

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2023/095869.**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
24 JUNE 2025	
DATE	SIGNATURE

In the matter between:

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

and

THE INDEPENDENT INSTITUTE OF EDUCATION (PTY) LTD

First Respondent

ADVTECH LTD

Second Respondent

and in the matter between:

Case No: **2023/133361**

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

**MUNICIPAL MANAGER OF THE CITY OF
JOHANNESBURG METROPOLITAN MUNICIPALITY**

Second Applicant

and

INDEPENDENT SCHOOLS ASSOCIATION OF

SOUTHERN AFRICA NPC

First Respondent

**THE TRUSTEES FOR THE TIME BEING OF THE
SPARROW SCHOOLS EDUCATIONAL TRUST**

Second Respondent

BELLAVISTA SCHOOL NPC

Third Respondent

CITYKIDZ PRE AND PRIMARY SCHOOL NPC

Fourth Respondent

and in the matter between:

Case No: **2023/120464**

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

**MUNICIPAL MANAGER OF THE CITY OF
JOHANNESBURG METROPOLITAN MUNICIPALITY**

Second Applicant

and

CURRO HOLDINGS LTD

Respondent

and in the matter between:

Case No: **2023/128616**

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Applicant

and

AFRIFORUM

Respondent

Judgment handed down electronically by circulation to the parties' legal representatives via email, and release to SAFLII and by uploading it on CaseLines. The date and time for hand down is deemed to be 10:00 on... June 2025.

Administrative justice – review – grounds –the constitutional right to administrative justice – application for leave to appeal – Section 17 of the Superior courts Act, 10 of 2013- application dismissed with costs.

JUDGMENT: LEAVE TO APPEAL

MUDAU, J:

Introduction

- [1] This is an application for leave to appeal following this court's declaration that the Johannesburg Municipality's 2023/2024 Property Rates Policy, Rates By-law, and Rates Resolution are unlawful and constitutionally invalid to the extent that they regulated the categorisation and rating of educational properties. The judgment followed a consolidated hearing of four but separate review applications concerning the classification of privately-owned schools under the "Business and Commercial" category, and the procedural and substantive legality of the policy-making process that preceded it.
- [2] The main judgment turned largely on constitutional and legal principles applied to largely uncontested facts. The matter involves the application of settled law on public participation, procedural rationality and the best interests of the child principle. In the main applications, this court concluded that the city conducted a dishonest and sham public participation process in its engagement with the respondents (applicants in the main applications) in all these matters but embarked on unilateral decision-making, not deliberative and devoid of any meaningful public participation.
- [3] In *Doctors for Life International v Speaker of the National Assembly and Others* ("*Doctors for Life*"),¹ the Constitutional Court summarised the duty of legislative bodies to conduct meaningful public participation in the legislative process as follows:

¹ [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at para 145.

"To sum up, the duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less."

- [4] The Constitutional Court amplified this approach in *SA Veterinary Association v Speaker of the National Assembly and Others*,² as follows:

"The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making."

- [5] In terms of section 17(1) of the Superior Courts Act,³ a court may grant leave only if it is persuaded that (a)(i) the appeal would have reasonable prospects of success, or (a)(ii) there is some other compelling reason for it to be heard. Accordingly, this is a higher standard than the prior "reasonable possibility" test under the old Supreme Court Act. The use by the legislator of the word "only" in section 17(1) is an indication of a more stringent test.⁴ The applicant in its papers makes no reference to section 17(1) of the Superior Courts Act at all. The authorities relied upon were only uploaded onto Caselines after the applicant's counsel had addressed this court on the merits and without the benefit of any heads of argument or a practice note.
- [6] Our courts have emphatically and repeatedly stated that leave should not be granted unless there truly is a reasonable prospect of success. A case that is arguable or has some merit will not proceed on appeal unless it can be shown

² [2018] ZACC 49, 2019 (2) BCLR 273 (CC); 2019 (3) SA 62 (CC) at [22].

³ Act 10 of 2013.

⁴ See *Matoto v Free State Gambling and Liquor Authority* [2017] ZAFSHC 80 at [5].

that the appellate court would likely upset the High Court's decision.⁵ The bar has been raised.⁶ Put differently, an applicant must show more than merely "arguable" or "not hopeless" grounds but there must be a sound, rational basis to conclude that another court would reach a different outcome.⁷

- [7] However, even where prospects of success are lacking, the court is enjoined to consider whether there is any other compelling reason to permit an appeal pursuant to Section 17(1)(a)(ii) of the Superior Courts Act. This provision caters for exceptional situations where, despite poor prospects on the merits, the interests of justice demand that the matter be ventilated by an appellate court. The duty is on the applicant to establish such a compelling reason. However, the merits remain vitally important and are often decisive.⁸
- [8] The applicant suggests that this court erred on the facts and the law in holding that the City's public participation process, which led to the adoption of the City's 2023/2024 Rates Policy, Rates By-law, and the City's Budget in relation to the inclusion of educational property under the "Business and Commercial" category, was a sham. This is essentially a challenge to this court's factual finding that the public participation process for the 2023/2024 Rates Policy was inadequate, which is as counsel for one of the respondents, Curro correctly described it, "a fact-intensive and context-sensitive inquiry".
- [9] This court had the benefit of reviewing the full record of the City's consultation process (or lack thereof) and made specific findings on how and why it fell short as the respondents correctly pointed out. This Court noted, by way of example that the City's own response to public submissions (Annexure C1) does not engage at all with submissions made by members of the public. The City in this instance, failed to identify any misdirection by this Court, nor any material factual evidence that was overlooked. It is, therefore, unlikely that another Court would have a different view of the applicant's inadequacies regarding the public participation process embarked upon. As Curro correctly pointed out, the City's

⁵ See *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) at [2].

⁶ See *The Mont Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2335 (LCC) at para 6.

⁷ See *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 at [16].

⁸ *Id* n5 at [2].

disagreement with this court's "factual appraisal of the consultation process does not translate into a bona fide prospect of success on appeal".

[10] As a second ground, the City suggests that this court erred in granting paragraph 4 of the Order and in misapplying the ratio of *Matatiele Municipality and Others v President of the RSA and Others (No 2)*⁹ on the recognition of the owners of educational properties as a "discrete" group. The criticism is without any basis. In this regard, the City conflates the power of the court to grant a just and equitable order in terms of section 172(1)(b) of the Constitution and the legislative powers of the municipal council, which in this instance were exercised irregularly and unlawfully. Paragraph 4 of the order complained of is part of the just and equitable remedy imposed by the court directing the City to properly conduct its public participation process vis-à-vis the applicants *a quo* and the general public affected by the City's categorisation of public and independent schools.

[11] Thirdly, the City suggests that the Court erred in finding that, "the City failed to consider the best interests of the children that attend independent schools when it decided to re-categorise private educational properties" and that it approached the issue "in a piecemeal and isolated fashion the rights of the child in the context of the Rates Policy. It is within the constitutional powers of the City to make the political choices of how the interest of the child may be reflected in its Budget".

[12] The criticism is without any foundation. As the IEE rightly pointed out in its submission, "the City failed to state that it is the City itself which sets the differential rates to the categories of public service purpose and public benefit organisations. The City provides no explanation for how or why it considered the best interests of the child when determining a higher rate applicable to the category of public service purpose, i.e. public schools, as opposed to the category of public benefit organisation, which includes some of the most elite and privileged schools in the country". The City failed to consider the best interests of the child in its decision to unlawfully categorise independent schools

⁹ [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) at para 68.

as "business and commercial" properties without adequate prior consultation with the relevant stakeholders.

- [13] Section 28(2) of the Constitution requires that, "[a] child's best interests are of paramount importance in every matter concerning the child." This provision applies to all organs of state, including municipalities. The affected learners include many from low- and middle-income households, especially in Johannesburg's inner-city and township areas, who attend independent schools as ISASA pointed out. The facts clearly established that the City's decision had a direct and foreseeable impact on children and their access to education. Accordingly, the interests of affected learners were implicated. Yet the City's answering affidavit failed to engage with these concerns.
- [14] In *Governing Body of the Juma Masjid Primary School v Essay NO and Others*,¹⁰ the Constitutional Court held that actions impairing access to education-whether directly or indirectly-must be scrutinized, and the causal link between such actions and their consequences must be established.¹¹ The Johannesburg Municipality is accordingly constitutionally bound to consider how its decisions affect fundamental rights, including those of children as in this instance.
- [15] The fourth ground is on broad terms that, the Court Order impermissibly and unconstitutionally intrudes into the exercise of the executive and legislative powers of the City in that it fetters the power of the City to rate property in a manner authorised by section 229 of the Constitution and the Rates Act and "usurps the power of the City not to determine a category of education". The City asserts that the court adopted a narrow and selective focus, isolating the treatment of independent schools instead of appreciating the Rates Policy as a whole. But the Court did not impermissibly intrude into the executive and legislative powers of the City but instead found that the City's public participation was inadequate and unreasonable in the circumstances. This Court complied with its constitutional obligations in striking down the relevant

¹⁰ [2011] ZACC 13; 2011 (8) BCLR 761 (CC); 2011 JDR 0343 (CC) paras 58-60.

¹¹ *Id* para 58.

parts of the by-law and imposing a just and equitable remedy as sanctioned by the Constitution.

- [16] The fifth ground is an allegation that, the Court erred in granting paragraph 2 of the Order in the absence of any examination of and finding on the alleged phasing in of the property rates over a period of 4 years from 2023/2024 to 2026/2027. There is no merit in this criticism. The City failed to substantiate on what basis the City is empowered under the Constitution or the Rates Act to delay the imposition of a rate to a category over successive years.
- [17] The sixth ground is that the court failed to consider and decide on the several grounds of review canvassed by the applicants and the arguments in that regard. Accordingly, so the argument goes, the Court erred in the exercise of a remedial discretion under section 172(1)(b) of the Constitution. In terms of section 172(1)(a) of the Constitution, a court must declare conduct inconsistent with the Constitution invalid. Section 172(1)(b) authorises a court to "make any order that is just and equitable." These provisions empower the Court to fashion effective and flexible relief to redress illegality.
- [18] It is well established and therefor trite that a high bar must be overcome for an appellate court to interfere with the exercise of a "discretion in a true sense"¹² to grant just and equitable relief in terms of section 172 of the Constitution unless it is satisfied that this discretion was not exercised judicially.¹³ The several grounds relied upon by the applicants in all these matters were unnecessary for consideration upon this court's finding that, the City's decision was unlawful due to, inter alia, a failure to conduct a proper public participation process.
- [19] The application for leave to appeal by the City, as it relates to all the respondents, is without merit and fails to meet the elevated bar required by section 17(1) of the Superior Courts Act. Differently put, the City has neither made out a case that it has reasonable prospects of success in the appeal nor shown that there are other compelling reasons to grant it leave to appeal. The

¹² *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (10) BCLR 1199 (CC); 2015 (5) SA 245 (CC) at [85].

¹³ *Id* at [88].

application for leave to appeal falls to be dismissed with costs, including the costs of two counsel where so employed on scale C.

Order

The application for leave to appeal in all the applications is dismissed with costs, including the costs of two counsel where so employed on Scale C.


MUDAU ADJP
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

Counsel for the Applicants: Adv. S Ogunronbi
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Counsel for the Respondent: Adv. J L Verwey,
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AFRIFORUM NPC

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CURRO HOLDINGS

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The Independent Schools Associations of Southern Africa NPC and 3 Others

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Date of Hearing: 20 June 2025

Date of Judgment: 24 June 2025

