable for rates *equitably*.' This section invokes the right to equality and equal treatment before the law, as provided for in s 9 of the Constitution of the Republic of South Africa, 1996[15]. Therefore, the City has a legal duty in terms

---

[14] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40 (CC); 2018 (2) SA 23 (CC).

[15] *The Constitution of the Republic of South Africa,* Act 108 of 1996.

of its policy on the levying of rates on rateable properties, to treat persons liable for rates equitably.

[26] To conclude, first the City has misconstrued the thrust of the Lombardy judgments and orders in the high court and this Court. The Lombardy case was about the categorisation of the properties from residential to vacant, based on the impugned valuation rolls. Second, the declaration of invalidity and setting aside of the valuation rolls and their categorisation of the properties as vacant, had the consequence that the rates imposed on vacant properties were also invalid and set aside. There was thus no need for Wecanwin or any property owner in Lombardy Estate to institute review proceedings to have any valuation, categorisation, or the imposed property rates declared invalid and set aside. Third, where it is found to have acted unlawfully, the City has the duty to correct that unlawful act and its deleterious consequences. The City's conduct in declining to do so is deprecated. Therefore, for reasons stated in this judgment, I ineluctably conclude that the City's appeal must fail.

[27] In view of the City's failure in their duty, to proactively take measures to correct their unlawful conduct, and in particular the consequences thereof as far as the rates are concerned, Wecanwin had to unnecessarily incur the costs of litigation. The costs in this appeal should therefore follow the result.

[28] The following order shall issue:

The appeal is dismissed with costs, including costs of two counsel.

_____

S P MOTHLE
JUDGE OF APPEAL

Appearances

For the appellant:	T Strydom SC with L Kotze
Instructed by:	Mothle Jooma Sabdia Inc., Pretoria
	Symington De Kok Attorneys, Bloemfontein
For the respondent:	N Ferreira with A Molver
Instructed by:	Adams & Adams Attorneys, Pretoria
	Phatshoane Henny Attorneys, Bloemfontein