CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 119/23

In the matter between:

EKAPA MINERALS (PTY) LIMITED	First Applicant
EKAPA RESOURCES (PTY) LIMITED	Second Applicant
and	
SOL PLAATJE LOCAL MUNICIPALITY	First Respondent
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Second Respondent
MINISTER OF FINANCE	Third Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, NORTHERN CAPE	Fourth Respondent

Neutral citation:	*Ekapa Minerals (Pty) Ltd and Another v Sol Plaatje Local Municipality and Others* [2025] ZACC 1
Coram:	Zondo CJ, Maya DCJ, Bilchitz AJ, Gamble AJ, Madlanga J, Mathopo J, Mhlantla J and Tshiqi J
Judgments:	Gamble AJ (unanimous)
Heard on:	6 May 2024
Decided on:	24 March 2025

Summary: [municipal property rates] — [principle of legality] — [section 172(1)(b)] — [just and equitable relief] — [review proceedings]

ORDER

On appeal from the High Court of South Africa, Northern Cape Division, Kimberley:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and substituted with the following order:
   (a) "The decisions taken by the council of the first respondent to set a property rates ratio of 1:22 in respect of the category of "mining" for the financial years 2015/2016; 2016/2017; 2017/2018; 2018/2019 and 2019/2020 are declared unlawful and set aside.
   (b) In terms of section 172(1)(b)(i) of the Constitution, the order in paragraph 3(a) will operate retrospectively with effect from 1 July 2015 onwards.
   (c) The first respondent may recover from the applicants, only the amounts of the mining property rates ratio in relation to the residential property rates ratio calculated based on the Local Government: Municipal Property Rates Act 6 of 2004 and the regulations promulgated in terms thereof, less any amount in excess of the legally permissible limit, in respect of each financial year from 2015/2016 to 2019/2020; and
   (d) The first respondent is to pay the applicants' costs of suit."
4. The first respondent is ordered to pay the applicants' costs of the appeal, including the costs of two counsel where so employed.

5. The applicants' undertaking not to claim any reimbursement from the first respondent for the rates it voluntarily paid under the 1:3 ratio is made an order of court.

JUDGMENT

GAMBLE AJ (Zondo CJ, Maya DCJ, Bilchitz AJ, Madlanga J, Mathopo J, Mhlantla J and Tshiqi J concurring):

Introduction

[1] The city of Kimberley is synonymous with the exploration of diamonds which were discovered in the area in the mid-1860s. In 1888, De Beers Consolidated Mines Limited (De Beers) was formed. This is a company which has dominated the exploration and marketing of diamonds throughout the world for more than a century.[1] Around 2010, De Beers scaled back its mining operations in the Kimberley area, leaving behind substantial earth in the form of mine dumps. These are known in the mining industry as "tailings" and were believed to contain residual stones which were yet to be retrieved.

[2] In 2015, the first and second respondents, Ekapa Minerals (Pty) Limited and Ekapa Resources (Pty) Limited (collectively referred to as Ekapa) bought eight immovable properties from De Beers in and around Kimberley (properties) for the purpose of re-working the tailings. In terms of a written agreement of sale with De Beers (agreement), Ekapa took up occupation of the properties and became liable to the first respondent, Sol Plaatje Local Municipality (municipality) for the payment of

[1] The Editors of Encyclopaedia Britannica "De Beers S.A." (21 February 2025), available at https://www.britannica.com/money/De-Beers-SA.

rates, taxes and other charges (rates) in respect of the properties. While Ekapa had acquired ownership of three of the properties, the transfer of the remaining five properties was held up as the municipality refused to issue rates clearance certificates in respect of them. This was due to a dispute that had arisen between the municipality and Ekapa regarding the extent of the rates payable on the remaining five properties.

[3] Eventually, Ekapa approached the High Court of South Africa, Northern Cape Division, Kimberley (High Court) in 2021 for declaratory relief in relation to the outstanding rates payable to secure a rates clearance certificate in respect of the properties awaiting transfer. It was only partially successful in the High Court and after leave to appeal to the Supreme Court of Appeal had been refused by that Court, Ekapa sought leave from the Supreme Court of Appeal. When that Court refused leave to appeal, Ekapa approached this Court for leave to appeal.

Background to the rates dispute

[4] In terms of section 8(1) of the Local Government: Municipal Property Rates Act[2] (Rates Act), a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property. The manner in which such rates are calculated is based on the market value of the property.[3] All rates ratios in respect of the various categories of properties are calculated in relation to the "residential property" rate which is used by the municipality as a benchmark. Each year[4] the municipal council (council) determines the rates ratio that is applicable and the rates' tariffs are then promulgated according to those ratios.

[5] The council determined the rates tariffs for the 2014/2015 to 2020/2021 financial years as follows:

[2] 6 of 2004. Section 8(1) provides that "[s]ubject to section 19, a municipality may in terms of the criteria set out in its rates policy levy different rates for different categories of rateable property".

[3] Section 11(1)(a) of the Rates Act.

[4] The financial year runs from 1 July to 30 June in any particular year.

Category	**2014/15**	**2015/16**	**2016/17**	**2017/18**	**2018/19**	**2019/20**	**2020/21**
Residential property	**0.011618**	**0.009315**	**0.009688**	**0.010221**	**0.010834**	**0.009752**	**0.010376**
Vacant residential property			0.014531	0.015331	0.016251	0.014628	0.015564
Industrial property	**0.047634**	**0.032602**	**0.031000**	**0.032707**	**0.034670**	**0.031206**	**0.03320**
Vacant industrial property			0.033907	0.035773	0.037920	0.034132	0.036316
Business and commercial property	0.034854	0.027479	0.028578	0.030254	0.032069	0.029256	0.031128
Vacant Business and commercial property			0.033907	0.035773	0.037920	0.034132	0.036316
Agricultural property	0.002905	0.002329	0.002422	0.002555	0.002709	0.002438	0.002594
Mining property	**0.191698**	**0.195612**	**0.213127**	**0.224858**	**0.238354**	**0.214544**	**0.228275**
Public service property			0.029063	0.051104	0.054171	0.043884	0.046693
Property used by organ of state			0.067813	0.071546	0.075840	0.058512	0.046693
Public service infrastructure			0	0	0	0	0
Public benefit activity property			0	0	0	0	0
Place of worship			0	0	0	0	0
Land reform beneficiary			0	0	0	0	0
Private open space				0.010221	0.010834	0.009752	0.010376
Multi-purpose properties			0.019375				

Municipal property used for municipal purposes			0	0	0	0	0
Independent schools		0	0	0	0	0.002438	0.002594
Guest houses		0.018630	0.019375	0.020442	0.021669		
Solar farms				0.020442	0.021669	0.029256	0.031128
Sports grounds and facilities operated for gain				0	0	0	0
University			0	0	0.021669	0.029256	0.031128

The rates payable in respect of mining property were thus around 22 times greater than those payable in respect of residential property, while, for example, the rates on property used for industrial purposes were only three times more than residential property.

[6] This table shows that during the 2014/2015 financial year, an owner of mining property would have paid 19.5612 cents per rand on the valuation of the property during that year. On this calculation, the owner of a mining property valued at say R1 million in 2014/2015 would have paid R195 612 per year, or the equivalent of R16 301 per month. In comparison, during the same financial year the owner of industrial property would have paid 3.2602 cents per rand on the valuation of its property. On this calculation, the owner of industrial property valued at an estimated R1 million in 2014/2015, would have paid R32 602 per annum, or the equivalent of R2 716.83 per month. Therefore, an entity which owned mining property in the 2014/2015 financial year would have paid almost eight times more than the owner of industrial property. Over the years, the annual rates for mining property valued at, for example, R1 million increased from R195 612 in the 2014/2015 financial year to R228 275 in the 2020/2021 financial year.

[7] Ekapa's papers do not reflect what the municipality's ratio was for mining property prior to the council's decision in respect of the 2014/2015 year. However, it

is suggested that while De Beers operated its diamond mines over the decades in the Kimberley area, its properties were not subjected to an individual system of rates. Rather, it is said that De Beers appears to have been afforded some sort of preferential treatment and paid annual rates to the municipality in terms of an agreement arrived at between the parties. Ekapa further says that the agreement came to an end in 2010.

[8] Ekapa says that the ratio applied by the municipality to the five properties only came to its attention in 2019: it does not say anything about the receipt (or not) of the rates' accounts over the preceding four years. In the middle of 2019, Ekapa raised an objection with the municipality, complaining that it regarded the ratio of 1:22 in respect of mining property as excessive and out of kilter with the other categories of rateable properties. There was then some debate as to how the rates' calculation had been arrived at.

[9] Ekapa said in its founding affidavit in its High Court legality review application that it conducted its own investigations into rates levied on mining properties by 10 other municipalities located over a broad geographical area. It attached a table to that affidavit which reflected that such rates varied from between 1:1.09 to 1:3.6. Based on these rates, Ekapa unilaterally proclaimed that a rate of 1:3 was not unreasonable in the Kimberley area.

[10] Despite the council's decision to increase the rates ratio to 1:22 annually for the period 2014/2015 to 2020/2021, Ekapa says it decided to pay the rates at the ratio of 1:3 throughout the period, while it attempted to negotiate with the municipality about a lower ratio and thereafter, while it approached the High Court to have the council's decisions reviewed and set aside on the basis that they contravened section 19(1)(c) of the Rates Act.[5] At that time, there was an outstanding amount of approximately R30 million due by Ekapa for rates levied by the municipality, comprising the

[5] Section 19(1)(c) provides that "[a] municipality may not levy . . . rates which unreasonably discriminate between categories of non-residential properties".

difference between the rates that it decided to pay (at a ratio of 1:3) and the rates that were not paid (ultimately at a ratio of 1:22).

Litigation history

High Court – review application

[11] On 8 April 2021, Ekapa brought an application in the High Court to review and set aside each of the decisions taken by the council for the financial years 2014/2015 to 2020/2021 to fix the ratio for rates payable on the properties at 1:22 (the impugned decisions). Ekapa sought to have the impugned decisions declared invalid on the basis that they violated section 229(2)(a)[6] of the Constitution and section 19(1)(c) of the Rates Act. It did not seek any just and equitable order under section 172(1)(b) of the Constitution, nor did it seek a declaratory order as to the appropriate ratio that should have been applied by the municipality in respect of rates payable on mining properties.

[12] Ekapa contended that the differentiation and disparity between the rates payable by an owner of mining property and the rates payable by an owner of other non-residential properties (such as industrial land) within the municipal area was unlawful, irrational, unreasonable and offended the doctrine of legality. It submitted that when increasing the property rates, the council had acted *ultra vires* (beyond its powers) the empowering provisions in section 229(2) of the Constitution and section 19(1)(c) of the Rates Act. Ekapa also relied on section 16 of the Rates Act,[7] which was

[6] Section 229(2) states:

> "The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—
>
> (a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
>
> (b) may be regulated by national legislation."

The Rates Act is the national legislation enacted in terms of section 229(2)(b) of the Constitution.

[7] Section 16 states that in terms of section 229(2)(a) of the Constitution, a municipality may not exercise its power to levy rates on property in a way that would materially and unreasonably prejudice national economic policies, economic activities across its boundaries or the national mobility of goods, services, capital or labour. Section 16 also provides procedural mechanisms for the Minister of Cooperative Governance and Traditional Affairs, after notifying the Minister of Finance, to give notice to the municipality to limit the rate and imposes obligations on the municipality to comply with such notice.

incorporated into that Act to give effect to section 229(2) of the Constitution. Lastly, Ekapa relied on a document issued in 2020 by the Department of Cooperative Governance and Traditional Affairs (COGTA) titled "Local Government: Municipal Property Rates Act, No. 6 of 2004 (General Guidelines March 2020)".[8] In that policy document, COGTA detailed how a municipality was required to exercise its power to levy rates in accordance with section 16 of the Rates Act and section 229(2)(a) of the Constitution.

[13] Ekapa contended before the High Court that the rates imposed by the council created an unreasonable financial burden which impacted on its profitability and argued that the significant increase in rates would result in the loss of employment and would have an adverse effect on the businesses of certain of Ekapa's service providers. Lastly, Ekapa stressed that its diamond mining operations were essential to South Africa's export market and job creation in general.

[14] On the delay in bringing the application, Ekapa submitted that—

(a) prior to 2019, it was unaware of the rates ratio imposed by the municipality in respect of mining; and

(b) that since 2019, it had made every attempt to engage with the municipality to resolve the dispute. In that regard, it enclosed correspondence with the municipality to reflect the extent of its engagement over the years.

[15] The municipality opposed the application and submitted that the impugned decisions were not justiciable in that court. In this regard, the municipality relied on the decision of the Supreme Court of Appeal in *Nokeng Tsa Taemane*,[9] where it was held that the power to levy rates on property for services provided by a municipality concerns "political and inter-governmental issues, evidently specialist areas involving

[8] Local Government: Municipal Property Rates Act, No. 6 of 2004 (General Guidelines March 2020).

[9] *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* [2010] ZASCA 128; 2011 2 All SA 46 (SCA).

policy issues" outside the expertise of courts.[10] The municipality further opposed the review application on the following grounds:

(a) When taking the impugned decisions, the council was not performing administrative action, but was acting in its capacity as an elected body: such decisions were therefore not subject to review under the Promotion of Administrative Justice Act[11] (PAJA); and

(b) There was an unreasonable delay in bringing the application.

[16] In its answering affidavit the municipality disavowed any knowledge of a discrete arrangement in the past between it and De Beers relating to the payment of rates. It pointed out that the ratio in respect of the rates on mining property had always been in place and had steadily increased over the years – from 0.02 in 2000 to 0.034 in 2005 and from 0.14 in 2010 to 0.195 in 2015. It went on to contend that the properties on which Ekapa's operations were located had previously been listed as "agricultural" on the valuation roll and thus attracted a significantly lower ratio. It said that when Ekapa began using the properties for mining operations, it was necessary to procure the correction of the valuation roll description to "mining", thereby resulting in a significant increase in the rates payable thereon.

[17] On 2 September 2022, the High Court delivered judgment in favour of Ekapa and declared the six impugned decisions unconstitutional in terms of section 172(1)(a) of the Constitution. In this regard, it held that there was a striking differentiation in the rates ratio applicable to the various categories of non-residential properties and that, on the face of it, this differentiation was unreasonable. Further, because the municipality had not advanced any palpable explanation for the differentiation in rates nor listed any considerations underpinning its determination, the impugned decisions were held to be inconsistent with section 19(1)(c) of the Rates Act, irrational and thus unlawful.

[10] Id at para 8.

[11] 3 of 2000.

[18] In upholding the application, the High Court rejected the municipality's reliance on *Nokeng Tsa Taemane* and held that the case concerned the power to levy rates on property for services provided by a municipality which was significantly different to a municipality's power under section 19(1)(c) of the Rates Act to determine rates that do not unfairly discriminate between various categories of non-residential properties. The High Court reasoned that the former was not justiciable by the courts whilst the latter was.

[19] In respect of the other two grounds of opposition, the High Court held that Ekapa brought the review challenge under the doctrine of legality and not PAJA: the challenge was not to impugn the municipality's powers to determine rates, but sought only to review and set aside the impugned decisions as being unlawful, irrational and unreasonable. The very purpose of the challenge, the Court held, was to prevent the municipality from recovering the outstanding rates from Ekapa.

[20] On the question of the delay in bringing the review application, the High Court found Ekapa's explanation to be "extremely sketchy and unsatisfactory". It held that there was no explanation as to why Ekapa was unaware of the rates ratio applicable until 2019, given that it had purchased the properties in 2015 and had been contractually responsible for payment of rates in respect of the properties since then. Further, the High Court assumed that Ekapa must have received monthly rates' statements since it had purchased the properties in 2015.

[21] The High Court held that the absence of adequate reasons for the delay in bringing the review application rendered the delay unreasonable. It noted that the period from 2015 to 2021 was lengthy and that the prejudice to the municipality was clear. In this regard, the High Court found that the outstanding amount due by Ekapa of around R30 million was what the municipality would have budgeted to collect, and as a result, the municipality may have had to borrow money from financial institutions to cover the shortfall. It reasoned that if the impugned decisions were set aside,

the municipality would not be able to recover the amount of the debt owed to it by Ekapa and that this was real prejudice which the municipality would suffer.

[22] On remedy, the High Court held that setting aside the impugned decisions would have a disruptive effect on the affairs of the municipality in that it would not be able to enforce the outstanding rates owed to it by Ekapa. In order to ameliorate the disruptive consequences of setting aside the impugned decisions, the High Court made an order limiting the retrospective effect of the declaration of invalidity and ordered that it should operate with prospective effect only. In that way, the High Court reasoned, the municipality would still be able to enforce payment of the debt owed to it by Ekapa, notwithstanding the setting aside of the impugned decisions.

[23] Consequently, the High Court granted the following order:

> "52.1 The decisions taken by the Council of the [municipality] to set a property rates ratio of 1:22 in respect of the category of "*mining*" for the financial years [2015/16 to 2020/21] are declared unlawful and set aside.
>
> 52.2 In terms of section 172(1)(b)(i) of the Constitution, the order in paragraph 52.1 above shall have prospective effect only.
>
> 52.3 The [municipality] shall pay the costs of the application, including the costs consequent upon the employment of two counsel".

[24] On 28 September 2022, Ekapa brought an application before the High Court for leave to appeal only against its order declaring the impugned decisions invalid with prospective effect. The municipality opposed the application. There was no cross-appeal by the municipality in respect of the other two orders granted by the High Court. On 13 January 2023, the High Court dismissed Ekapa's application for leave to appeal with costs. In doing so, the High Court rejected the contention that it had not exercised its discretion judicially. In this regard, it held that courts cannot grant orders with retrospective effect if they are likely to have deleterious consequences.

Supreme Court of Appeal

[25] Aggrieved by the High Court's dismissal of its application for leave to appeal, Ekapa applied for leave to the Supreme Court of Appeal, which was dismissed, with costs, on 12 April 2023.

In this Court

Ekapa's submissions

Jurisdiction and leave to appeal

[26] In this Court, Ekapa submits that the constitutional issue raised in this matter relates to the constitutional discretion exercised by the High Court in terms of section 172(1)(b) of the Constitution. In essence, it contends that the High Court did not exercise that discretion judicially; that it was influenced by a wrong principle; misdirected itself on the facts and thus failed to make a just and equitable order. Further, it contends that the High Court failed to apply the constitutional values embodied in the Constitution and in particular, section 172(1)(b).

Merits

[27] In the main, Ekapa contends that when a decision has been declared invalid on the basis of legality and a just and equitable order must be made, a court ought to consider whether the relief is justified in the particular circumstances of the case before it. Further, it argues that such a remedial order should have regard to the interests of all of those affected by it.

[28] Ekapa contends that the High Court did not consider the effect of its order on it. It argues that the municipality's contention that, although the High Court did not specifically refer to what effect its order might have on Ekapa, this did not necessarily mean that the High Court did not consider that aspect, is untenable and contrary to the tenets of our law. Ekapa argues that it must be clear and transparent to all concerned which factors were taken into account and which were not taken into account when a

court exercises a discretion such as that contemplated in section 172(1)(b). It submits that it is clear that the High Court failed to consider Ekapa's position properly, or at all.

[29] Ekapa suggests that the following factors were material and ought to have been considered by the High Court when making its just and equitable order:

(a) That it conducts diamond mining operations on portions of the properties in question by reworking the tailings, and in the process old deposits are then reworked;

(b) Ekapa's operations entail the recovery of diamonds using new technology that allows it to identify and find diamonds that were not recovered during the original diamond operations, the majority of which are not very large;

(c) Ekapa processes the ground that it recovers through its own mining operations in respect of three underground mines in terms of the mining licenses and permits held by it;

(d) Ekapa commenced these operations after purchasing the properties from De Beers which had ceased its mining operations;

(e) During the Covid-19 pandemic, Ekapa had been required to reduce its employees' salaries in order to survive; and

(f) Importantly, the mining operations thus conducted constitute a marginal diamond mining business. Continuity in its business operations is dependent on the international rough diamond market price and the rand/dollar exchange rate, which are important variables.

[30] Consequently, Ekapa contends that the High Court did not consider at all what the impact of the unlawfully promulgated rates would constitute for the continuation of its marginal business and the deleterious impact it would have on its service providers and employees. It stresses that the High Court only considered the interests of the municipality.

[31] Ekapa further submits that the High Court made speculative assumptions about the loans that the municipality might have had to make, and would not be able to repay

these, should Ekapa not pay its rates. It complains that there was no evidence to this effect before the High Court. Ekapa goes on to state that it continued to pay rates throughout the relevant period at the ratio of 1:3, which equates to the rates payable on the category for business and commercial properties and which it demonstrated through evidence was the average ratio paid by other mining houses in the country to their respective local authorities. Ekapa stresses that it did not refuse to pay rates per se, but paid rates on the ratios applicable to similar business operations and, further, that it does not seek repayment of any of the monies already paid. It was adamant, however, that the municipality should not be entitled to levy the unlawful rates at a ratio of 1:22.

[32] Ekapa further submits that the rates in the present matter covered six financial years and that the sum of R30 million (the difference between the 1:3 ratio and the 1:22 ratio) amounts to approximately R5 million a year over the six financial years. This, it says, could hardly have placed the municipality in the impoverished financial position about which the High Court speculated.

[33] Lastly, Ekapa contends that the High Court did not attempt a balancing exercise with respect to the parties' competing interests. It complains that an order in which a successful litigant is still ordered to pay rates which have been found to be unlawful manifestly does not vindicate the rights of that litigant.

[34] For these reasons, Ekapa submits that this Court should interfere with the order of the High Court. It expressly asks in its notice of application for leave to appeal that this Court should delete the order contained in paragraph 52.2 of the order of the High Court (which makes the operation of the order of invalidity prospective) and replace it with the following order—

> "That [Ekapa is] ordered to pay rates on [its] properties that are categorised 'mining' at a rates ratio of 1:3 for the financial years 2015/16 up to and including 2020/21. The Municipality is not entitled to collect any further rates other than the amounts set out above."

It should be stressed that this is the first time in the course of this litigation that Ekapa has asked for such declaratory relief: it did not do so in its notice of motion before the High Court.

The municipality's submissions

Jurisdiction and leave to appeal

[35] The municipality contends that this Court only grants leave to appeal if, amongst others, it is in the interests of justice to do so. It submits that it is not in the interests of justice for the apex court to pronounce on the narrow, fact-specific question presented by this case, namely whether on the specific facts of this case, the High Court exercised its discretion correctly. It further submits that this Court is generally unwilling to be detained by fact-specific cases which are of no real relevance beyond the narrow interests of the litigants themselves and that the issues should be of importance to a sufficiently large section of the public.

Merits

[36] The municipality contends that the substance of Ekapa's complaint is that the High Court reached the wrong conclusion: it is thus a complaint about the correctness of the High Court's order. The municipality contends that such correctness is not embraced by the test on appeal where the issue is the exercise of a true discretion. It contends that the High Court's discretion can only be interfered with in circumstances where it failed to exercise its discretion judicially, or where it exercised the discretion on wrong principles or misdirected itself on the facts. It says that Ekapa has failed to establish these criteria.

[37] Further, says the municipality, Ekapa's complaint relates in the main to the manner in which the High Court exercised its discretion on the specific facts of this case. This, the municipality contends, demonstrates that the issues raised are factual in nature and do not go beyond the narrow interests of the litigants.

[38] The municipality further argues that the High Court exercised its discretion correctly, in that it is permissible for a court, in exercising its discretion under section 172(1)(b), to decline to grant a retrospective remedy on the basis that doing so would be disruptive or result in deleterious consequences. The municipality says that even if the High Court exercised its discretion incorrectly, or applied the wrong legal test in the exercise of its discretion, that would not be sufficient: the misapplication of a settled legal test does not engage this Court's jurisdiction. It further submits that the contention that the High Court reached an incorrect decision is not, without more, a constitutional matter.

[39] The municipality submits that a "setting aside" order is discretionary. Accordingly, it argues that Ekapa does not have the right to have invalid and unlawful actions or decisions set aside. An interpretation contrary to this would be at odds with the plain wording of section 172(1)(b) and the established jurisprudence of this Court.

[40] The municipality contends that Ekapa's proposition that it is important for decision-makers to give reasons for their decisions, conflates the decision of the municipality with the High Court judgment. The question before this Court is whether Ekapa has made out a case for this Court to interfere with the High Court's exercise of a true discretion, a question which cannot be answered by reference to the duty of administrators to give reasons when they exercise public power.

[41] For all of these reasons, the municipality submits that leave to appeal must be refused. If leave is granted, it says that the appeal should be dismissed.

Issues

[42] The issues to be determined by this Court are:

(a) whether this Court's jurisdiction is engaged;

(b) if this Court has jurisdiction, whether leave to appeal should be granted;

(c) if leave to appeal is granted, whether this Court should interfere with the discretion exercised by the High Court to grant an order under section 172(1)(b) of the Constitution with prospective effect; and, if so,

(d) the appropriate remedy to be granted in the circumstances.

Analysis

Jurisdiction and leave to appeal

[43] There is an argument as to whether this matter raises purely a factual issue. In my view this is not the case as the enquiry here relates to relief that was granted in terms of section 172(1)(b) of the Constitution. The case raises important issues concerning the manner in which courts should exercise their true discretion in relation to relief under that section and thus, in my view, the case raises constitutional issues. As regards whether leave to appeal should be granted, I consider that there are good prospects of success, particularly when regard is had to the limited attention that the High Court paid to the interests of Ekapa in considering an appropriate just and equitable remedy.

Merits

Issues

[44] There is no debate between the parties that the order of invalidity granted by the High Court under section 172(1)(a) with respect to the rates' ratios must stand. The crisp question is whether this Court should interfere with the discretion exercised by the High Court to grant an order under section 172(1)(b) with prospective effect only. The High Court's justification in granting such an order relates to Ekapa's unreasonable delay in instituting proceedings, and the prejudice the municipality would suffer should a retrospective order be issued. The order of the High Court is clear insofar as it set its face against the possibility that the municipality was to be deprived of the right to recover the arrear rates. In my view, however, the delay issue should work both ways – the municipality was equally dilatory in recovering outstanding rates in the ordinary course from Ekapa from 2015 onwards.

Delay

[45] The High Court dealt with the issue of unreasonable delay by reviewing the timeline and justifications put up by Ekapa. The contested decisions dated back to the 2015/2016 financial year, with the rates ratio for immovable properties set annually by the council. Nonetheless, Ekapa delayed significantly in challenging these rates – it only launched its review application in April 2021.

[46] Ekapa puts up two reasons for its delay:

(a) It claims that it was unaware of the extent of the rates until 2019, and only knew of the extent of its liability when it was required to clear the arrears prior to taking transfer of the properties; and

(b) Since 2019, it has engaged with the municipality and had been trying to resolve the dispute but says it was given the run-around by the municipality.[12]

[47] The High Court found these explanations inadequate. It observed that, having purchased the properties on 30 November 2015, Ekapa was obliged under the agreement of sale to effect payment of the rates from that point on. The High Court suggested that Ekapa would in all likelihood have received monthly statements from the municipality regarding such rates and taxes. The High Court further regarded it as implausible that Ekapa was oblivious of the rates for such an extended period, given its on-going responsibility for these payments. I find this reasoning unconvincing in the absence of direct evidence that the rates' accounts were indeed sent to Ekapa. It is thus necessary to look briefly at the evidence.

[48] In Ekapa' s founding affidavit, its CEO, Mr Hohne, states:

[12] Annexed to Ekapa's founding affidavit are letters it wrote the municipality in July 2019 taking issue with the property rates ratio.

> "It was only after we had purchased the properties and after the value of the properties had been altered from agricultural to mining that this issue really came to the fore."

[49] The municipality's reply to this allegation is found in its answering affidavit deposed to by Mr Nel, a senior manager in its properties and taxation department. He denied that "the value of the properties" had ever been altered from agricultural to mining, noting that they had been zoned as mining properties "for ages". He explained further that after he took up his position with the municipality in September 2015, he "realised that the properties were not correctly categorised in the valuation roll. They appeared under the category "Agricultural" in the valuation roll although they were being used for mining purposes."

[50] Mr Nel says he then took the necessary steps to rectify the position and references the change by referring to annual rates' statements dated July 2021 which record that in 2014 the properties were rated for the category "Agricultural Farms" while in October 2018 they were rated as "Mine Ground". The statements in question appear to have been marked for the attention of De Beers.

[51] There is thus no challenge by the municipality to Ekapa's allegation that it did not know of the rates payable on the properties until 2019. In fact, the documents put up by the municipality tend to confirm this allegation. After all, De Beers was still the registered owner of the properties in 2019 and the issue with the extent of the rates only arose when Ekapa tried to obtain a rates clearance from the municipality so as to enable it to take transfer of the properties. There is no evidence to suggest that the municipality knew of the sale agreement between De Beers and Ekapa, and there is nothing to suggest that Ekapa had been substituted for De Beers in the municipality's books of account or that the accounts had been sent to it. Lastly, there is no plausible explanation as to why the municipality failed to demand payment from Ekapa of the outstanding rates from 2015 onwards.

[52] In the result, I do not agree that Ekapa's delay in challenging the 1:22 mining property rates ratio was of the order of five years. In fact, the delay was really from around November 2019 to April 2021 when Ekapa lodged its application for review – a period of some 18 months at most. Yet the High Court deemed the delay to have been from 2015 to 2021, regarded this as extensive and found Ekapa's reasons for the delay unconvincing, thus rendering the delay unreasonable.

[53] Recognising that the enquiry did not end there, the High Court assessed whether the unreasonable delay could be overlooked. Following *Khumalo*,[13] it evaluated the unreasonableness of the delay with regard to its potential prejudice to the municipality and considered the implications of setting aside the impugned decision against that background. The High Court noted that Ekapa owed R30 million to the municipality, a sum likely to have been accounted for in previous budgets. Thus, the High Court held that overlooking the delay and setting aside the decisions with full retrospectivity would occasion "deleterious" consequences for the municipality and cause significant financial prejudice, possibly affecting its financial stability.

[54] The High Court, however, held that the exercise of its remedial discretion in terms of section 172(1)(b) could ameliorate the prejudice the municipality would suffer if the delay was overlooked and consequently, the impugned rates were set aside by limiting the retrospective effect of the order and granting a prospective order only. This decision was made in the context of vindicating the principle of legality, given the municipality's manifest deviation from the relevant statutory requirements. In coming to this conclusion, the High Court overlooked the delay in an endeavour to uphold the principle of legality, which was necessitated by the municipality's deviation from the relevant statutory prescripts as an organ of state.[14] The decision to limit the retrospective effect of the order, and thus the issuing of an exclusively prospective

[13] *Khumalo v Member of the Executive Council for Education; KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC).

[14] Section 19(c) of the Rates Act.

order, was informed by this context. The Court acknowledged the practical difficulties of setting aside municipal rates and budgets, aligning its reasoning with *SAPOA*.[15]

Just and equitable relief

[55] In review proceedings under the principle of legality and in considering the application of section 172(1)(b) of the Constitution, it is settled law that a court has broad and a flexible discretion to craft an order that prioritises substance over form, thereby allowing the court to pinpoint the genuine underlying conflict between the parties and mandate actions that resolve the dispute in accordance with constitutional principles, due regard being had to the specific circumstances of the case.[16] The court must balance the interests of all parties, avoiding a narrow focus on the interests of one side alone.[17]

[56] In my considered view, the facts of this case bear a striking resemblance to *Thaba Chweu*,[18] where the Supreme Court of Appeal held that this balancing act has to have regard to both the interests of the municipality and the need to ensure that the principle of legality is given effect to. That approach is equally applicable in the present matter.

[57] The Supreme Court of Appeal confirmed in *Central Energy Fund*,[19] that the discretion exercised in terms of section 172(1)(b) of the Constitution is a true discretion, to be exercised on a case-by-case basis. Therefore, it may only be interfered with on

[15] *South African Property Owners Association v Johannesburg Metropolitan Municipality* [2012] ZASCA 157; 2013 (1) SA 420 (SCA); 2013 (1) BCLR 87 (SCA) at paras 74–5.

[16] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*) at para 96–7.

[17] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) (*Millennium Waste*) at para 22.

[18] *Thaba Chweu Rural Forum v Thaba Chweu Local Municipality* [2023] ZASCA 25 at para 36. The case involved a complaint by a ratepayers' forum that its members had not been treated fairly by the local authority when it imposed the same property rates which were payable on urban properties on their agricultural land. They sought just and equitable relief under section 172(1)(b) of the Constitution.

[19] *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* [2022] ZASCA 54; 2022 (5) SA 56 (SCA) at para 43.

appeal, if the court of appeal is satisfied that the discretion was not exercised judicially, or was influenced by wrong principles or based on a misdirection of fact. It follows that the enquiry here should be whether the High Court misdirected itself on the facts and the law.

[58] The High Court's prospective order is challenged by Ekapa on two bases. First, it is submitted that, in exercising its discretion in limiting the retrospective effect of the order of invalidity, the High Court singularly failed to take into account the interests and position of Ekapa: it merely took into account the interests of the municipality. It is therefore argued that the lack of balance by the High Court in the exercise of its discretion constitutes a misdirection, which opens the door for this Court to interfere with the discretion.[20] Ekapa also contends that it put forward relevant facts that would have assisted the High Court in the exercise of its discretion under section 172(1)(b) of the Constitution. There is no debate that it is apparent from the judgment that the position and interests of Ekapa were not considered. Counsel for the municipality conceded as much before us.

[59] The second basis advanced by Ekapa that would justify this Court's interference with the High Court's order is the latter's failure to take into account the prejudice to the public interest in allowing the municipality to recover rates that are set at unreasonable levels and that were accordingly declared invalid.

[60] Regarding the first basis, this Court has remarked that: "*improper* performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief" (own emphasis).[21] It has also distinguished between a declaration of invalidity and a setting aside order as was the case in *Khumalo*, where this Court held that "[w]hile a court must declare conduct that it finds to be

[20] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 88.

[21] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

unconstitutional invalid, it need not set the conduct aside".[22] A declaration of invalidity would then engage a court's remedial powers to grant a "just and equitable" order under section 172(1)(b) of the Constitution.[23]

[61] Thus, when a court declares a decision of the state invalid and unlawful, the default position is that the impugned decision is void *ab initio* (from the start), for example, the declaration of invalidly has retrospective effect – "an administrative decision declared to have been invalid is to be retrospectively regarded as if it had never been made."[24] However, the court has wide powers to exercise a discretion to ameliorate the consequences of such an order.[25] It follows that a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy: for example, notwithstanding the invalidity, the impugned decision might not be set aside, and hence the declaration of invalidly would have no retrospective effect.

[62] The rationale as to why an order of prospective invalidity is made is another factor that must be considered — the case law on this issue is trite. Accordingly, this Court has consistently held that an order limiting retrospectivity can be used as a mechanism "to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute".[26]

[63] In light of the aforementioned, it is necessary to have regard to the facts before the High Court when it exercised its discretion. The municipality, in its answering affidavit in the application for leave to appeal, asserted that the rates ratio was annually determined by the council as part of its annual budget approval process, as prescribed

[22] *Khumalo* above n 13 at para 53.

[23] Id.

[24] *City of Johannesburg v AD Outpost (Pty) Ltd* [2012] ZASCA 40; 2012 (4) SA 325 (SCA) at para 20.

[25] *Notyawa v Makana Municipality* [2019] ZACC 43; 2020 (2) BCLR 136 (CC); 2020 4 BLLR 337 (CC); (2020) 41 ILJ 1069 (CC) at para 50.

[26] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 43.

in sections 16 and 17 of the Local Government: Municipal Finance Management Act.[27] It stressed that these amounts were earmarked as anticipated revenue to be collected by the municipality. This is congruent with the High Court's finding that an order of setting aside with full retrospective effect would have a disruptive, if not deleterious, effect on the affairs of the municipality in the enforcement of the impugned outstanding rates.

[64] On the same score, it is also correct that the High Court did not consider that Ekapa had paid rates throughout the relevant period at a ratio of 1:3, in line with the rates charged by the municipality on the category of business and commercial properties, and claimed to pay rates on the ratio applicable to similar mining operations elsewhere in the country. The shortfall on the municipality's budget projections over several financial years amounted to around R30 million (representing the difference between the 1:3 ratio and the 1:22 ratio), arguably resulting in an approximate annual deficit of R5 million over six years. Advancing this assumption, I regard it as unlikely that an annual shortfall of such a relatively limited amount would have necessitated having to borrow money from the bank. The High Court clearly did not consider this factor.

[65] In examining the second basis and the municipality's argument before this Court that the High Court correctly exercised its remedial discretion in terms of the prospective order, the submission implies that the effect of the order accords with the norms of justice and equity. That is, the municipality is still able to exact payment of this amount even though the High Court has held that the decisions that gave rise to that indebtedness were unconstitutional. Should matters be left as they are, the municipality stands to unjustifiably claim the unlawfully imposed excessive portion of the municipal rates levied on Ekapa that were charged on the basis of an incorrect and unlawful tariff. As the Court in *Thaba Chweu* held, the municipality cannot seriously argue that it is

[27] 56 of 2003.

entitled to claim the spoils of unlawfully overcharging ratepayers going forward.[28] If so, it should be asked: why should the municipality benefit from payment of the unlawful arrear rates?

[66] Furthermore, the High Court's judgment did not address the objections lodged by Ekapa regarding unfairness of the rates since 2019, nor did it acknowledge its attempts to engage the municipality in discussions regarding these objections. A year later the municipality indicated to Ekapa that its submissions would be considered in future budget and tariff drafts, but these did not materialise. Subsequently, a slew of correspondence between 2020 and 2021 highlights the municipality's awareness of the objections to its tariff decisions and its intransigence in dealing therewith.

[67] I am of the view, therefore, that the High Court confined itself to the fiscal interests of the municipality without due regard for the impact of the principle of legality and Ekapa's rights and substantial prejudice in having to pay more than R30 million in unlawful rates. Accordingly, in exercising its remedial discretion, the High Court misdirected itself and failed to adhere to the mandated approach.

Remedy

[68] This Court held in *Hoërskool Ermelo*[29] that what constitutes an appropriate order under section 172(1)(b) will be determined by the particular facts of the case. Furthermore, the relief granted by this Court must reflect that proceedings "against the state assume a public character which necessarily widens the reach of orders issued to cover persons who were not privy to particular litigation".[30] In carving out appropriate just and equitable relief, the approach in *Millennium Waste* and, more pertinently, *Lombardy*,[31] (which, like *Thaba Chweu* is on all fours with this matter), should find

[28] *Thaba Chweu* above n 18 at para 34.

[29] *Hoërskool Ermelo* above n 16 at para 96.

[30] *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC) at para 40.

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

application: this Court has to weigh the consequences of retrospectively invalidating the impugned municipality rates against the imperative to vindicate the principle of legality.

[69] In this case, there are several competing interests that are required to be taken into account in considering the exercise of the discretion under section 172(1)(b). In doing so, it must be borne in mind that the very inequity is this: if the prospective order of the High Court stands, the municipality will be entitled to sue and recover the unpaid portion of the rates, despite the decisions levying the rates having been found to be unlawful and having been set aside. I leave aside for present purposes the defence of prescription which might be raised by Ekapa in the event that the municipality proceeds to recover the arrears.

[70] I have set out the consequences should the status quo be permitted to persist. On the other hand, the municipality claims prejudice in that these funds were earmarked as anticipated revenue. What of the burden of proof when an order limiting a declaration of invalidity is sought? Previous jurisprudence establishes that the burden of proof that a retrospective order is not just and equitable rests on the party seeking its limitation. The Supreme Court of Appeal approached the matter as follows in *Lombardy*:

> "The procedures set out in the MPRA for the compilation of a valuation roll are a jurisdictional prerequisite for the exercise by the City of its power to collect rates. The reference in any law to any action or conduct is presumed to be a reference to a lawful or valid action or conduct. If, as here, those procedures were not followed, the result is that the consequent collection of rates by the City premised on the valuation roll is invalid. The High Court's declaration of invalidity of the 2012 roll is thus unassailable. And, as it was put in *City of Johannesburg v AD Outpost* 2012 (4) SA 325 (SCA) para 20 'an administrative decision declared to have been invalid is to be retrospectively regarded as if it had never been made.' The City contends however that the roll should not have been set aside or that some other just and equitable order short of setting aside the roll should have been made. In that regard it is important to emphasise that a litigant seeking a just and equitable remedy limiting the impact of the mandatory remedy of a declaration of invalidity must make out such a case. In particular, facts should be adduced as to the deleterious consequences for the public

> interest of setting aside a decision that has been declared invalid. This is to enable the Court to weigh up those consequences against the imperative to vindicate the principle of legality. No such case has been made out by the City in its papers. If anything, the City has been aware of the vociferous objections by its residents since it first implemented the massive rates increases in July 2012. It could thus hardly be said that the delay between July 2012 and June 2013 has caused any prejudice to it, in the sense that relevant evidence has been forgotten or proof destroyed. 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 than that the court should decline to set aside the 2012 valuation roll."[32] (Footnotes omitted.)

[71] It follows that the municipality bears the burden of proving that a fully retrospective order is not just and equitable in the circumstances of this matter. But, its case before this Court was relatively constrained on this point. It is worth repeating that the High Court engaged in speculative reasoning regarding the municipality's potential need to secure loans to cover the shortfall. This speculation lacked any evidential basis, and the municipality readily conceded the point in this Court.

[72] The municipality's submissions regarding the disruptive consequences of a fully retrospective order in the High Court, although terse, were intended to demonstrate that the rates payable by Ekapa were anticipated revenue and that such an order would result in disruptive budgetary consequences for the municipality. However, in my view, the municipality overemphasised the consequences of a retrospective order, and those flawed submissions informed the High Court's reasoning in limiting retrospectivity and, consequently, in formulating its order.

[73] The delay taken by Ekapa in challenging the decision of the municipality after a number of financial years had elapsed, albeit that they had lodged their objections during that period, must be considered as part of the balancing exercise that

[32] *Lombardy* above n 31 at para 21.

section 172(1)(b) contemplates. Certainly, it could be argued that the impact on the municipality would have been softened if Ekapa had acted more speedily. On the other hand, the municipality knew that Ekapa had only paid its rates in terms of the 1:3 ratio and did not institute action to claim the outstanding amount due in terms of the 1:22 ratio. Moreover, it was also cognisant of the fact that Ekapa had lodged objections to the said rates. It is thus improbable that the municipality laboured under the misconception that its actions would not be challenged by Ekapa.

[74] In the result, the municipality has not discharged the evidential burden of showing that it was unable to balance the books during the disputed time frame spanning 2015 to 2021 without access to the unpaid R30 million.

[75] The following conundrum thus arises: Ekapa is more than satisfied with paying the rates at a 1:3 ratio, as it has been doing, while the municipality is equally content with the prospective order issued by the High Court. But I have found that the municipality's stance is not acceptable for the reasons articulated above. On the other hand, the remedy now belatedly sought by Ekapa is problematic for two reasons. Firstly, the stance effectively asks this Court to determine the rates for the past six years, an approach that can be considered as infringing on the separation of powers by encroaching on the municipality's domain. Secondly, and most importantly, the issue was never traversed in the papers or debated before the High Court.

[76] Unfortunately, neither counsel for Ekapa nor the municipality could come up with any meaningful alternatives when these issues were raised in argument. This Court must then do the best that it can in the circumstances: the fact that no specific relief was sought before the High Court is not a bar to this Court exercising the correct discretion under section 172(1)(b).

[77] As I have observed, the municipality would have been aware of the non-payment of rates on the properties with effect from the 2015 financial year onwards. Yet, on the evidence before us, it took no legal steps to recover any amounts from Ekapa. Rather,

it appears that it sat on its hands and only sought to recover the rates (which I have found were unlawfully imposed) when Ekapa asked for a rates clearance certificate in order to take transfer of its properties. Furthermore, there is no evidence that the municipality took any steps to recover from Ekapa the full amount allegedly due by it after it unilaterally elected to pay less than what was said to be due by it after 2019.

[78] On the other hand, Ekapa was seemingly oblivious of the extent of its indebtedness until it sought the rates clearance certificate and, when it did become aware of the extent thereof, it actively engaged with the municipality in an endeavour to address the impasse. In so doing, it made part payment in the interim so that the municipality was not entirely out of pocket. Without commenting on the reasonableness of the amount so paid by Ekapa, it is apparent that Ekapa has not entirely shirked its responsibility towards the municipality to pay rates on its properties. Furthermore, Ekapa has undertaken not to seek to recover any of the amounts paid by it in the event that this Court declares the conduct of the municipality to be unlawful.

[79] In assessing the constitutional delinquency of the municipality's conduct *vis—à—vis* (with regard to) that of Ekapa, I refer to what the Supreme Court of Appeal said in *Thaba Chweu.*

> "It is important to bear in mind that in the fabric of our Constitution, the first respondent is a sphere of government and the second and third respondents are organs of state. Our constitutional democracy is based on the rule of law. As stated by this Court in *Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others*: '. . . *the function of public servants . . . is to serve the public, and the community at large has the right to insist upon them to act lawfully and within the bounds of their authority . . .*' The municipalities are thus expected not only to be conversant with the law applicable to their sphere of government, but also to conduct their affairs within the confines of the law. Should they fail to do so, the courts should not be impeded from considering and granting an appropriate order that would have the effect of vindicating the principle of legality. A trend should not develop, or precedent established, where there would be no consequences when municipalities function outside the parameters of the law. In

Lombardy, this Court cautioned against the implications of such practice."[33] (Emphasis added.)

[80] I conclude that the interests of justice will be met in this case if the order of invalidity is made fully retrospective while Ekapa is held to its undertaking given in this Court and is precluded from recovering any amounts already paid under the 1:3 ratio. In holding Ekapa to this undertaking, I stress again that this Court makes no pronouncement on the reasonableness of the amount actually paid by Ekapa or of the rates ratio applicable in respect of mining property.

Order

[81] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and substituted with the following order:
   (a) "The decisions taken by the council of the first respondent to set a property rates ratio of 1:22 in respect of the category of "mining" for the financial years 2015/2016; 2016/2017; 2017/2018; 2018/2019 and 2019/2020 are declared unlawful and are hereby set aside.
   (b) In terms of section 172(1)(b)(i) of the Constitution, the order in paragraph 3(a) will operate retrospectively with effect from 1 July 2015 onwards.
   (c) The first respondent may recover from the applicants, only the amounts of the mining property rates ratio in relation to the residential property rates ratio calculated based on the Local Government: Municipal Property Rates Act 6 of 2004 and the regulations promulgated in terms thereof, less any amount in

[33] *Thaba Chweu* above n 18 at para 37.

excess of the legally permissible limit, in respect of each financial year from 2015/2016 to 2019/2020; and

(d) The first respondent is to pay the applicants' costs of suit."

4. The first respondent is ordered to pay the applicants' costs of the appeal, including the costs of two counsel where so employed.

5. The applicants' undertaking not to claim any reimbursement from the first respondent for the rates it voluntarily paid under the 1:3 ratio is made an order of court.

For the Applicants:	M M Rip SC, A M Viviers and S G Webster instructed by Duncan Rothman Attorneys.
For the First Respondent:	K W Lüderitz SC, S Quinn and B Ramela instructed by Van De Wall Incorporated.