REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/905

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

30 August 2024 [redacted]

In the matter between:

PHILIPPE RUBBERS N.O	**First Applicant**
RACHEL CATHARINA RUBBERS N.O	**Second Applicant**
DANIELLE RUBBERS N.O	**Third Applicant**
DAMIEN RUBBERS N.O	**Fourth Applicant**
THE BEST TRUST COMPANY (JHB) (PTY) LTD N.O	**Fifth Applicant**

and

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**Respondent**

JUDGMENT

Mdalana-Mayisela J

Introduction

1. The applicants are trustees of the Phina Property Trust, Registration number IT6234/2004 ("the Trust") with registered address at 15 Tesla Crescent, Sunninghill, Johannesburg. The Trust is the registered owner of Portion 0 of Holding 136 Linbro Park AH ("the Property") since 26 March 2010. The property has been categorized as Property Rates: Agricultural Business for rating purposes by the Municipal Valuer of the respondent. The Trust has an account, number 550 270 723 with the respondent for rates and municipal services provided by the respondent.

2. The respondent is the City of Johannesburg Metropolitan Municipality, a municipality as described in Section 2 of the Local Government: Municipal System Act, 2000, duly established in terms of Notice No. 6766, promulgated in the Provincial Gazette Extraordinary of 1 October 2000 in terms of section 12(1) read with section 14(2) of the Local Government: Municipal Structures Act, 1998, as amended, having its principal place of business at 158 Civic Boulevard, Braamfontein.

3. The applicants seek an order that the respondent takes any and all necessary measures to ensure that *inter alia,* the following adjustments are made to the Trust's account within 14 days from the date of this order:

   3.1 Writing off all charges billed to the account in respect of the illegal use property rates tariff for the period 1 April 2019, alternatively 1 May 2019 to date of compliance with this order;

   3.2 The respondent re-bill the property rates based on the Agricultural Business tariff for the period of 1 April 2019, alternatively 1 May 2019 to date of compliance with this order;

   3.3 Reversing any/all interest, VAT and ancillary charges on the Trust's account in respect of the abovementioned amounts that stand to be reversed or written off;

   3.4 Within 14 days after the order is granted, furnishing the Trust with an. adjusted municipal account showing all reversals made;

   3.5 That the respondent refrain from terminating or restricting the supply of any service to the property, or threatening to terminate or restrict the supply of any service to the property, in respect of the disputed charges on the account arising from being billed on the unlawful use tariff, until the dispute has been resolved; and

3.6 That the respondent pends or refrain from any debt collection, or threats of debt collection of the disputed charges on the account, until the dispute has been resolved.

4. The application is opposed by the respondent on the following grounds:

4.1 The order sought in sub-paragraphs 3.1 to 3.4 is incompetent in law as the Trust has not impugned the validity of the legal instruments which empowers the respondent to apply the illegal use tariff on the property;

4.2 The interdictory relief sought is not competent in law. It is precluded by section 26 read with section 50(6) of the Rates Act; and

4.3 The Trust has not made out a case for the debatement of account.

Common cause issues

5. The following issues are common cause:

5.1 The Trust is the registered owner of the property;

5.2 The property has been categorized as Property Rates: Agricultural Business for rating purposes and same is noted as such on the Trust's municipal invoices;

5.3 The respondent charges the Trust for *inter alia* property rates in relation to the property on account number 550 270 723. The Trust is responsible for payment of all the amounts billed for rates (and others) on the account.

5.4 The respondent is charging the Trust for property rates based on the illegal use tariff as from April or May 2019 to date.

Issues for determination

6. The parties have agreed that the issues requiring determination are as follows:

6.1 Whether the Trust is utilizing the property in breach of the assigned zoning rights of Agricultural Business;

6.2 Whether the illegal use tariff has been applied to the Trust municipal account correctly;

6.3 Whether the Trust is entitled to the writing off and reversal of the charges of illegal use from 1 April or 1 May 2019 to date of compliance with the order; and

6.4 Whether the applicants have met the requirements for a final interdict.

Illegal use tariff

7. I deal with the issues mentioned in sub-paragraphs 6.1 to 6.3 under this heading. Section 8 of the Local Government: Municipal Property Rates Act 6 of 2004 ("the Rates Act") permits the respondent to levy different rates for different categories of property and requires it to specify the rates and categories in its rates policy. In preparing the valuation roll the municipal valuer determines the category into which the property is to be placed as provided by the respondent's rates policy. The property in issue has been categorized as Agricultural Business in terms of the respondent's 2018 General Valuation Roll. The respondent's Rates Policy of 2018/2019 ("the Rates Policy") defines Agricultural Business as follows:

> *"(k) Agricultural Business: Agricultural holdings and farm portions from which a business or commercial activity is undertaken shall be categorized as business and commercial. Agricultural holdings and farm portions where an industrial or horticultural activity is undertaken shall be categorized as business and commercial."*

8. I deal first with the issue of whether the Trust is utilizing the property in breach of the assigned zoning rights of Agricultural Business. In the title deed the property is defined as an agricultural holding and a single dwelling house. The respondent contended that the Trust is utilizing the property for a purpose not authorized by its land use scheme. It provided three conflicting versions for this contention.

9. *First*, it stated that the Trust is using the property as an office park based on the evidence obtained during the inspections by its officials, and it issued a warning to the Trust to cease using it as such. The respondent has failed to provide evidence in support of this contention in its answering affidavit. The reports by the officials stating their factual findings and conclusions that the property is used as office park are not attached to the answering affidavit. The confirmatory affidavits to the allegations made in the answering affidavit about their involvement are also not attached to the answering affidavit.

10. The respondent simply attached a copy of the previous application brought by it against the Trust, which was abandoned after the answering affidavit thereto was filed by the Trust. The respondent referred the court to the portions of the founding affidavit filed in the previous application. The deponent to the previous

application is not the same as the deponent to the answering affidavit in the current application. The deponent to the answering affidavit has no personal knowledge of the averments made in the founding affidavit filed in the previous application. The confirmatory affidavit of the deponent in the previous application is not attached to the answering affidavit. The applicants have objected to the admissibility of the copy of the previous application on the basis that it is hearsay evidence. The objection is upheld.

11. The applicants have disputed that the property is utilized as an office park. They stated that it is used for residential purposes and there are three home offices or studies, which are used by the first applicant and her two children. They further stated that if the property were to be used as an office park, not only three of the forty-eight rooms would be used as offices. There would be no bedrooms or living room in the property. They attached photographs, depicting the front of the property, the bedroom, living space and home offices.

12. The unsubstantiated allegation made by the respondent that the property is used as an office park cannot stand and it must be rejected.

13. *Second*, the respondent contended that the Trust is using the property as a guest house on the strength of the application made by the Trust dated 10 July 2019 for rezoning of the property to be used for purposes of a guest house and/or boutique hotel and ancillary uses. This contention was also disputed by the applicants. I find it difficult to understand the basis for this contention because nowhere in the aforesaid application did the Trust mention that it was using the property as a guesthouse. The Trust in the aforesaid application stated that the property has already been built to be used as a guest house and/or boutique hotel and ancillary uses after its rezoning has been approved. The property is a very large building consisting of multiple bedrooms and amenities. The applicants submitted that the title deed makes no reference to the size of the building, as such its provisions have not been contravened. Furthermore, the erection of the large dwelling unit and outhouses on the site are not contrary to the current zoning of the property, which allows for a dwelling unit thereon. I find that the contention made by the respondent that the property is currently used as a guest house has no merit.

14. *Third*, the respondent contended that the property was used unlawfully as a storage based on another previous application made by the Trust for the relaxation of building lines on the property. In the aforesaid previous application, the respondent made a decision that "*the proposed structures for storage purposes are in contravention of the zoning of the property.*" The respondent submitted that these two previous applications made by the Trust for rezoning of the property "*were in acknowledgement of the continuance of the land use contraventions with the land use applications being the Trust's efforts to*

regularise the contraventions." I fail to understand on what basis the respondent is making this submission because the aforesaid previous applications were in respect of future utilization of the property. I reject the contention that the property has been used unlawfully as a storage.

15. For the reasons stated above, I find that the respondent has failed to prove that the Trust is utilizing the property in breach of the assigned zoning rights of Agricultural Business.

16. I turn to deal with the issue of whether the illegal use tariff has been applied to the Trust municipal account correctly. The Rates Policy provides for the application of penalty tariff for unauthorized use of the property as follows:

"*Unauthorized use*

(i) This category comprises all properties that are used for a purpose (land use) not permitted by the zoning thereof in terms of any applicable Town Planning Scheme or Land Use Scheme; abandoned properties and properties used in contravention of any of the Council's By-laws and Regulations, which include the National Building Regulations and Building Standards Act, 103 of 1977 and any Regulations made in terms thereof.

(ii) The rate applicable to this category will be determined by the City on an annual basis. The City reserves the right to increase this penalty tariff higher than other tariffs."

17. It is common cause that the respondent is charging the Trust for the property rates based on the illegal use tariff as from April alternatively May 2019 to date. The applicants are not certain whether the illegal use tariff was charged from April or May because the Trust did not receive the municipal account invoice in April. It is not in dispute that the respondent sent notices of land use contravention to the Trust by registered post before the illegal use tariff was applied. However, the applicants contended that such notices were not received, they became aware of them during the previous application brought by the respondent.

18. The respondent averred that the Trust did not lodge an objection in terms of section 50(1)(c) of the Rates Act to the entry on the valuation roll and that is fatal to the application. The applicants denied that they were obligated to lodge the aforesaid objection. They contended that the aforesaid provision is not applicable in this case because the rating category as reflected on the municipal account invoices is still set out correctly, and the respondent is entitled to charge the illegal use tariff without changing the category of the property.

19. The respondent further averred that based on the unauthorized use of the property by the Trust, it applied the illegal use tariff. It stated that it has the statutory and constitutional authority to impose an illegal use tariff on the property as it did, which has not been challenged by the applicants in this application. It is common cause that the applicants have not challenged the validity of the legal instruments empowering the respondent to levy the illegal use tariff where the property is used for unauthorized purposes. However, the applicant's case is that the respondent has no legal basis to levy such tariff on the property because the Trust is not utilizing the property in breach of the assigned zoning rights of Agricultural Business.

20. I have already made a finding above, that the Trust is not utilizing the property in contravention of the assigned zoning rights of Agricultural Business. Therefore, there is no legal justification for the respondent to charge the Trust for the property rates based on illegal use tariff.

21. I now deal with the issue whether the Trust is entitled to the writing off and reversal of the charges of illegal use from 1 April or 1 May 2019 to date of compliance with the order. The applicants averred that the levy of illegal use tariff on the property inflated the Trust's rates charges from R25,217.32 per month in 2019 and 2020, to R58,194.99 per month in 2019, and to R60,523.09 per month in 2020, and from R25,721.75 per month in 2021, to R61,733.45 per month in 2021, up to date. This evidence was not disputed by the respondent.

22. I have already found that the respondent has levied the illegal use tariff incorrectly as it had no legal basis to do so. Therefore, the Trust is entitled to the writing off and reversal of the charges of illegal use tariff from 1 April 2019, alternatively 1 May 2019. The respondent's records would show the actual date it commenced levying the Illegal use tariff.

23. The respondent contended that the applicants have not made out a case for the debatement of account. The applicants submitted that they have not applied for the debatement of account because the respondent's actions in levying the incorrect tariff are patently unlawful, and the Trust seeks an interdict against the respondent in order for it to be compelled to correct the account. I conclude that the applicants have made out a case for the writing off and reversal of the illegal use tariff charges for the abovementioned period.

Final interdict

24. The applicants seek an order against the respondent to refrain from terminating or restricting the supply of any service to the property or threatening to terminate or restrict the supply of any service to the property, in respect of the

disputed charges on the account arising from being billed on the illegal use tariff, until the dispute has been resolved. The applicants also seek an order that the respondent pends or refrain from any debt collection, or threats of debt collection of the disputed charges on the account, until the dispute has been resolved.

25. The issue to be determined here is whether the applicants have met the requirements for a final interdict. The applicants averred that they made efforts to resolve the dispute between the parties before they brought this application. They logged a query, on 25 May 2021. After 30 days period had lapsed, they sent the written complaint and letter of demand to the respond in terms of section 16.2 of the respondent's Credit Control and Debt Collection Policy. Another 30 days period lapsed, and the dispute remained unresolved before this application was brought. The respondent failed or neglected to provide the Trust with the outcome to its queries. The applicants averred that they have exhausted all other remedies available to the Trust.

26. The applicants submitted that the Trust is suffering harm as a result of the unlawful levy of illegal use tariff, as it was being held liable for inflated property rates for a period which it should not be held liable for.

27. Further, the applicants submitted that the Trust has a clear right to log a query in terms of section 16 of the Credit Control and Debt Collection Policy, and the respondent has a statutory duty to investigate the query logged by the Trust and advise the Trust of the outcome of its investigation before credit control action is taken, and if the query is found to have been correct, adjust the account. The Trust has a legal right to receive correct invoices.

28. Furthermore, the applicants submitted that in terms of section 102(2) of the Systems Act no credit control action may be taken against the Trust while there is an ongoing dispute about the levy of the illegal use tariff, and only payment of the undisputed charges on the account are necessitated.

29. I am satisfied that the applicants have made out a case for a final interdict.

Costs

30. The applicants seek costs of the application on an attorney and own client scale on the basis *inter alia* that the respondent failed to comply with the applicable case law, national legislation, municipal by-laws, policies, common law and Constitution. In addition, the respondent disregarded the Trust's letters of demand and appeal. They submitted that this demonstrated a wilful disregard for the Trust's rights and the respondent should be appropriately dissuaded from doing same in the future.

31. The respondent has denied that it wilfully disregarded the rights of the Trust. It submitted that due to its size and scope of services rendered to the public it receives several demands and legal actions regarding disputes in relation to municipal services rendered. It makes genuine attempts to defend litigation where necessary and makes attempts to settle where such route is feasible.

32. I have considered the submissions made by the parties on the scale of costs and I am not persuaded that the punitive costs order is justified in this application.

Order

33. The following order is made:

1. The respondent is ordered to take all necessary measures to ensure that *inter alia,* the following adjustments are made to the Trust's account within 14 days from the date of this order:

1.1 Writing off all charges billed to the account in respect of the illegal use property rates tariff for the period 1 April 2019, alternatively 1 May 2019 to date of compliance with this order;

1.2 The respondent re-bill the property rates based on the Agricultural Business tariff for the period of 1 April 2019, alternatively 1 May 2019 to date of compliance with this order;

1.3 Reversing any/all interest, VAT and ancillary charges on the Trust's account in respect of the abovementioned amounts that stand to be reversed or written off;

1.4 Within 14 days from the date of this order, furnish the Trust with an adjusted municipal account showing all reversals and written offs made;

1.5 That the respondent refrain from terminating or restricting the supply of any service to the property, or threatening to terminate or restrict the supply of any service to the property, in respect of the disputed charges on the account arising from being billed on the illegal use tariff, until the dispute has been resolved; and

1.6 That the respondent pends or refrains from any debt collection, or threats of debt collection of the disputed charges on the account, until the dispute has been resolved.

2. The respondent is ordered to pay the costs of the application on a party and party scale.

[redacted]

MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division,
Johannesburg

Digitally delivered by uploading on CaseLines and emailing to the parties

Date of delivery: 30 August 2024

Appearances:

For the applicants:	Adv T Paige-Green
Instructed by:	Schindlers Attorneys
For the respondent:	Adv S Ogunronbi
Instructed by:	Kunene Ramapala Inc.