



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 960/2019

In the matter between:

eTHEKWINI MUNICIPALITY

FIRST APPELLANT

STELLENBOSCH MUNICIPALITY

SECOND APPELLANT

and

**INDEPENDENT SCHOOLS ASSOCIATION
OF SOUTHERN AFRICA**

FIRST RESPONDENT

**THE NATIONAL MINISTER FOR
COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

SECOND RESPONDENT

THE NATIONAL MINISTER OF FINANCE

THIRD RESPONDENT

Neutral citation: *eThekwini Municipality and Another v Independent Schools Association of Southern Africa and Others* (960/2019) [2021] ZASCA 155 (3 November 2021)

Coram: MBHA, DLODLO and MBATHA JJA and LEDWABA and UNTERHALTER AJJA

Heard: 15 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of

Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 3 November 2021.

Summary: The Local Governance Municipal Property Rates Act, 6 of 2004 (the MPRA) – local government – power of the Minister to promulgate regulations to cap municipal rates on property belonging to public benefit organisations – municipalities are bound to comply with amended regulations.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Lopes J sitting as court of first instance): judgment reported *sub nom Independent Schools Association of Southern Africa v eThekweni Municipality and Another* 2020 (2) SA 235 (KZD).

- a. The appeal is dismissed.
- b. The appellants are liable jointly and severally, the one paying the other to be absolved, for the costs of the first, second and third respondents, including the costs of two counsel.
- c. The first respondent's cross appeal is dismissed with no order as to costs.

JUDGMENT

Ledwaba AJA (Mbha, Dlodlo and Mbatha JJA and Unterhalter AJA concurring):

Introduction

[1] This is an appeal by the first and second appellants, eThekweni Municipality (eThekweni) and Stellenbosch Municipality (Stellenbosch) against the judgment and order of the KwaZulu-Natal Division of the High Court, Lopes J, which was delivered on 3 July 2019. The first, second and third respondents are the Independent Schools Association of Southern Africa (ISASA), the National Minister for Cooperative Governance and Traditional Affairs (Minister for CoGTA), and the National Minister of Finance (Minister of Finance). The issues in this appeal arise from the amendment of

national regulations promulgated by the Minister for CoGTA in March 2010 in terms of s 19¹ and s 83² of the Local Governance Municipal Property Rates Act 6 of 2004 (the MPRA). The 2010 regulations amended the regulations that were passed in 2009 under the same provisions of the MPRA. The amendment capped the rates that municipalities may levy on, *inter alia*, property owned by public benefit organisations (PBO property), by means of a prescribed ratio based on the rates on residential property.

[2] After the promulgation of the 2010 regulations, ISASA filed an application (the main application) in the Kwa-Zulu Natal Division of the High Court, Durban (the high court), seeking an order to bar eThekweni from levying a rate in excess of 25 per cent of the rate levied on residential property in respect of PBO property. It is common cause that ISASA owns PBO properties throughout South Africa. Stellenbosch was later joined as the second respondent. eThekweni brought a counter-application to challenge the validity of the 2010 regulations and the constitutionality of s 19 of the MPRA. ISASA then made a conditional collateral application challenging the validity of the rates policies of eThekweni made after the 2010 regulations.

[3] The high court granted the order sought by ISASA.³ eThekweni and Stellenbosch filed a notice of intention to appeal against the order. Lopes J

¹ Section 19 provides as follows:

‘(1) A municipality may not levy --

(a) Different rates on residential properties, except as provided for in sections 11(1)(b), 21 and 89;
 (b) a rate on non-residential properties that exceeds a prescribed ratio to the rate on residential properties determined in terms of section 11(1)(a);
 (c) rates which unreasonably discriminate between categories of non-residential properties; or
 (d) additional rates except as provided for in section 22.

(2) The ratio referred to in subsection (1)(b) may only be prescribed with the concurrence of the Minister of Finance.’

² Section 83 (1) empowers the Minister to make regulations not inconsistent with the MPRA.

³ The high court made the following order:

(1) “It is declared that the first respondent may not henceforth (and was not, with effect from the 1st July 2010 permitted to) levy a rate in excess of 25 per cent of the rate levied by it on residential property, on:

granted the appellants leave to appeal to this Court and further granted ISASA leave to cross-appeal.

[4] The main issues for adjudication in the high court were: whether the 2010 amended regulation, properly interpreted, applied to eThekweni; whether the 2010 regulations were valid; and whether s 19(1)(b) and the amended 2010 regulations were unconstitutional.

Factual background

[5] It is important first to summarise the background of this matter. On 19 December 2007, the Minister for CoGTA published draft regulations for comment in the Government Gazette in terms of s 19(1) of the MPRA, dealing with a proposed rate ratio, relative to residential property, in respect of six categories of non-residential property, namely:

- i. agricultural property;
- ii. business and commercial property,
- iii. industrial property,
- iv. mining property,
- v. public benefit organisation property, and
- vi. state-owned property

-
- (a) Non-residential properties owned by public benefit organisations as contemplated in terms of s 30 of the Income Tax Act, 1962 ('the Act') and used for the specified public benefit activity of education and development as contemplated in item 4 of the ninth schedule to the Act.
 - (b) Property owned by the rate payers whose names are listed in the schedule annexed hereto marked 'X' and used for the specified public benefit activity of education and development as contemplated in item 4 of the ninth schedule to the Act, provided that they retain their status as public benefit organisations in terms of s 30 of the Act.
 - (2) The first respondent is directed to levy a rate on the property of public benefit organisations, with effect from the 1st July 2010 and in compliance with the Local Government: Municipal Property Rates Act, 2004, and with Regulations 1 and 2 of the Amended Municipal Property Rates Regulations on the rate ratios between Residential and Non-Residential Properties, GN R.195, GG 33016, 12 March 2010.
 - (3) The first respondent and the intervening party, the one paying, the other to be absolved, are directed to pay the applicant's costs, such costs to include those consequent upon the employment of two counsel.
 - (4) The first, second and third respondents, and the intervening party] shall each bear their own costs.

For PBO property, the proposed rate was 25 percent of the rate on residential property.

[6] Comments were received from nine municipalities and 34 non-governmental private and civic organisations. eThekweni and Stellenbosch participated through the South African Local Governance Association (SALGA). The Minister for CoGTA did not receive any objections to the proposed amendment. Importantly, eThekweni and Stellenbosch did not object to the inclusion of PBO property and the proposed ratio applicable to them.

[7] On 22 February 2008, the Department of Provincial and Local Government consulted with eThekweni regarding the draft regulations. In the said meeting, eThekweni did not favour the position of the Minister for CoGTA and the Minister of Finance that restricted how levies should be charged. As indicated, however, no formal objection was lodged.

[8] On 27 March 2009, the Minister for CoGTA, with the concurrence of the Minister of Finance, in terms of s 19(1) of the MPRA, promulgated the 2007 draft regulations which were to be effective from 1 July 2009. But the published 2009 regulations omitted to include PBO property as the 2007 draft regulations had done. Only two categories, namely agricultural property and public service infrastructure property, were included. This implied that PBO properties were excluded from properties which would not be rated in excess of 25 percent of residential property. As a result of the omission, in September 2009, ISASA brought a review in the Gauteng Division of the High Court, Pretoria (the Gauteng High Court), challenging the omission of the PBO property in the regulations. The respondents in this review were the Minister for CoGTA, the Minister of Finance and SALGA. Public notice of the application was also given in terms of Uniform Rule 16A. Importantly, correspondence was also addressed to

eThekwini, specifically drawing its attention to the application in the Gauteng High Court. SALGA did not oppose the application and neither did eThekwini seek to intervene. There was no reaction to the Rule 16A notice.

[9] On 15 March 2010 the Gauteng High Court made the following order:

‘...BY AGREEMENT BETWEEN THE PARTIES IT IS ORDERED THAT: -

- (1) The First and Second Respondents shall pursuant to the provisions of Sections 19(1)(b) and 83 of the Local Government Municipal Property Rates Act, No.6 of 2004 (“the Rates Act”) publish regulations in the Government Gazette prescribing an upper limit rate ratio of 1:0:25 for properties owned by the Public Benefit Organisations as contemplated in Section 8(2)(q) of the Rates Act (“the Regulations”);
- (2) The First and Second Respondents will publish the Regulations by no later than Tuesday, 30th March 2010;
- (3) The matter will be postponed *sine die* pending compliance by the First and Second Respondents with Prayers 1 to 2 above and for a period of one year after such compliance;
- (4) The First and Second Respondents will pay the Applicant’s costs jointly and severally, the one paying the other to be absolved, such costs to be payable on the making of this settlement agreement an Order of Court.’

[10] The Minister for CoGTA was advised by his senior counsel that it was not necessary to start the process of publication afresh, so as to avoid duplication. It is important to mention that the aforesaid court order has to date neither been appealed nor set aside. The order remains valid and enforceable. The publication of the regulations, on 12 March 2015, before the court order does not make the regulations invalid. ISASA explained that the regulations were published earlier because ISASA and both Ministers reached an agreement before the high court gave its order.

Further applications

[11] eThekwini did not comply with the amended published regulations, its reason being that PBO property was not one of the defined categories of rate payers in the 2009 regulations. eThekwini's conduct triggered ISASA to issue another application (the main application) in June 2010 in the high court. It sought an order to bar eThekwini from levying a rate in excess of 25 percent of the rate levied on residential property in respect of PBO property belonging to its members.

[12] eThekwini opposed the main application and filed a counter- application seeking, *inter alia*, an order: that the decision of the Minister for CoGTA, concurred to by the Minister of Finance, to amend the 2010 regulations promulgated in terms of the MPRA and published in the Government Gazette on 12 March 2010, should be reviewed and set aside; that the amended regulations be declared invalid; and that eThekwini was not obliged to comply with the amended regulations. eThekwini further sought a declaration that s 19(1)(b) of the MPRA is unconstitutional and invalid to the extent that it restricts the powers of a municipality to levy rates at ratios determined by that municipality.

[13] In November 2010, ISASA filed another application (the second application) in the high court against eThekwini, the Minister for CoGTA and the Minister of Finance, wherein it sought an order declaring that eThekwini's rates policy for the 2009/2010 years, where it contradicts the 2010 amended regulations, was unconstitutional. It also sought an order directing eThekwini to comply with the 2010 amended regulations.

[14] In June 2011, ISASA filed an amended notice of motion to the second application, supported by an affidavit, seeking to compel eThekwini to levy rates from 1 July 2010 in accordance with the 2010 amended regulations, and further

declaring eThekwini's rates and policies for the 2010/2011 and the 2011/2012 years and regulations for 2008/2009 – 2011/2012 rates policies to be unconstitutional and invalid. ISASA further sought to challenge eThekwini's rates policies until the final determination of the matter. eThekwini reacted by filing an application to strike out the additional affidavits filed to support the amended notice of motion of the second application.

[15] Stellenbosch filed a joinder application in the counter-application to the main application of eThekwini of August 2010, as second applicant. The application was granted in November 2011. ISASA responded to allegations in the founding affidavit filed by Stellenbosch. On 25 February 2011, it was agreed between the parties that pending the outcome of the main application and second application, eThekwini would not levy rates to ISASA in excess of 25 per cent, that is, ISASA members would pay rates as per the amended regulations of 2010, until the disputes between the parties had been resolved.

Interpretation of the MPRA and the Regulations

[16] Whether the 2010 amended regulations apply to eThekwini depends upon the interpretation of s 8(1)⁴ read with s 19(1)(b) of the MPRA. In terms of s 151(3) of the Constitution, 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. The following three sections of the Constitution are pivotal to the interpretation of ss 8 and 19(1) of MPRA:

i. Section 156(2):

⁴ Section 8 (1) stipulates that:

‘Subject 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, which may include categories determined according to the —

(a) use of the property;

(b) permitted use of the property; or

(c) geographical area in which the property is situated.’

‘A Municipality may make and administer by-laws for the effective administration of the matter which it has the right to administer.’

ii. Section 156(5):

‘A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.’

iii. Section 229(2):

‘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.’

These provisions of the Constitution make the following plain. A municipality has a right to govern the local government affairs of its community. In doing so a municipality has the power to impose rates on property. But this power may be regulated by legislation. The MPRA is national legislation that regulates the power of municipalities to impose rates. The 2010 amended regulations were promulgated in terms of sections 19 and 83 of the MPRA. Do the 2010 amended regulations apply to eThekweni?

[17] eThekweni submitted that the pre-2014 MPRA did not prescribe what categories of property must be included in its rates policies. Thus it was not obliged to include the PBO property category of rateable property in its rates policies because the word ‘may’, in s 8(1) confers a discretion on the municipality whether it can do so. eThekweni had decided not to do so, and hence the 2010 amended regulations were not of application.

[18] This submission is predicated upon what is said to be the permissive competence of a municipality to determine, in terms of s 8, whether a particular category of property is to be included in a municipality’s rates policy. If a

category of property is excluded, then s 19, and any regulations promulgated in terms of s 19, cannot require the recognition of a category of property that the municipality has decided not to include in its policy.

[19] It is common ground that even prior to amendment, s 8 was made ‘subject to section 19’. Section 19 limits the rates that a municipality may levy on a category of non-residential property. Those limits are determined by reference to a prescribed ratio. The 2010 amended regulations prescribed such a ratio for PBO property. eThekweni contends that if it decides not to recognize PBO property as a separate category of ratable property, then s 19 can have no application because the prescribed ratio posited by s 19 cannot be determined. This interpretation, it was submitted, is consistent with the constitutional competence of municipalities to govern their local communities.

[20] Such an interpretation fails to accord to s 19 the primacy that the legislative scheme requires. Section 19, read with the 2010 amended regulation, has determined a prescribed ratio in respect of PBO property. Once that is so, municipalities may not impose a rate that exceeds the prescribed ratio for PBO property. A municipality cannot avoid this limitation by declining to recognize PBO property in its rates policy. Once a category of property exists within a municipality, rates may not be imposed upon such property in excess of the prescribed ratio. Whatever the scope of the municipality’s competence to determine categories of property for the purposes of its rates policy, that competence cannot be exercised so as to avoid the obligatory limitations that arise from the exercise of powers under s 19. To hold otherwise would permit of the wholesale evasion of the national regulation that s 229(2)(b) of the Constitution specifically provides for.

Constitutional Challenge

[21] eThekweni contend that s 19(1)(b) of MPRA is unconstitutional to the extent that it limits a municipality's power to levy rates.

[22] eThekweni relied upon *City of Tshwane v Marius Blom*⁵ and submitted that a municipality has the independence to make its own policy choices in relation to the categories of rateable property that attract different rates as provided for in its policies.

[23] eThekweni further relied on the following passage from *City of Tshwane v Marius Blom*, where Court said this:

‘. . . Section 8(2) lists a number of categories of rateable property that may attract different rates. These categories are optional. The municipality may adopt all of them, drop some or include new categories, depending on the nature of the objectives its rates policy seeks to achieve. The municipality has a choice. Rates policies entail, by definition, policy choices which lie at the core of municipal autonomy, and as long as the rates policy treats ratepayers equitably and is consistent with the provisions of the Constitution and the Rates Act, there can be no basis for questioning the choices it makes with regard to properties that may be differentially rated with respect to different categories of property. The court a quo therefore erred in finding that the creation of a “non-permitted use” category was improper.’⁶

[24] The issue in *City of Tshwane v Marius Blom* involved the interpretation of ss 8(1) and (2) of the MPRA, in particular whether the MPRA conferred authority on the appellant (City of Tshwane) to add to the list of categories of rateable property and to levy a rate accordingly.

⁵ *City of Tshwane v Marius Blom and GC Germishuizen Inc and Another* [2013] ZASCA 88; [2013] 3 All SA 481 (SCA); 2014 (1) SA 341 (SCA).

⁶ Fn 5 above para 18.

[25] At the heart of the constitutional challenge to s 19(1)(b) is the contention that this provision offends against the separation of powers that the Constitution dictates, more specifically, in that the Constitution accords autonomy to municipalities to set their own rates policies. Section 19(1)(b), it is contended, impermissibly offends against that autonomy by giving the Minister for CoGTA the power to prescribe a ratio that municipalities may not exceed in determining rates for categories of non-residential property.

[26] The separation of powers that confers this robust autonomy upon municipalities is said to derive from various provisions of the Constitution, and in particular ss 40, 41, 151(3), 151(4), 153, 154(1) and 156. The Constitution recognizes the important part that local government plays as a sphere of democratic government that serves local communities. But the powers of local government under the Constitution are not untrammelled. Local government does not inhabit a sphere of wholly autonomous authority. Rather, local government cohabits with other spheres of government, and the Constitution articulates the basis of that cohabitation. As s 151(3) of the Constitution makes plain, a municipality has the right to govern, subject to national and provincial legislation, as provided for in the Constitution. The Constitution gives express treatment to the power of municipalities to impose rates. Sections 229(1) and (2) permits a municipality to impose rates. But that power is made subject to limitation. It may not be exercised materially and unreasonably to prejudice various economic activities and policies stipulated in s 229(2)(a). And the power may be regulated by national legislation as laid down in s 229(2)(a).

[27] The scheme of the Constitution has a nuanced framework within which the separation of powers is articulated. The power of the municipalities to impose rates is a species of taxing power that may have significant economic effects for

other spheres of government and for the development of the economy as a whole. Hence the municipal power to impose rates is made subject to regulation by national legislation. The challenge brought by eThekweni and Stellenbosch did not test the limits of the regulatory oversight given to Parliament. Rather, the challenge was made on the more radical premise that s 19(1) offends the autonomy of municipalities to impose rates. That challenge cannot succeed because s 19(1) is a regulation by national legislation that s 229(2)(b) of the Constitution expressly permits. The recognition in *Blom* of the power of municipalities to determine their rates policies does not derogate from the regulatory supervision accorded to the national legislature in terms of s 229(2)(b).

[28] The constitutional challenge must accordingly fail.

The validity challenge

[29] I now turn to deal with the issue of the consultation challenge. The municipalities challenged the validity of the 2010 amended regulations on the basis that there was no consultative process in terms of s 84(a) and (b)⁷ of MPRA. On the facts of this case, the municipalities were consulted in 2007 on the substance of the proposed amendment to the regulations, which included PBO property. There was no formal objection.

[30] In this matter, the inclusion of PBO property in the 2010 amended regulations is not a new issue that the appellants did not know about. After the Minister for CoGTA published the draft regulations in 2007, there was proper consultation around 2007, and there were no objections to the published draft

⁷ S 84 provides as follows:

‘Before regulations in terms of section 83 are promulgated, the Minister must —
(a) consult organised local government on the substance of those regulations; and
(b) publish the draft regulations in the *Government Gazette* for public comment.’

regulations. eThekweni was aware of the amendments that the Minister for CoGTA intended to introduce and did not object.

[31] Stellenbosch submitted that it is challenging the validity of the 2010 amended regulations on the basis that there was no consultation with organised local government in terms of s 84 of MPRA. It submitted that the Gauteng High Court did not find or state that s 84 of MPRA was not applicable. The Minister for CoGTA had to comply with the provisions of s 84 and he had first to consult organised local government and publish the draft regulations in the Government Gazette for comment. This argument does not take into consideration that consultation and publication of draft regulations had already taken place. Stellenbosch's representative, SALGA, was specifically informed that the regulations will not be published for public comment. SALGA did not object or oppose ISASA's application, nor did it insist that s 84 was to be complied with.

[32] The promulgated regulations in 2007 omitted PBO property. ISASA challenged the regulations. The failure to include PBO property in the published regulations caused ISASA to challenge this omission in the Gauteng High Court within a reasonable period after the publication of the regulations. SALGA was cited as a respondent and did not oppose the application. Initially, both ministers opposed the application, but later withdrew their opposition, after receiving an opinion from senior counsel. eThekweni was informed about the application in the Gauteng High Court; it did not file a joinder application, nor raise an objection that the consultative process did not take place in terms of s 84 of the MPRA before the amended regulations of 2010 were promulgated.

[33] It is clear that the Minister for CoGTA did consult organised local government on the substance of the regulations and published the draft regulations in the Government Gazette for public comment before the

promulgation of the 2007 regulations, which were to become effective from 1 July 2009. In my view, there was no need for the Minister for CoGTA to consult eThekweni on the substance of the regulations again because the substance of the published regulations had not changed. Importantly, the Minister for CoGTA, on 21 December 2009, addressed a letter to SALGA, the respondent in the proceedings, explaining why he had decided to seek the concurrence of the Minister of Finance to promulgate the revised regulations that were inclusive of a ratio for public benefit organisation property. The Minister for CoGTA further informed SALGA that the matter would be settled out of court. SALGA did not participate in the main application.

[34] The amended regulations were published before the end of March 2010 and were to be effective from 1 July 2010. eThekweni and Stellenbosch did not file a review to challenge the court order. They are bound by the court order of the Gauteng High Court. They only challenged the validity of the 2010 amended regulations in the counter-application after ISASA filed the main application in June 2010.

[35] The validity challenge must therefore fail.

ISASA's cross appeal

[36] The high court granted ISASA leave to cross-appeal in terms of paras 1, 2 and 3 of the notice of application for leave to appeal. The high court in its order did not grant prayer 2.1 of the ISASA's amended notice of motion, in terms whereof ISASA sought an order declaring the eThekweni rates policies from 2010/11 to date, any by laws, municipal notices or resolutions passed to give effect to levy its own rate unconstitutional and invalid insofar as they precluded the levying of a rate on PBO property in compliance with the 2010 amended regulations.

[37] I have at length dealt with the constitutional and validity challenge in relation to the main appeal. The high court did likewise in its judgment. ISASA's counsel submitted that the high court's omission to make an order in terms of prayer 2.1 of ISASA's amended notice of motion was an oversight and he urged this Court to grant the declaratory relief that was sought.

[38] Having considered the facts of this matter, I am of the view that it will not be ideal in this appeal to deal with the cross appeal and pronounce on the amendment of the notice of motion and the constitutional validity of eThekweni's municipal rates policies passed from 2010/2011 to date. Clearly, the prayer sought in paragraph 2.1 of ISASA's amended notice of motion is not relief that is required in the light of the relief already given by the high court and affirmed in this appeal.

[39] I have therefore decided that the order sought by ISASA in the cross appeal should not be granted. It should further be noted that before the high court, the parties agreed that pending the outcome of the main application, eThekweni would not levy rates against ISASA in excess of 25 per cent of the rate charged on residential property. As I have found that the main appeal falls to be dismissed, the main relief sought by ISASA now becomes final which means that the appellants' cannot now seek to impose rates under the historic rates policies that are at variance with the high court order that requires municipalities to apply the new amended regulations.

Costs

[40] The appeal by eThekweni and Stellenbosch must fail based on the reasons set out above. The respondents have substantially succeeded in challenging the appeal and they are therefore entitled to the costs. The cross appeal even though

unsuccessful, was brought with good reason and *bona fide*. I therefore think that it will not be proper to mulct ISASA with costs in respect thereto.

[41] I therefore make the following order:

- a. The appeal is dismissed.
- b. The appellants are liable jointly and severally, the one paying the other to be absolved, for the costs of the first, second and third respondents, including the costs of two counsel.
- c. The first respondent's cross appeal is dismissed with no order as to costs.

A P LEDWABA
ACTING JUDGE OF APPEAL

APPEARANCES:

| | |
|---------------------------------------|--|
| For the first appellant: | N Singh SC (with A Boulle) |
| Instructed by: | Linda Mazibuko & Associates, Durban Matsepes Inc, Bloemfontein |
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| Instructed by: | The State Attorney, KwaZulu-Natal The State Attorney, Bloemfontein. |