IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 11812/2022

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

2025/7/21 [redacted]
DATE SIGNATURE

In the matter between:

LEWRAY INVESTMENTS (PTY) LTD **First Applicant**
(REGISTRATION NUMBER: 2005/027112/07)

SHANIKE INVESTMENTS NO 84 (PTY) LTD (RF) **Second Applicant**
(REGISTRATION NUMBER: 2010/001695/07)

BALLYCASTLE PROPERTIES 104 (PTY) LTD **Third Applicant**
(REGISTRATION NUMBER: 2002/022140/07)

INDLUPLACE PROPERTIES LTD **Fourth Applicant**
(REGISTRATION NUMBER: 2013/226082/06)

MADULAMMOHO HOUSING ASSOCIATION NPC **Fifth Applicant**
(REGISTRATION NUMBER: 2004/012568/08)

TORTELLO INVESTMENTS 143 (PTY) LTD **Sixth Applicant**
(REGISTRATION NUMBER: 2010/000751/07)

JOZI HOUSING (PTY) LTD **Seventh Applicant**
(REGISTRATION NUMBER: 2003/009620/07)

JOHANNESBURG PROPERTY OWNERS AND
MANAGERS ASSOCIATION **Eighth Applicant**
(REGISTRATION NUMBER: 2011/110042/08)

BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD **Ninth Applicant**
(REGISTRATION NUMBER: 2004/004954/07)

BREAK EVEN 1489 (PTY) LTD **Tenth Applicant**
(REGISTRATION NUMBER: 2008/000091/07)

brickfields housing company (pty) ltd **Eleventh Applicant**
(REGISTRATION NUMBER: 2002/026972/07)

CLIDET NO 1000 (RF) (PTY) LTD **Twelfth Applicant**
(REGISTRATION NUMBER: 2009/018240/07)

URBAN LAND PROPERTIES (PTY) LTD **Thirteenth Applicant**
(REGISTRATION NUMBER: 2007/033942/07)

DALEM INVESTMENTS (PTY) LTD **Fourteenth Applicant**
(REGISTRATION NUMBER: 2015/081394/07)

GUVON BELEGGINGS (PTY) LTD **Fifteenth Applicant**
(REGISTRATION NUMBER: 1980/004015/07)

INYANGA TRADING 492 (PTY) LTD **Sixteenth Applicant**
(REGISTRATION NUMBER: 2006/022125/07)

JIKA PROPERTIES (PTY) LTD **Seventeenth Applicant**
(REGISTRATION NUMBER: 2005/035424/07)

JOHANNESBURG HOUSING COMPANY NPC **Eighteenth Applicant**
(REGISTRATION NUMBER: 1995/013843/08)

LEAD PROPERTIES CC **Nineteenth Applicant**
(REGISTRATION NUMBER: 2002/027490/23)

LITTLE SWIFT INVESTMENTS 450 (PTY) LTD **Twentieth Applicant**
(REGISTRATION NUMBER: 2015/353522/07)

DICK, MICHAEL **Twenty-first Applicant**

RIVERSFIELD PROPERTY INVESTMENTS (PTY) LTD **Twenty-second Applicant**
(REGISTRATION NUMBER: 2014/083215/07)

PONDOS INV (PTY) LTD **Twenty-third Applicant**
(REGISTRATION NUMBER: 2014/012598/07)

QUARTZ RENTAL MANAGEMENT (PTY) LTD **Twenty-fourth Applicant**
(REGISTRATION NUMBER: 2012/027228/07)

ROSNEV INVESTMENTS (PTY) LTD **Twenty-fifth Applicant**
(REGISTRATION NUMBER: 1975/003971/07)

SIRIUS PROPERTY INVESTMENTS (PTY) LTD **Twenty-sixth Applicant**
(REGISTRATION NUMBER: 2012/142747/07)

SOLAR SPECTRUM TRADING 179 (PTY) LTD **Twenty-seventh Applicant**
(REGISTRATION NUMBER: 2006/029500/07)

SUNNYSHORE INVESTMENTS AND
TRADING 103 (PTY) LTD **Twenty-eighth Applicant**
(REGISTRATION NUMBER: 2007/014839/07)

ZINATHI PROPERTY (PTY) LTD **Twenty-ninth Applicant**
(REGISTRATION NUMBER: 2018/296010/07)

TEACA PROPERTIES (PTY) LTD **Thirtieth Applicant**
(REGISTRATION NUMBER: 2006/009429/07)
DICK, VERONA **Thirty-first Applicant**

WEEMAC MANSIONS (PTY) LTD **Thirty-second Applicant**
(REGISTRATION NUMBER: 2017/251710/07)

ZAHAVI ESTATES CC **Thirty-third Applicant**
(REGISTRATION NUMBER: 1987/020790/23)

ANSON HOLDINGS (rf) (PTY) LTD **Thirty-fourth Applicant**
(REGISTRATION NUMBER: 1958/000474/07)

KAYE-EDDIE, PETER **Thirty-fifth Applicant**

JACOBS, GIL **Thirty-sixth Applicant**

TOLLMAN, JOEL **Thirty-seventh Applicant**

HANSEN, ANNA **Thirty-eighth Applicant**

MANNERING, ANNE **Thirty-ninth Applicant**

HESSELINK N.O., MARINUS JOHANNES **Fortieth Applicant**

WONG N.O., PATRICK MARTIN **Forty-first Applicant**

WOUTERS N.O., SIETSE GOVERT **Forty-second Applicant**

and

THE CITY OF JOHANNESBURG **First Respondent**

PIKITUP (PTY) LTD
(REGISTRATION NUMBER: 2000/029899/07) **Second Respondent**

JUDGMENT

Motha, J

Introduction

1) The *fons et origo* of this matter is the reclassification of multi-unit residential rental accommodation from the refuse charge tariff to the non-sectional title refuse tariff, in the City of Johannesburg. The applicants seek an order declaring this classification unlawful and inconsistent with the Local Government Municipal Systems Act, 2000 (MSA), read together with the first respondent's Tariff Determination By-laws, 2008. On the contrary, the respondents submit that the reclassification is not *ultra vires*, since the tariff determination scheme arises from the relevant empowering legislation, and non-sectional titled units should attract municipal levies in the same way as sectional titled units.

The facts in brief and the parties.

2) Save for the eighth applicant, all applicants are companies that own multi-unit residential rental accommodation within the City of Johannesburg. Collectively, they are responsible for 7,333 residential dwelling units, which cater to lower and middle-income tenants. The eighth applicant is a non-profit association which was incorporated to represent the interests of property owners and managers in Johannesburg.

3) In terms of s156(1)(a) read with Part B of Schedule 5 of the Constitution, the respondents have the executive authority to ensure the provision of service delivery, such as, *inter alia,* refuse removal, refuse dumps and solid waste disposal, to communities. Furthermore, the respondents are authorized by the legislation to impose taxes, levies and duties.

4) Stripped to its bare essentials, this matter concerns the lawfulness of the decision by the City of Johannesburg to impose a non-sectional title tariff on the buildings that were paying a refuse charge tariff.

The legislative framework

5) The hierarchical legal framework is that the City's tariff-setting power has its roots in the Constitution, finds expression in the Systems Act, and is fleshed out in the City's Tariff Determination Policy and the City's Tariff Determination By-laws. Section 151(1) of Chapter 7 of the Constitution, which deals with Local Government, reads:

> "(1) The local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic.
> (2)....
> (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution...
>
> 152 Objects of local government are-
> (a) to provide democratic and accountable government for local communities;
> (b) to ensure the provision of services to communities in a sustainable manner;
> (c) to promote social and economic development;
> (d) to promote a safe and healthy environment; and
> (e) to encourage the involvement of communities and community organizations in the matters of local government...
>
> 156 Powers and functions of municipalities
> (1)...
> (2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer...
>
> 229 Municipal fiscal powers and functions
> (1) Subject to subsection (2), (3) and (4), a municipality may impose-

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) if authorized by national legislation, other taxes, levies and duties are appropriate to local government or to the local or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty."

6) In November 2000, the MSA was promulgated, and s 11(3) thereof reads:

"(3) A municipality exercises its legislative or executive authority by-

(a) developing and adopting policies, …

(b)…

(c)…

(e) implementing applicable national and provincial legislation and its by-laws;

(f) …

(g)…

(h)…

(i) imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariff, rates and tax and debt collection policies;

(j)…

(k)…

(l)…

(m) passing by-laws and taking decisions on any of the above-mentioned matters; and …

74. Tariff policy

(1) A Municipal council must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements, and which complies with the provisions of this Act, the Municipal Finance Management Act and any other applicable legislation.

(2) A tariff policy must reflect at least the following principles, namely that-

(a) Users of municipal services should be treated equitably in the application of tariffs…

(3) A tariff Policy may differentiate between different categories of users, debtors, service providers, services, service standards, geographical areas and other matters as long as the differentiation does not amount to unfair discrimination.

75. By-laws to give effect to policy

(1)A Municipal council must adopt bylaws to give effect to the implementation and enforcement of its tariff policy.

(2) By-laws in terms of subsection (1) may differentiate between different categories of users, debtors, service providers, services, service standards and geographical areas as long as such differentiation does not amount to unfair discrimination.

75A. General power to Levy and recover fees, charges and tariffs.

(1) A municipality may-

(a) levy and recover fees, charges or tariffs in respect of any function or service of the municipality; and

(b) recover collection charges and interest on any outstanding amount …"

The submissions

7) The applicants submit that it is the Policies and By-laws that dictate how a municipality's tariff-setting power (as provided for in section 75A of the Systems Act) must be exercised. Further, their counsel submits that in terms of section 74(1) of the Systems Act, a municipality must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service

delivery agreements, and which complies with the provisions of the Systems Act, the Municipal Finance Management Act 56 of 2003 and any other applicable legislation.

Counsel for the respondents

8) Referring to the notice of motion in which the applicants seek the classification of "non-sectional title properties" as contained in the first respondent's Tariff of Charges for Solid Waste Services for the years 2018 to 2019, 2019 to 2020, 2020 to 2021 and 2021 to 2022 to be declared unlawful and inconsistent with the Local Government Municipal Systems Act, 2000, read together with the first respondent's Tariff Determination By-laws, 2008, counsel for the respondents submits that the applicant's case is based on *ultra vires*.

9) To argue that, if regard is had to the Policy or the By-laws, one would not find the reference to the non-sectional title is a fundamentally wrong way of interpreting the MSA, he maintains. Essentially, the court is being asked to determine whether the Policy and By-laws are ultra vires s 75(2) of the MSA, the argument goes. He submits that the remit of the empowering provision of s75(2) of MSA is wide enough to permit "the COJ to impose or extend the non-sectional title tariff to flats in buildings owned by the applicants."[1] As he develops the submission, he argues that this is a classic case of a tail wagging the dog, as outlined in the matter of *Trustco Group International (Pty) Ltd v Vodacom (Pty) Ltd and Another.*[2] For completeness' sake, it is apt to refer to paragraphs 14 and 16, on which he places reliance, viz:

> "In Rossouw & another v Firstrand Bank Ltd [2010] ZASCA 130; 2010 (6) SA 439 (SCA) para 24, this court said the following:
>
> > '. . . [I]t is generally impermissible to use regulations created by a minister as an aid to interpret the intention of the legislature in an Act of Parliament, notwithstanding that the Act may include the regulations,...

[1] Heads of argument of the respondent para 23.8
[2] (82/2015) [2016] ZASCA 56; 2017 (5) SA 283 (SCA); 2016 BIP 27 (SCA) (1 April 2016)

[16] In addition as submitted further, the rule of statutory interpretation, that a specific provision overrides a general provision, applies to provisions within the same legislative instrument. A specific provision in a regulation cannot override a general provision in a statute. To read the Act 'conjunctively' with the Regulations and to construe the Regulations in the manner resorted to by the court below is in effect to have the tail wag the dog."

10) At this juncture, it is apt to pause and mention that the court enquired if the Policy and by-laws did not serve to give substantive content to the enabling provision. Counsel submits that the Policy and by-laws may indeed do so, but did not override the empowering legislative provision. In response, the court referred him to the detailed differentiations and distinctions contained in the Tariff Determination By-laws, particularly the following:

"The Council may allow for the following categorization-

A. Categories of users

(i) Residential or Domestic,
(ii) Commercial;
(iii) Industrial;
(iv) Farming,
(v) Government; and
(vi) State owned enterprises."

11) Counsel argues that it is not necessary for the by-law to explicitly mention the words non-sectional title. Posing a rhetorical question, the court asks what the function of by-laws is, if not to delineate the users. In further engagements, counsel submits that the by-law expands upon the power to impose a tariff. To quote him: "The Act gives you the power to make a tariff; the by-law expands upon the power. It says yes, you can impose a tariff for these kinds of users." However, the enabling provision should be looked at without reference to by-laws, he concludes.

12) Additionally, he submits that the applicants' second attack is based on the decision taken during October or November 2021 to recalculate the applicants' City of Johannesburg

account numbers in terms of the non-sectional title residential refuse tariff. The submission is that there is no attack on the imposition of the tariff, but on the letters, which are, for all intents and purposes, meant for debt collection. Referring to these letters, dated 22 October 2021 and 15 November 2021, counsel maintains that they do not amount to a decision but a correction of the billing tariff.

Counsel for the applicant

13) In response to the respondents' submissions, counsel submits that the applicants' case has been mischaracterized as being based on *ultra vires* when in fact it is based on both *ultra vires* and rationality. Further, he submits that the case advanced by their counsel in court is beyond the respondents' pleaded case. Accordingly, it is incorrect to understand the notice of motions as seeking to declare the classification inconsistent and, therefore, unlawful, as opposed to seeking to declare the classification unlawful and inconsistent, which is their case.

14) He submits that it is incorrect to simply have regard to the MSA without having regard to the by-laws. It is his submission that the case of *Trustco Group International (Pty) Ltd* does not find application in this case. He reminds the court that it is common cause that the distinction between non-sectional title and sectional title properties is not one of delineated categories.

15) On the question of rationality, he submits that the high-water mark of respondents' response is found at paragraph 37, which reads: "The distinction between non-sectional title properties, largely freehold, vis-a-vis flats and sectional title units is rational on the basis of the relatively low waste generated by most flat dwellers means that the tariff applied to the non-sectional title properties category would severely under-recover the costs associated with rendering the service to the other forms of residential dwellings which are charged at a lower rate."[3]

[3] Answering affidavit

16) Counsel takes issue with this paragraph, and contends that it is irrational, as no valuation has been conducted to determine whether the applicant's units are valued at less than R350,000.00—in which case, they would not be liable for refuse charges.

The law

17) It is trite that: "a local government may only act within the powers lawfully conferred upon it." In the matter of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,[4] the court held:

> "It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."[5]

18) Outlining the role played by the principle of legality, the court in *Masetlha v President of the Republic of South Africa and Another* [6] held:

> "It is therefore clear that the exercise of the power to dismiss by the President is constrained by the principle of legality, which is implicit in our constitutional ordering. Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect, be arbitrary and at odds with the rule of law."[7]

19) A brief exposition of the law in this regard is found in the matter *of Democratic Alliance v President of South Africa and Others* [8]where the court said:

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[4] (CCT7/98) [1998] ZACC 17; 1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998)
[5] Supra para 58
[6] CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007)
[7] Supra 85
[8]CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) (5 October 2012)

"The Minister and Mr Simelane accept that the 'executive' is 'constrained by the principle that [it] may exercise no power and perform no function beyond that conferred... by law' and that the power must not be misconstrued. It is also accepted that the decision must be rationally related to the purpose for which the power was conferred. Otherwise, the exercise of the power would be arbitrary and at odds with the Constitution. I agree."[9]

Analysis

20) To me, the point of departure is to point out that *Trustco Group International (Pty) Ltd* is distinguishable from this case. For starters, *Trustco* was concerned with regulations and not by-laws. Secondly, the by-laws is created in terms of the empowering provisions which is in sharp contract with the regulations which were created by a minister, as the SCA held that it is generally impermissible to use regulations created by a minister as an aid to interpret the intention of the legislature in an Act of Parliament, notwithstanding that the Act may include the regulations. Lastly, in casu we are not examining a specific by-law which overrides a general provision of the MSA, as was the case when the SCA held that the rule of statutory interpretation, that a specific provision overrides a general provision, applies to provisions within the same legislative instrument and that a specific provision in a regulation cannot override a general provision in a statute.

21) The empowering provision, s75(1) of MSA, envisages the creation of by-laws "to give effect to the implementation and enforcement of its tariff policy." The tariff policy is enuaciated in s 74 (1) of MSA. Similarly to the tariff policy, by-laws may, in terms of 75(2), "differentiate between different categories of users, debtors, service providers, services, service standards and geographical areas as long as such differentiation does not amount to unfair discrimination."

22) Upon a proper examination of the Tariff Determination Policy, which is created in terms of MSA, two issues stick out like a sore thumb insofar as this case is concerned, namely:

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[9] Supra para 27.

there is no differentiation called sectional title and non-sectional title properties, and to enforce and implement the tariff policy, by-laws **must** be adopted. [my emphasis]

23) In the Preamble of the Tariff Determination By-laws, pertinently, the empowering provisions are acknowledged and tabulated. The differentiation as foreshadowed in ss 74(3) and 75(2) eventuated under s 7(2) of Tariff Determination By-laws as follows:

> "When determining the tariffs and making the differentiation for tariff purposes, the Council may allow for the following categorization-
>
> A. Categories of users
>
> (i) Residential or Domestic,
> (ii) Commercial,
> (III) Industrial,
> (iv) Farming,
> (v) Government,
> (VI) State owned enterprises.
>
> The sub-categories of residential or domestic users may be defined based on any one or more of the following criteria.
>
> (i) Settlement type (which must include informal settlements and Homeless people Shelters);
> (ii) Property value,
> (iii) Service consumption level,
> (iv) Payment levels,
> (v) Household income, and
> (vi) Type of connection.
>
> B. Categories of service
>
> (i) Type of service,

(ii) Category of user,

(iii) Level of consumption,

(iv) Type of connection, and

(v) Time of use.

C. Categories of standard of service

Different categories of standard of service may be defined for different categories of users or services. They may be based on:

(i) Access; and

(ii) Frequency

D. Categories of Geographical Area

Differentiation based on geographic area may be used if the service provided is at least the basic service and one of the following criteria is met:

(i) Topography must have significant impact on the cost of delivering the service;

(ii) Significant capital costs are needed to develop service infrastructure in the area; and

(iii) The Integrated Development Plan identifies the area as having strategic developmental importance.

(3) The differentiation for tariff purposes shall be done during the tariff determination process.

24) The creation of a distinction between sectional and non-sectional title properties introduces a category that finds no basis in the empowering provision. It, therefore, ineluctably follows that the respondents acted *ultra vires* in purporting to create a non-sectional title distinction. Chapter 5 of the Tariff Determination Policy defines "Different types (of) tariffs" for Waste and Refuse Removal. It provides for a "Domestic Tariff " that applies to private dwellings per erf, block(s) of flats, ... and old age homes,

a "Non-domestic Tariff", a "Business refuse" tariff, etc. It makes no distinction between sectional title and non-sectional title properties.

25) To merely contend, as respondents do, that s 75(2) is sufficiently broad to permit a distinction between sectional and non-sectional title properties is to overlook the pivotal role of a tariff policy and by-laws. Without a tariff policy and by-laws, the imposition of tariffs is left without a rational legal framework and becomes susceptible to challenges on the grounds of unfair discrimination and irrationality. For example, sectional title owners whose flats are less than R350,000 do not pay any refuse levies. What is the rationale for charging non-title property owners for units that could be worth less than R350,000?

Conclusion

26) Having found that the respondents acted *ultra vires*, the distinction between sectional and non-sectional title properties is reviewed and set aside.

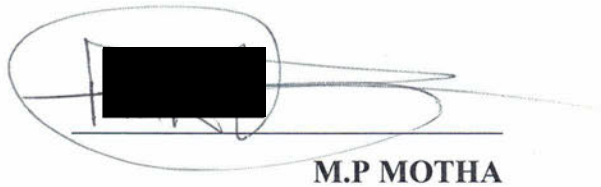
Costs

27) It is trite that costs are within the discretion of the court. Since there is no reason why costs should not follow the action, the respondents are to pay the costs on a party-party scale.

Order

1. The classification of "non-sectional/title properties" as contained in the first respondent's Tariff of Charges for Solid Waste Services for the years 2018 to 2019, 2019 to 2020, 2020 to 2021 and 2021 to 2022 is declared unlawful and inconsistent with the Local Government Municipal Systems Act, 2000, read together with the first respondent's Tariff Determination By-laws, 2008, and is set aside.

2. The respondents are directed to pay the costs of this application jointly and severally on scale C.



M.P MOTHA
JUDGE OF THE COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of Hearing:	14-15 April 2025
Date of Judgment:	21 July 2025

APPEARANCES:

For the Applicant:	L Hollander Sc and A Shont
Instructed by:	Vermaak Marshall and Wellbeloved Inc.
For the Respondents:	TJ Bruinders Sc and E Richards
Instructed by:	Moodie & Roberts Inc