N.Z. MHLANTLA

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THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

ME JUSTICE N MHLANTLA

The Supreme Court of Appeal
Judges' Chambers
P O Box 258
Bloemfontein
9300

Tel: 051 412 7400
Fax2Email: 086 500 4325
NMhlantla@justice.gov.za

The Secretariat
Judicial Service Commission
Constitutional Court
Constitution Hill
Braamfontein
Johannesburg

Dear Mr Chiloane

Re: Judicial Vacancy – Constitutional Court

I am forwarding herewith the hardcopy of my application documents for your records.

Kind regards

Judge Mhlantla

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POSITION APPLIED FOR

JUDGE OF CONSTITUTIONAL COURT

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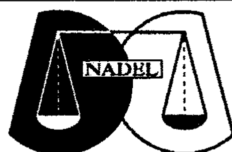
Dated at Port Elizabeth on this the 23rd day of April 2015

Received copy hereof
on this ___day of April
2015

National Association of Democratic Lawyers

Commerce House
55 Shortmarket Street
Cape Town
8000
South Africa



Equality and Justice

Email: fazoe@nadel.co.za
Cell: 078 514 3706
Fax: 086 602 6167

23 April 2015

The Secretariat
Judicial Service Commission
Constitutional Court
Constitution Hill
Braamfontein
Johannesburg

Dear Chief Justice

RE: CONSTITUTIONAL COURT VACANCY: NOMINATION OF THE HONOURABLE JUSTICE NONKOSI ZOLISWA MHLANTLA

The National Association of Democratic Lawyers (NADEL) wishes to nominate Justice Nonkosi Zoliswa Mhlantla for the judicial vacancy in the Constitutional Court.

Justice Mhlantla is a founder member of NADEL and has served in its Executive since inception and remained an active member and participant in various Human Rights and Advice Centre projects until she was appointed to the Bench.

We previously recommended Justice Mhlantla for the position of Judgeship in the Eastern Cape. It is in this position that Justice Mhlantla demonstrated astuteness as jurists, not only in the manner in which she wrote and produced her judgement, but her clear demonstration of social consciousness.

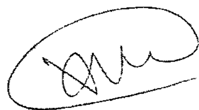
It was further in this context, together with her professionalism, timeous delivery of judgment and her humility, that we further supported her elevation to the Supreme Court of Appeal.

We followed Justice Mhlantla's performance at the Supreme Court of Appeal and have been impressed by her diligence, attention to detail and affability. We believe her experience in the SCA and her acting stint in the Constitutional Court makes Justice Mhlantla a suitable candidate for the above advertised position.

In the country's quest for a legitimate, credible and transformed judiciary, Justice Mhlantla presents an ideal candidate, not only as a Black Woman, but a capable and competent jurist.

We therefore have no hesitation in recommending her for the vacancy in the Constitutional Court.

Yours faithfully



XM BOQWANA

President: National Association of Democratic Lawyers (NADEL)

THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

The Supreme Court of Appeal
Judges' Chambers
P O Box 258
Bloemfontein 9300

Tel: 051 412 7400
Fax2email: 086 500 4315
NMhlantla@justice.gov.za

23 April 2015

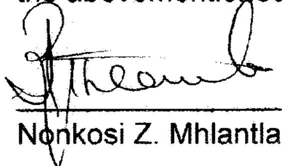
Your Ref: Mr Sello Chiloane

The Secretariat of the JSC
Constitutional Court
Private Bag X1
Constitutional Hill
Braamfontein
Johannesburg
2017

Dear Mr Sello Chiloane

Re: N.Z. MHLANTLA – ACCEPTANCE OF NOMINATION – VACANCY iro JUDGE OF THE CONSTITUTIONAL COURT

I, NONKOSI ZOLISWA MHLANTLA do hereby accept the nomination in respect of the abovementioned position.



Nonkosi Z. Mhlantla

JUDICIAL SERVICES COMMISSION

Tel: 011-838 2010/2015
Fax 2 Email: 086 649 0944
Email: Chiloane@concourt.org.za

Constitutional Court
Private Bag X1
Constitutional Hill
Braamfontein
Johannesburg
2017

QUESTIONNAIRE FOR JUDGES

SECTION 1: **PERSONAL**

1. What are your full names and surname?

    1.1 Surname : Mhlantla
    1.2 Full Names : Nonkosi Zoliswa
    1.3 Maiden Name : Mhlantla

2. What is your address?

    2.1 Residential

    12 Longmeadow Residential Estate, Hilltop Drive, Lovemore Park, Port Elizabeth

    2.2 Postal

    P.O Box 15745
    Emerald Hill
    6001

    2.3 Telephone Number

    Code : (051) 4127 400
    Mobile : 082 378 5653
    Email address : nmhlantla@justice.gov.za

3. What is your date of birth?

    3.1 Date of Birth : 2 May 1964
    3.2 Place of Birth: Kwazakhele, Port Elizabeth
    3.3 Citizenship : South African
    3.4 Identity Number : 6405020664087

4. What is your marital status?

4.1 Not married

4.2 Particulars of children:
One, a daughter aged 27 years

5. Please furnish particulars of your tertiary education.

5.1	Qualifications	: B.Proc Degree
5.2	Name of institution(s)	: University of the North, Limpopo
5.3	Dates acquired	: June 1987

6. Please furnish chronological particulars of employment since leaving school or university

6.1 **JUDICAL EXPERIENCE – DATE OF ELEVATION – 1 JUNE 2002**

Name of employer	Position held	Period
Department of Justice	Judge of Appeal –SCA	1 Dec 2008 to date
	Acting Judge of the Constitutional Court	Jan to Dec 2013
	Judge of Appeal – CAC	1 Jan 2008 to Dec 2008
	Acting Judge of Appeal, SCA	1 June 2007 to 30 Nov 2008
	Acting Judge of Competition Appeal Court (CAC)	1 Jan 2005 to 31 Dec 2007
	Judge of the High Court, ECD	1 June 2002 to 30 Nov 2008
	Acting Judge of the High Court	1 April to 30 June 2000
		4 to 30 Sept 2000

6.2 **ATTORNEY'S PRACTICE I WAS ADMITTED AS AN ATTORNEY ON 14 SEPTEMBER 1989**

Nonkosi Mhlantla Associates	Founding Partner	1990 to 2002
Small Claims Court	Commissioner	1996 to May 2002

Thole Majodina & Co, PE	Professional Assistant	October 1989 to May 1990
Thole Majodina & Co, PE	Candidate Attorney	Oct 1988 – July 1989
Seriti Mavundla & Partners	Candidate Attorney	July 1987 – Sept 1988

7. Please furnish chronological particulars of your membership of legal organisations – past and present

Name of Organisation	**Position Held**	**Period**
Law Society of the Cape of Good Hope	Member	1988 to 2002
National Association of Democratic Lawyers	Member	1988 to 2002
South Eastern Cape Attorneys' Association	Member	1996 to 2002
Eastern Cape Gambling & Betting Board	Deputy Chair	1997 to 2002
International Association of Women Judges (SA Chapter)	Member	2005 to 2006
Project Committee on the Review of the Law of Evidence	Member	June 2007 to date
Judges' Remuneration Committee	Member	June 2007 to Dec 2008

8. Please furnish particulars of community and other organisation of which you are or have been a member in the past ten years.

Name of organisation (Church)	**Position Held**	**Period**
Methodist Church in Africa	Member	More than 30 years

9. Are you now or have you ever been a member if a secret organisation?

No

If so, please identify the organisation, position(s) held and the dates of membership.

Not Applicable

10. Is there anything about the state of your health should be disclosed to the Commission?

    No

    If so, please state:

    Not Applicable

SECTION 2: JUCIDIAL BACKGROUND

11. Please furnish particulars of your appointment.

    11.1 To which Court are you appointed?

    Supreme Court of Appeal since 1 December 2008

    11.2 In which division were you appointed? (Initial Appointment)

    High Court, PE, Eastern Cape Division

    11.3 Please give the date of your appointment.

    1 June 2002

12. If you have any publications in the field of law please list them and identify those which you regard as most significant and state shortly why you regards them as significant.

    None

13. In regard to major publications indicate by whom they have been reviewed.

    None

14. If any of your writings have been cited in judicial decisions please identify those decisions and indicate whether the citing was with approval.

15. If you have any publications outside the field of law please list them.

    None

16. In regard to these publications please indicate by whom they have been reviewed.

    Not Applicable

17. CASES

    17.1 List the cases where you have written the judgment (not more than ten) which you regard as being the most significant and why?

(a) **Kubyana** v **Standard Bank of South Africa Ltd** (CCT 65/23) [2014] ZACC 1, 2014 (30) SA 56 (CC); 2014 (4) BCLR 400 (CC)

This case involved the interpretation of section 129 (1) of the National Credit Act 34 of 2005 (the notice of default). The various divisions of the High Court had provided different interpretations of this provision. In dealing with the case, I also clarified what was previously said about section 129 by the Constitutional Court in its earlier case of *Sebola* v *Standard Bank* [2012] ZACC 11. I concluded that under section 129, a credit provider wishing to enforce a credit agreement must deliver a notice to a consumer setting out the consumer's default and drawing the consumer's attention to his or her rights. In order to effect delivery, the credit provider must take those steps that would bring the notice to the attention of a reasonable consumer. I further held that the Act does not allow consumers to frustrate the delivery of section 129 notices by ignoring notifications from the Post Office. In this case the bank had done all that was required of it by the Act.

(b) **MEC for Education in Gauteng Province and Other** v **Governing Body of Rivonia Primary School and Others** (CCT 135/12) [ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC)

This case dealt with the right to basic education as enshrined in section 29 of the Constitution. The issue related to the interpretation of section 5 of the South African Schools Act 84 of 1996 and the Regulations thereto (admission policy). A prospective Grade 1 learner was unsuccessful in finding placement at Rivonia Primary School for the academic year starting in 2011. A dispute arose between the governing body and the Gauteng HOD. I concluded that the scheme of the Schools Act in relation to admission showed that the Department of Education maintains the ultimate control over the implementation of admission decisions and that the Gauteng HOD was lawfully empowered to admit learners who had been refused admission to the school. Further, that power must be

exercised in a reasonable and procedurally fair manner. In this case, I held that the decision by the Gauteng HOD was not exercised in a procedurally fair manner, that scant attention was paid to the partnership and cooperation framework envisaged in the Schools Act.

(c) **Liebenberg NO and Others** v **Bergrivier Municipality** (CCT 104/12) [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC).

In this case, certain rural land owners within the jurisdiction of the Bergrivier Municipality refused to pay the municipal rates that had been imposed in respect of their rural land over a period of eight years. They raised a dispute about the validity of municipal rates.

A starting point was a proper interpretation of the applicable statutory framework regulating local government. I concluded that section 179 (2) of the Municipal Finance Management Act 56 of 2003 suspended the legal operation of the repeal of section 10G(7) of the Local Government Transaction Act 209 of 1993 and provided for its continued existence alongside the Finance Act. I further held that section 10 G(7) depended on the enactment of the Rates Act and was subject to the transitional provisions of section 88 of that Act and that it had applied throughout the period covering the contested levies and rates. I therefore rejected the attack on the validity of the rates. In respect of the challenges to the rates imposed, I concluded that the Municipality had substantially complied with the relevant statutory requirements.

(d) **Dube** v **The State** (523/07) [2009] ZASCA 28

This matter related to a question of recusal of a judicial officer on the grounds of appearance of bias. In my judgment, I restated the test applicable to determine whether a judicial officer is disqualified from hearing a case by reason of a reasonable apprehension of bias. I also considered the Bangalore Principles of Judicial Conduct which deal with ethical principles as well as the position applicable in other legal jurisdictions. I concluded that since there was a close relationship between the presiding judge and one of the legal representatives a reasonable litigant would have been justified in entertaining a reasonable apprehension of bias on the part of the judge. This, however, did not mean that bias on the part of the judge had been established. I thus concluded that the judicial officer's failure to recuse himself tainted the appeal process. The proceedings were set aside and the appeal was remitted to the high court for rehearing.

(e) **City of Johannesburg Metropolitan Council v Patrick Ngobeni** (314/11) [2012] ZASCA 55

This matter concerned the conduct and duties of a trial judge. I restated the principles in respect of judicial conduct and set out the correct approach to be adopted by a judicial officer in civil trials when calling witnesses; deciding to call for an inspection in loco; questioning of witnesses etc. In this matter, I concluded that the trial judge breached many of the canons of judicial behaviour and that his behaviour constituted an irregularity. After considering the merits, I concluded that the court was faced with two mutually destructive versions and that it had misdirected itself when it failed to decide the issue of onus of proof and in the process disregarded the unsatisfactory aspects of the plaintiff's evidence. The appeal was accordingly upheld.

(f) **Law Society of the Northern Provinces** v **Dube** (874/11) [2012] ZASCA 137, [2012] 4 All SA 251

This matter concerned an application to have the name of the respondent, an attorney, to be struck from the roll of attorneys. I concluded that the acts of dishonesty committed by the respondent were not so serious to warrant his removal from the roll. I restated the general rule in matters of this kind, that a respondent should pay the costs of the Law Society on an attorney client scale; that the Law Society is not an ordinary litigant and performs a public duty and did not act on its own frolic. I therefore altered the costs order.

(g) **Medicross Healthcare Group (Pty) Ltd and another** v **Competition Commission** [2006] 1 CPLR 1 CAC

This is a judgment in respect of an appeal against the decision of the Competition Tribunal in which it prohibited a merger between the parties.

(h) **Just Names Properties 11 CC** v **Fourie and others** [2007] JOL 20721 (SCA)

This case concerned the interpretation of a written agreement of an immovable property and whether the sale agreement complied with the requirements in section 2 (1) of the Alienation of Land Act 68 of 1981, in circumstances where the offer was signed and delivered by the offeree in an incomplete form. I concluded that the offer had been amended upon request of the respondent and that the agreement did not comply with the provisions of section 2 (1) of the Act.

(i) **Carolus** v **The State** (32/07) [2008] ZASCA

The appeal was against a conviction of indecent assault involving a child. There were inordinate delays in the commencement and finalisation of the trial. The police handled the case in an irregular manner and disregarded the rules relating to identification parade. The flaws in the State's case were however not fatal as per complainant's evidence together with the testimony of the other witnesses for the State was credible. I therefore confirmed the appellant's conviction and dismissed the appeal.

(j) **Magistrate M Pangarker** v **Arnold Botha and another** (446/13) [2014] ZASCA

This matter involved a review of divorce proceedings. The trial had been postponed three times at the instance of Mr Botha (the first respondent). On a subsequent appearance, being the trial date he launched an application for the recusal of the magistrate and thereafter left the court. Such application was dismissed. The trial continued in his absence. In considering the appeal, I outlined the grounds of review and the legal principles in respect of postponements. I concluded that the principles relating to postponements and recusal applications were not properly considered by the high court, that the regional magistrate was faced with one application – that of her recusal – which was correctly dismissed. No formal application for a postponement of the trial was launched. I concluded that no gross irregularity was committed by the regional magistrate for not postponing the trial mero motu and proceeding with the divorce trial in the absence of the first respondent.

17.2 Which of these cases have been reported?

(a) ***Kubyana*** v ***Standard Bank*** 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC)

(b) ***MEC for Education in Gauteng Province and other*** v ***Governing Body of Rivonia Primary School and others*** 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC)

(c) ***Liebenberg NO and others*** v ***Bergrivier Municipality*** 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC)

(d) ***Law Society of the Northen Provinces*** v ***Dube*** [2012] 4 All SA 251 (SCA)

(e) ***Pangarker*** v ***Botha*** [2014] 3 All SA 538 (SCA); 2015 (1) SA 503 (SCA)

(f) ***Medicross Healthcare Group (Pty) Ltd and another*** v ***Competition Tribunal*** [2006] 1 CPLR 1 (CAC)

17.3 Please list cases in which you gave judgment that were unsuccessfully appealed against (not more than ten)

1. ***RAF*** v ***O H Ronaasen N.O. obo J Joubert*** Case.; 1471/06

2. ***Zola Skefile and 2 others*** v ***The State*** Case No. CA 304/2000

3. ***Elton Leeuskieter*** v ***The State*** Case No: CA 199/06

17.4 Please list cases in which you gave judgment that were successfully appealed against (not more than ten)

1. ***M Fululu*** v ***The State*** Case No: CA 304/2005

2. ***Mshweshwe*** v ***The State*** (Against Sentence)

3. ***Nelson Mandela Metropolitan Municipality*** v ***Ngonyama Okpanum Hewitt-Coleman and Others*** 145/01 SE; 765/2010 [2012] ZASCA 11

4. ***Imvula Quality Protection (Pty)Ltd*** v ***Loureiro and others*** (130/12) [2013] ZASCA 12; 2013 (3) SA 407 (SCA); [2013] All SA 659

18. What would you regard as your most significant contribution to the law and the pursuit of Justice in South Africa?

(a) As a member of NADEL and the Human Rights Trust I was actively involved in the education of the community members around socio-legal issues.

(b) During October 2006, I assisted the Law Society of SA (Legal Education and Development) in training a group of local attorneys on Judicial Skills.

(c) Since 2012, I have participated in educational workshops organised by South African Judicial Education Institute (SAJEI) for aspirant judges training courses. I prepared and delivered study material on judicial ethics. I have also mentored acting judges. I believe that Judicial

education is one of the most effective tools to achieving transformation in the judiciary.

SECTION 3: GENERAL

19. Are there any circumstances known to you which may cause you embarrassment in seeking the appointment for which you have been nominated?

    No

    If so, please furnish particular:

    Not Applicable

20. Is there any other relevant matter which you should bring to the attention of the Commission?

    No

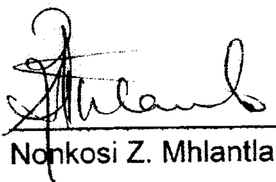
    If so, please furnish particulars:

    Not Applicable

21. Do you hold or have you ever held any other office of profit? If your answer is yes have you divested yourself of those assets? Kindly furnish details if applicable

    No

DATED and SIGNED at PORT ELIZABETH on this the 23rd day of April 2015



Nonkosi Z. Mhlantla

CURRICULUM VITAE

OF

NONKOSI ZOLISWA MHLANTLA

PERSONAL DETAILS

Full Names	:	Nonkosi Zoliswa Mhlantla
Date of Birth	:	02 May 1964
Place of Birth	:	Kwazakhele, Port Elizabeth
Citizenship	:	South African
Marital Status	:	Not Married
No of Dependants	:	One, 27 year old daughter
Home Language	:	Xhosa

EDUCATIONAL BACKGROUND

June 1987	:	B Proc-University of the North, Limpopo
December 1982	:	Matric Exemption, Kenneth Masekela High School, KwaThema Springs

WORK EXPERIENCE

I have 27 years experience in the legal profession. I have worked as an attorney for 14 years and have been a judge in various capacities as set out below for 13 years.

JUDICIAL BACKGROUND

DATE OF ELEVATION : 1 JUNE 2002

(a)	Dec 2008 to date	:	Judge of Appeal , Supreme Court of Appeal
(b)	Jan to Dec 2013	:	Acting Judge of the Constitutional Court
(c)	Jan 2008 to Dec 2008	:	Judge of Appeal, Competition Appeal Court
(d)	June 2007 to 30 Nov 2008	:	Acting Judge of Appeal, SCA
(e)	Jan 2005 to Dec 2007	:	Acting Judge of the Competition Appeal Court
(f)	June 2002 to 30 Nov 2008	:	Judge of the High Court, ECD
(g)	4 April to 30 June 2000	:	Acting Judge of the High Court, ECD
(h)	4 Sept to 30 Sept 2000	:	Acting Judge of the High Court, ECD

ATTORNEY'S PRACTICE

I was admitted as attorney of the High Court, Eastern Cape Division on 14 September 1989

May 1990 – 31 May 2002	: Founding Partner of Mhlantla & Majodina & Co, later known as Nonkosi Mhlantla & Associates, Port Elizabeth
Sept 1989 – May 1990	: Professional Assistant at Thole Mojodina & Co,Port Elizabeth
Oct 1988 – Aug 1989	: Candidate Attorney at Thole Majodina & Co, Port Elizabeth
July 1987 – Sept 1988	: Candidate Attorney at Seriti Mavundla & Partners,Pretoria

OTHER WORK EXPERIENCE

2000 – May 2002	:	Appointed as a panellist on arbitration by various bargaining councils, namely the Public Service Bargaining Council ("PSBC"), the Educational Labour Relations Council ("ELRC"), Motor Bargaining Council and Safety & Security Bargaining Council.
1996 – May 2002	:	Appointed as a part-time Commissioner by the Commission for Conciliation, Mediation & Arbitration ("CCMA") as a mediator and arbitrator
1996 – May 2002	:	Appointed by the Minister of Justice as a Commissioner of the Small Claims Court
1996 – 2000	:	Admitted and acted as an arbitrator through the auspices of the Independent Mediation Services of South Africa ("IMSSA")
1997 – May 2002	:	Member and deputy-chairperson of the Eastern Cape Gambling and Betting Board ("ECGBB")

1 March – May 1994	:	Employed by the Independent Electoral Commission (IEC), in Port Elizabeth as an investigator

MEMBERSHIP OF LEGAL AND COMMUNITY ORGANISATIONS

June 2007 to Dec 2008	:	Judges' Remuneration Committee
June 2007 to date	:	Project Committee on the Review of the Law of Evidence
Jan 2005 to Dec 2006	:	International Association of Women Judges (SA Chapter)
1993 to 2000	:	Human Rights Trust, PE
1989 to May 2002	:	Law Society of the Cape of Good Hope
1988 to May 2002	:	National Association of Democratic Lawyers

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 65/13

In the matter between:

MOSHOMO LEVIN KUBYANA	Applicant
and	
STANDARD BANK OF SOUTH AFRICA LTD	Respondent
and	
SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA	Amicus Curiae

Neutral citation: *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Jafta J, Froneman J, Madlanga J, Mhlantla AJ, Nkabinde J, Van der Westhuizen J and Zondo J

Heard on: 7 November 2013

Decided on: 20 February 2014

Summary: National Credit Act 34 of 2005 – section 129 – notice of default – obligation to deliver.
Consumer's election on manner of delivery of notices – credit provider must respect that election – delivery amounts to the taking of steps that would bring the notice to the attention of a reasonable consumer – consumer may not claim non-delivery of notice if she has been unreasonably remiss in failing to engage with the notice.

ORDER

On appeal from the North Gauteng High Court, Pretoria (Ledwaba J):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

JUDGMENT

MHLANTLA AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Madlanga J and Van der Westhuizen J concurring):

Introduction

[1] What are the steps that a credit provider must take in order to ensure that a notice of default reaches a consumer before it may commence litigation? What must a credit provider prove in order to satisfy a court that it has discharged its obligation to effect proper delivery of a statutory notice? These are the issues we are required to determine in this matter, which comes before us as an application for leave to appeal wherein the applicant challenges a decision of the North Gauteng High Court, Pretoria (High Court).

Background

[2] In November 2007 the applicant (Mr Kubyana) and the respondent (Standard Bank) entered into an agreement regulated by the National Credit Act,[1] in terms of which Mr Kubyana purchased a motor vehicle and was obliged to pay off the purchase price in 60 monthly instalments of R2 501,25 each. He chose an address as his *domicilium citandi et executandi*[2] for purposes of all notices and correspondence sent by Standard Bank in relation to the instalment sale agreement.

[3] On a number of occasions between October 2008 and July 2010 Mr Kubyana fell into arrears with his payments. Standard Bank attempted to bring this to his attention in various ways. It contacted him by telephone on numerous occasions, and during these conversations he made promises to settle his outstanding debt.[3] Standard Bank also attempted to discuss Mr Kubyana's indebtedness with him at his workplace. Its employees twice attempted to visit him there, to no avail.

[4] Thereafter Mr Kubyana's account consistently remained in arrears for a number of months. On 15 July 2010 Standard Bank sent him a notice in

---

[1] 34 of 2005 (Act).

[2] That is, an address for the purposes of being cited in litigation and for the execution of legal process.

[3] During oral argument counsel for Mr Kubyana contended that Standard Bank's calls to Mr Kubyana went unanswered. It is apparent from the record that this is incorrect.

terms of section 129(1) of the Act,[4] setting out his statutory rights and requesting him to pay his outstanding debts. The notice was sent by registered mail to the address nominated by Mr Kubyana in the instalment sale agreement.

[5] According to the track and trace report[5] from the Post Office, the notice reached the Pretoria North Post Office on 20 July 2010. On the same day the Post Office sent a notification to the address nominated by Mr Kubyana, informing him that an item had been sent by registered mail and was awaiting his collection. He failed to collect the registered item (the section 129 notice). Seven days later a second notification was sent to him. Again he did not respond and the notice remained at the Pretoria North Post Office. On 1 September 2010 the Post Office returned the unclaimed section 129 notice to Standard Bank.

Litigation history

[6] On 28 September 2010 Standard Bank issued summons against Mr Kubyana for the cancellation of the instalment sale agreement, the return of the motor vehicle and the payment of damages. Mr Kubyana filed a special plea that the High Court had no jurisdiction to hear the matter because Standard Bank

---

[4] That provision is set out in [23] below. In essence it requires a credit provider to notify a consumer who is in default of her rights under the Act before commencing legal proceedings to enforce the relevant credit agreement against that consumer.

[5] This is a document, available from the Post Office, which indicates when a registered item arrives at a particular branch of the Post Office for collection by the intended recipient. It also indicates whether the item was collected or returned to the sender.

had failed to comply with its obligations in terms of section 129 of the Act, as well as the terms of the instalment sale agreement, as his account had not been in arrears when the notice was sent. He subsequently averred that he did not receive the notice until he was served with the summons.

[7] The matter proceeded to trial in the High Court before Ledwaba J. Mr Kubyana was legally represented and the dispute was fully ventilated. Standard Bank adduced evidence to establish that: Mr Kubyana's account was and had been in arrears; it had taken steps to bring this to his attention; the section 129 notice had been sent via registered post to the address nominated by Mr Kubyana in the instalment sale agreement; the notice had reached the correct branch of the Post Office; and the notification from the Post Office had been sent to Mr Kubyana's address. Though present, Mr Kubyana did not testify or provide an explanation for his failure to collect the section 129 notice.

[8] The High Court upheld Standard Bank's claim, finding that it had no obligation to use additional means to ensure that Mr Kubyana received the section 129 notice.[6] It concluded that Mr Kubyana had a duty to explain why the notice did not reach him notwithstanding Standard Bank's efforts, and that his failure to do so had to count against him.[7]

---

[6] *Standard Bank of South Africa Ltd v Kubyana* [2012] ZAGPPHC 259 (High Court judgment) at paras 34-5.

[7] Id at paras 31-2 and 34-5.

[9] The Supreme Court of Appeal dismissed Mr Kubyana's application for leave to appeal against the decision of Ledwaba J. He now seeks leave to appeal to this Court.

Submissions in this Court

[10] In his papers Mr Kubyana set out various grounds of appeal, including a claim that Standard Bank had breached section 106 of the Act[8] by impermissibly debiting his account with insurance premiums and an allegation that the proceedings before the High Court were unfair and in

---

[8] Subsections (4) and (5) thereof read as follows:

> "(4) If the credit provider proposes to the consumer the purchase of a particular policy of credit insurance as contemplated in subsection (1) or (3)—
>
> (a) the consumer must be given, and be informed of, the right to waive that proposed policy and substitute a policy of the consumer's own choice, subject to subsection (6);
>
> (b) such policy must provide for payment of premiums by the consumer—
>
> (i) on a monthly basis in the case of small and intermediate agreements; or
>
> (ii) on a monthly or annual basis in the case of large agreements, for the duration of the credit agreement; and
>
> (c) in the case of an annual premium the premium must be recovered from the consumer within the applicable year.
>
> (5) With respect to any policy of insurance arranged by a credit provider as contemplated in subsection (4), the credit provider must—
>
> (a) not add any surcharge, fee or additional premium above the actual cost of insurance arranged by that credit provider;
>
> (b) disclose to the consumer in the prescribed manner and form—
>
> (i) the cost to the consumer of any insurance supplied; and
>
> (ii) the amount of any fee, commission, remuneration or benefit receivable by the credit provider, in relation to that insurance;
>
> (c) explain the terms and conditions of the insurance policy to the consumer and provide the consumer with a copy of that policy; and
>
> (d) be a loss payee under the policy up to the settlement value at the occurrence of an insured contingency only and any remaining proceeds of the policy must be paid to the consumer."

breach of section 34 of the Constitution.[9] After Mr Kubyana filed his papers but before the hearing, the Socio-Economic Rights Institute of South Africa (SERI) was admitted as a friend of the court (amicus curiae).[10] The Registrar of this Court was subsequently informed that counsel for SERI would present oral argument on Mr Kubyana's behalf, which he duly did. During the hearing the contentions regarding section 34 of the Constitution and section 106 of the Act were abandoned. Mr Kubyana's case narrowed considerably and he now asserts only two grounds of appeal.

[11] First, relying on this Court's judgment in *Sebola*,[11] Mr Kubyana contends that, if there is evidence that a section 129 notice was sent by registered post but was returned to the credit provider unclaimed, this shows that there has not been proper delivery as required by the Act as it indicates that the notice has not come to the attention of the consumer for whom it was intended.[12] In that event, a court hearing the dispute must adjourn the proceedings as contemplated in section 130(4)(b) of the Act[13] and cannot

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[9] The section, entitled "Access to courts", reads as follows:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[10] SERI is a non-profit company. It provides socio-economic rights assistance to individuals, communities and social movements in South Africa. It also has a history of engaging on issues concerning the Act. See, for example, its contribution in *Sebola* below n 11 at paras 23, 47-8, 51 and 54.

[11] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*).

[12] In other words, such a return constitutes a "contrary indication" as envisaged in *Sebola* above n 11 at para 77. I deal with this concept more fully in [49]-[53] below.

[13] That provision is set out in full in [25] below. In essence it requires a court hearing an application for the enforcement of a credit agreement to adjourn proceedings if a credit provider has failed to comply with sections 127, 129 or 131 of the Act. The adjournment is granted to allow the credit provider time to rectify its failure before it may enforce the debt.

grant judgment. In the circumstances of this case, Mr Kubyana contends that the fact that the section 129 notice was returned to Standard Bank uncollected constituted an indication contradicting the inference of proper delivery. Judgment therefore ought not to have been granted in Standard Bank's favour. Second, Mr Kubyana relies on sections 8(3), 32(1)(b) and 39(2) of the Constitution[14] (read with sections 129 and 130 of the Act) and argues that he is entitled to information held by another person if that information is required for the exercise or protection of his rights. He submits that his constitutional right to receive information was infringed when he did not receive delivery of the section 129 notice, as that notice contained information necessary for the exercise of his rights under the Act.

[12] In response to Mr Kubyana's first argument, Standard Bank argues that, once it is proven that the section 129 notice was sent by registered mail to

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[14] Section 8(3) reads as follows:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
>
> (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

Section 32, entitled "Access to information", reads as follows:

> (1) Everyone has the right of access to—
>
> (a) any information held by the state; and
>
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

Section 39(2) reads as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

the correct branch of the Post Office, the credit provider may credibly aver receipt of the notice by the consumer. This satisfies the requirements of the Act. The burden of rebuttal then shifts to the consumer to assert that the notice did not reach her and to invite the court to make a finding in relation thereto. To place additional requirements on the credit provider would impose too onerous a burden and would afford consumers the undue advantage of being able to ignore validly sent notices with impunity.

[13] Regarding Mr Kubyana's access to information argument, Standard Bank contends that his reliance on section 32(1)(b) of the Constitution is misplaced because section 32(1)(b) is realised through the Promotion of Access to Information Act.[15] In the circumstances of this case he has no cause of action under that statute, so the argument goes, because he made no formal request for information in terms of PAIA and therefore never engaged its protections. Moreover, Standard Bank contends that it regularly kept Mr Kubyana informed of the state of his account and cannot be said to have deprived him of relevant information.

[14] SERI submits that, in the light of *Sebola*, the crucial question for determination in a dispute such as the present one is whether, as a matter of fact, the section 129 notice came to the attention of the consumer. Why it may not have done so is irrelevant, for the Act does not require an enquiry

[15] 2 of 2000 (PAIA).

into subjective factors such as a consumer's culpability for not receiving notices. On the undisputed facts, SERI contends it is clear that the section 129 notice did not reach Mr Kubyana: it was never collected by him from the Pretoria North Post Office and was returned to Standard Bank unclaimed. Accordingly, there was no compliance with section 129 of the Act. SERI contends that the High Court therefore ought to have adjourned the trial and directed Standard Bank to take further steps to ensure that the section 129 notice reached Mr Kubyana.

Issues

[15] In this matter we are required to—

(a) determine whether leave to appeal should be granted;

(b) interpret section 129 of the Act and identify its requirements;

(c) clarify the meaning and implications of *Sebola* and its application to this case; and

(d) determine an appropriate costs order.

Leave to appeal

[16] It is by now trite that this Court will hear a matter that raises a constitutional issue if the interests of justice so require.[16] As previously explained, the interpretation of the Act's notice provisions implicates

[16] See section 167(3)(b)(i) read with section 167(6) of the Constitution. See also *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 42 at para 4 and *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39 at para 22.

fundamental notions of equity in, and the transformation of, the credit market. Such an interpretation is therefore inherently linked to the constitutional objective of achieving substantive equality.[17] This matter thus gives rise to a constitutional issue.

[17] This case concerns the proper interpretation of a statute that regulates commercial activity undertaken by many people and institutions on a daily basis. The issues at stake are therefore of fundamental importance to many South Africans.[18] Furthermore, this matter requires us to clarify the scope and application of *Sebola*. As is apparent from the law reports, there are a number of conflicting superior court decisions dealing with the meaning of section 129 of the Act and the interpretation of that provision by this Court in *Sebola*.[19] It is imperative for purposes of certainty and the proper functioning of the marketplace that we identify the rights and obligations of both credit providers and consumers under the Act and specifically under section 129. In sum, this matter implicates constitutional issues that the interests of justice require us to determine. Leave to appeal is therefore granted.

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[17] *Sebola* above n 11 at para 36.

[18] Id at para 34.

[19] *ABSA Bank Ltd v Mkhize and Another; ABSA Bank Ltd v Chetty; ABSA Bank Ltd v Mlipha* [2013] ZASCA 139; *Balkind v ABSA Bank* [2012] ZAECGHC 102; 2013 (2) SA 486 (ECG); *ABSA Bank Ltd v Petersen* [2012] ZAWCHC 168; 2013 (1) SA 481 (WCC); *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* [2012] ZAKZDHC 38; 2012 (5) SA 574 (KZD); and *Nedbank Ltd v Binneman and Thirteen Similar Cases* [2012] ZAWCHC 141; 2012 (5) SA 569 (WCC).

The interpretation of section 129 of the Act

[18] It is well established that statutes must be interpreted with due regard to their purpose and within their context.[20] This general principle is buttressed by section 2(1) of the Act, which expressly requires a purposive approach to the statute's construction.[21] Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms.[22] However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.[23]

[19] The historical context and purpose of the Act were set out in detail in *Sebola*.[24] It suffices to emphasise the following points. The Act is a

[20] See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 61 and *Mistry v Interim Medical and Dental Council of South Africa and Others* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at paras 17-8.

[21] Section 2(1) states that "[t]his Act must be interpreted in a manner that gives effect to the purposes set out in section 3." I set out those purposes in [19]-[21] below.

[22] See generally *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[23] In *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) Kentridge AJ, at paras 17-8, stated:

> "I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.
>
> We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

While these remarks referred to constitutional interpretation, they apply even more forcefully in relation to statutory interpretation generally. See also *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 23-4 and 26.

[24] Above n 11 at paras 38-42.

legislative effort to regulate and improve relations between consumers and providers of credit. The main purposes of the Act are "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers".[25]

[20] There can be no doubt that the Act is directed at consumer protection.[26] However, this should not be taken to mean that the Act is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on consumers without any regard for the interests of credit providers. No. For just as the Act seeks to protect consumers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry. This objective is to be attained by promoting responsibility in the credit market;[27] "encouraging responsible borrowing [and the] fulfilment of financial obligations by consumers";[28] discouraging contractual default;[29] and adhering to a debt-enforcement system that prioritises "the eventual

[25] Section 3 of the Act.

[26] In express terms section 3 states that the aforementioned purposes are to be achieved by developing a credit market that is accessible to those for whom it has been historically inaccessible (section 3(a)), discouraging the provision of reckless credit by credit providers (section 3(c)(ii)) and correcting prevailing disparities in negotiating power between consumers and credit providers (section 3(e)). See *Sebola* above n 11 at paras 38-40.

[27] Section 3(c) of the Act.

[28] Id section 3(c)(i).

[29] Id section 3(c)(ii).

satisfaction of all responsible consumer obligations under credit agreements."[30]

[21] Thus, the promotion of equity in the credit market is to be achieved by balancing the respective rights and responsibilities of credit providers and consumers.[31] It follows that the correct interpretation of section 129 is one that strikes an appropriate balance between the competing interests of both parties to a credit agreement.

[22] It is also fitting to have regard to section 129 in particular.[32] This section sets out the procedures a credit provider must follow before enforcing a debt. Its purpose is two-fold. First, it serves to ensure that the attention of the consumer is sufficiently drawn to her default. Second, it enables the consumer to be empowered with knowledge of the variety of options she may utilise in order to remedy that default.[33] As explained in *Sebola*, the aim of the provision is to facilitate the consensual resolution of credit agreement disputes.[34] It is important to emphasise this consensuality – both the credit provider *and* the consumer have responsibilities to bear if the dispute is to be resolved without recourse to litigation.

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[30] Id section 3(i). See *Sebola* above n 11 at para 40.

[31] Section 3(d) of the Act. See *Sebola* above n 11 at para 40.

[32] The text of subsection (1) is set out in [23] below.

[33] For example, seeking the assistance of a debt counsellor with a view to debt restructuring, or seeking recourse to a consumer ombud for the non-litigious resolution of any dispute with the credit provider.

[34] Above n 11 at para 46. In support of this conclusion Cameron J relied on section 3(h) of the Act, which states that one of the means of achieving the purposes of the Act is the provision of "a consistent and accessible system of consensual resolution of disputes arising from credit agreements".

[23] This exposition of the aims and objects of the Act will inform our understanding of its particular provisions. However, interpretation is about giving meaning to words, and it is therefore appropriate to commence the interpretive exercise by considering the language of the statute. In this matter we are primarily concerned with section 129 of the Act, which is entitled "Required procedures before debt enforcement". Subsection (1) reads:

> "If the consumer is in default under a credit agreement, the credit provider—
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and
> (ii) meeting any further requirements set out in section 130."

[24] Although subsection (1)(a) is framed in permissive language ("the credit provider *may*"), subsection (1)(b) is expressed in peremptory terms: legal proceedings for the enforcement of a credit agreement "*may not* commence" until the section 129 notice has been provided to the consumer.[35] Proper dispatch of the section 129 notice is therefore essential for a credit provider

[35] See *Sebola* above n 11 at para 45.

that wishes to enforce its rights against a defaulting consumer in the courts.[36]

[25] In *Sebola* this Court held[37] that section 129(1) must be read in conjunction with the relevant provisions of section 130, which is entitled "Debt procedures in a Court". The relevant provisions of section 130 read:

> "(1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—
>
> (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;
>
> (b) in the case of a notice contemplated in section 129(1), the consumer has—
>
> (i) not responded to that notice; or
>
> (ii) responded to the notice by rejecting the credit provider's proposals; and
>
> (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127.
>
> . . .
>
> (3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with;

[36] Although this is subject to a proviso contained in section 130(2) of the Act, that proviso is not relevant for purposes of this case.

[37] Above n 11 at para 52.

. . . .

(4) In any proceedings contemplated in this section, if the court determines that—

. . .

(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3)(a) . . . the court must—

(i) adjourn the matter before it; and

(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed".

[26] As explained in *Sebola*, section 129 prescribes *what* the credit provider must do: indicate in writing to the relevant consumer that she is in default and that she has certain statutory remedies available to her in order to satisfy her outstanding debts without recourse to litigation. Section 130, on the other hand, sets out *how* the credit provider must discharge this obligation: deliver a written notice to the consumer as required by the statute.[38] The crucial question is: what must a credit provider do in order to meet the standard prescribed by the Act for the delivery of a section 129 notice?

[27] Unfortunately, the definition section and sections 129 and 130 are of little assistance in giving content to this obligation, as they make no prescriptions regarding the acceptable modes of delivery under the statute. We must have regard to sections 65, 96 and 168, for it is only these three provisions that deal with the delivery of documentation under the Act.

[38] Id at paras 55-6. At para 53 Cameron J concluded that "[s]ection 129 prescribes *what* a credit provider must prove (notice as contemplated) before judgment can be obtained, while section 130 sets out *how* this can be proved (by delivery)." (Emphasis in original.)

Section 65 is entitled "Right to receive documents". Subsections (1) and (2) state:

"(1) Every document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any.

(2) If no method has been prescribed for the delivery of a particular document to a consumer, the person required to deliver that document must—

(a) make the document available to the consumer through one or more of the following mechanisms—

(i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumer's expense, or by ordinary mail;

(ii) by fax;

(iii) by email; or

(iv) by printable web-page; and

(b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."[39]

[28] Section 96, entitled "Address for notice", reads:

"(1) Whenever a party to a credit agreement is required or wishes to give legal notice to the other party for any purpose contemplated in the agreement, this Act or any other law, the party giving notice must deliver that notice to the other party at—

(a) the address of that other party as set out in the agreement, unless paragraph (b) applies; or

(b) the address most recently provided by the recipient in accordance with subsection (2).

(2) A party to a credit agreement may change their address by delivering to the other party a written notice of the new address by hand, registered mail, or electronic mail, if that other party has provided an email address."

[39] Section 65(1) does not assist us, for "prescribed" means "prescribed by regulation" and the regulations promulgated under the Act are of no assistance with regard to the delivery of section 129 notices. See *Sebola* above n 11 at para 62.

[29] Finally, section 168, entitled "Serving documents", states the following:

"Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person will have been properly served when it has been either—

(a) delivered to that person; or

(b) sent by registered mail to that person's last known address."

[30] Section 65 specifies that documents delivered under the Act must be made available to the recipient through one or more of a number of enumerated mechanisms. If the consumer has chosen a particular mode of delivery from the enumerated options, the document must be delivered in accordance with that election. Section 96 provides that legal notices must be delivered to the address of the other party set out in the agreement or to the address most recently provided by the recipient where she has given written notice of a change in the address set out in the agreement. Finally, section 168 specifies how notices, orders and other documents under the Act are to be served where the method of delivery is not otherwise specified.

[31] These statutory provisions were comprehensively treated in *Sebola*[40] and I agree with what was stated there. For present purposes three features merit emphasis. First, there is no general requirement that the notice be brought to the consumer's subjective attention by the credit provider, or that

[40] Above n 11 at paras 62-72.

personal service on the consumer is necessary for valid delivery under the Act.[41] I am minded to agree with the High Court that, had the legislation meant either of these aspects to be a necessary condition for delivery, express provision would have been made for them.[42] Thus, while the section 129 obligation on the credit provider is to "draw the default to the notice of the consumer in writing", this obligation is discharged, in the words of section 65(2), by "[making] the document available to the consumer". This accords with section 130(1)(b)(i), which provides that a credit provider may seek to enforce its rights if a consumer has not responded to a section 129 notice. While a credit provider must take certain steps to ensure that a consumer is adequately informed of her rights, such a credit provider cannot be non-suited or hamstrung if the consumer unreasonably fails to engage with or make use of the information provided. In other words, it is the use of an acceptable mode of delivery – the taking of certain steps to apprise the consumer of the notice – which the statute requires of the credit provider, not the bringing of the contents of the section 129 notice to the consumer's subjective attention.

[32] Second, one of the acceptable modes of delivery is by means of the postal service:

"[W]here the notice is posted, mere despatch is not enough. This is because the risk of non-delivery by ordinary mail is too great. Registered mail is in my view essential.

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[41] Id at para 74.

[42] See the High Court judgment above n 6 at para 27.

> . . . But the mishap that afflicted the Sebolas' notice shows that proof of registered despatch by itself is not enough. The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer . . . . This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office."[43]

When a consumer has elected to receive notices by way of post, the credit provider's obligation to deliver thus ordinarily consists of (a) respecting the consumer's election; (b) undertaking the additional expense of sending notices by way of registered rather than ordinary mail; and (c) ensuring that any notice is sent to the correct branch of the Post Office for the consumer's collection.

[33] Third, the steps that a credit provider must take in order to effect delivery are those that would bring the section 129 notice to the attention of a reasonable consumer.[44] This requirement is premised on the "especial importance" and the "pivotal significance" of the notice[45] as understood in the light of the Act's objectives regarding consumer protection. In order to give effect to that importance and achieve those objectives, the Legislature has elected to impose on credit providers obligations that would not otherwise arise.[46] Indeed, if "delivery" is interpreted to mean that a reasonable consumer would still not receive the section 129 notice, that interpretation would undermine the Act's "innovative entrenchment of

[43] *Sebola* above n 11 at para 75.

[44] Id at paras 75 and 77.

[45] Id at paras 70 and 73.

[46] For example, the common law of contract does not prescribe that all notices sent in relation to an agreement, in order to have been validly delivered, must be sent by way of registered mail. See *Sebola* above n 11 at paras 82-3.

court-avoidant and settlement-friendly processes"[47] and would only provide protection for exceptional consumers. As the Court explained in *Sebola*, for there to have been delivery under the Act it must be the case that—

> "it may reasonably be assumed . . . that notification of [the] arrival [of the section 129 notice at the Post Office] reached the consumer and that a reasonable consumer would have ensured retrieval of the item".[48]

[34] I now consider the purpose of the section 129 notice and the obligations of a reasonable consumer. Section 129 aims to establish a framework within which the parties to the credit agreement, in circumstances where the consumer has defaulted on her obligations, can come together and resolve their dispute without expensive, acrimonious and time-consuming recourse to the courts. However, this form of dispute resolution is possible only if both parties come to the table: the credit provider must avoid hasty recourse to litigation and the consumer must seek to rectify her default in a reasonable and responsible manner.

[35] If the credit provider complies with the requirements set out in [31] to [33] above and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-

[47] *Sebola* above n 11 at para 72.

[48] Id at para 77.

emphasis that the purpose of the Act is not only to protect consumers, but also to create a "harmonised system of debt restructuring, enforcement and judgment, *which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*."[49] Indeed, if the consumer has unreasonably failed to respond to the section 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations.

[36] As set out earlier, even if the section 129 notice has been dispatched by registered mail and the Post Office has delivered the notification to the consumer's designated address, valid delivery will not take place if the notice would nevertheless not have come to the attention of a reasonable consumer.[50] But if the credit provider has complied with the requirements set out above, it will be up to the consumer to show that the notice did not come to her attention and the reasons why it did not.

[37] During the hearing counsel for Mr Kubyana asserted that the notion of "the obligations of a reasonable consumer" has no basis in the Act. This simply is not so. Its roots lie in section 3, which emphasises the importance of "responsible borrowing", the "fulfilment of financial obligations by

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[49] Section 3(i) of the Act. (Emphasis added.)

[50] See *Sebola* above n 11 at para 77.

consumers", "discouraging . . . contractual default by consumers" and the "satisfaction of all responsible consumer obligations". It also draws from, among other things, the notice provisions of the Act. In empowering a consumer to decide on the manner in which she receives notices, sections 65(2) and 96 impose a corollary obligation on her to do what is necessary in order to take receipt of those notices in accordance with the manner of delivery she has chosen. Put simply, if the consumer has elected to receive notices by way of registered mail, she must respond to notifications from the Post Office requesting her to collect registered items unless, in the circumstances, a reasonable person would not have responded.

[38] One of the main aims of the Act is to enable previously marginalised people to enter the credit market and access much needed credit. Credit is an invaluable tool in our economy. It must, however, be used wisely, ethically and responsibly. Just as these obligations of ethical and responsible behaviour apply to providers of credit, so too to consumers. It is so that a credit provider will only have discharged its obligation to effect delivery if the delivery would have resulted in the section 129 notice being drawn to the attention of a reasonable consumer. However, it is also the case that a consumer will not be entitled to rely on a credit provider's alleged non-compliance with section 129 if she has been unreasonably remiss in failing to engage with the notice. The notion of a "reasonable consumer" implies obligations for both credit providers and consumers.

Conclusion: the obligation to deliver

[39] In sum, the Act does not require a credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Rather, delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the section 129 notice available to the consumer by having it delivered to a designated address.[51] When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of dispatching the notice by registered mail,[52] ensuring that the notice reaches the correct branch of the Post Office for collection[53] and ensuring that the Post Office notifies the consumer (at her designated address) that a registered item is awaiting her collection.[54] This is subject to the narrow qualification that, if these steps would not have drawn a reasonable consumer's attention to the section 129 notice, delivery will not have been effected. The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence.

[40] The interpretation of "delivery" set out in the preceding paragraph is consonant with the statutory objectives of consumer protection and

[51] Sections 65(2) and 96(1) of the Act.

[52] Id section 168(b).

[53] *Sebola* above n 11 at paras 75 and 77.

[54] Id.

consensual dispute resolution in that it imposes obligations on the credit provider to ensure that the consumer is adequately informed of her statutory rights to seek extra-curial assistance. It also reflects an appropriate balancing of interests: while the obligation to deliver the section 129 notice rests on the credit provider, if the consumer acts unreasonably the credit provider may go ahead and seek enforcement of the credit agreement notwithstanding the consumer's failure to engage with the contents of the notice.

Sebola revisited: proof of delivery

[41] I now move on to consider what a credit provider must prove in order to satisfy a court that it has discharged its obligation to effect delivery of a section 129 notice to a consumer. It is appropriate to begin with a discussion of this Court's judgment in *Sebola*.

[42] *Sebola* concerned an application for the rescission of a default judgment. Mr and Mrs Sebola concluded a home loan agreement with Standard Bank. Approximately two years later they defaulted on their bond repayments. Although Standard Bank dispatched a section 129 notice, it was sent to the wrong branch of the Post Office. Standard Bank thereafter issued summons against the couple for payment of the full outstanding amount due under the mortgage bond. Subsequently, the Registrar of the High Court granted

default judgment against Mr and Mrs Sebola. The Sebolas successfully appealed to this Court.[55]

[43] The majority judgment held:

(a) The Act does not require proof that the section 129 notice came to the subjective attention of the consumer.[56] Instead, the Act requires the credit provider to "make averments that will satisfy a court that the notice probably reached the consumer".[57] Indeed, the Act must not be interpreted so as to impose obligations that are "impossible to fulfil."[58]

(b) When a consumer has elected to receive notifications through the postal service, the credit provider must show that—

  (i) the section 129 notice was sent by registered mail and delivered to the correct branch of the Post Office, generally to be deduced from a track and trace report;

  (ii) the Post Office informed the consumer that a registered item was available for collection;

  (iii) the notification from the Post Office reached the consumer, which may generally be inferred if the notification was sent to the correct postal address (as designated by the consumer), unless there is an indication to the contrary; and

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[55] Id at paras 4-10.

[56] Id at para 74.

[57] Id at para 75.

[58] Id at para 57.

(iv) a reasonable consumer would have ensured retrieval of the registered item from the Post Office.[59]

These principles are consistent with what has been set out above regarding the nature of a credit provider's obligation to deliver.

[44] However, the majority judgment in *Sebola* contains broad language which could be misconstrued. Paragraph 79 of that judgment reads:

> "If, in contested proceedings, the consumer asserts that the notice went astray after reaching the post office, or was not collected, or not attended to once collected, the court must make a finding whether, despite the credit provider's proven efforts, the consumer's allegations are true, and, if so, adjourn the proceedings in terms of section 130(4)(b)."

And at paragraph 87:

> "If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."

[45] *Sebola* was not concerned with contested enforcement proceedings during which judgment was granted against consumers – it related to the Sebolas' attempt to procure rescission of a default judgment. Neither was there any suggestion of a failure by, or culpability on the part of, Mr and

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[59] Id at paras 77 and 87.

Mrs Sebola. The judgment was therefore not concerned with a situation where the notice had been validly delivered by the credit provider, but then remained uncollected, or unattended to, by the consumers. The statements quoted above were unnecessarily broad. To the extent that the judgment implies that a credit provider will not have discharged its obligation to effect delivery because a consumer unreasonably fails to collect or attend to a properly dispatched section 129 notice, it misstated the law. This is apparent from the excursus of the Act set out above, that (a) a credit provider is under no obligation to bring a section 129 notice to the subjective attention of a consumer and (b) a consumer must respond reasonably when a credit provider has properly sought to bring such a notice to her attention. In a similar vein, and in addition to acknowledging the importance of a consumer's obligation to act reasonably,[60] the majority judgment stated the following:

> "[T]he statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible."[61]

[46] The Act does not imply, and cannot be interpreted to mean, that a consumer may unreasonably ignore the consequences of her election to receive notices by registered mail, when the notifications in question have been sent to the address which she duly nominated. While it is so that

[60] Id at para 77.

[61] Id at para 74.

consumers should receive the full benefit of the protections afforded by the Act, the noble pursuits of that statute should not be open to abuse by individuals who seek to exercise those protections unreasonably or in bad faith.

[47] Similarly to paragraphs 79 and 87 of *Sebola*, paragraph 74 indicates that there is an obligation on the credit provider to prove that the section 129 notice "in fact reached the consumer". This statement must be understood in the light of *Sebola*'s attempt to prescribe a method of fact determination for courts faced with applications for default judgment and to indicate which factual inferences may be drawn in a situation where factual sources are few. However, as shown, any notion that the Act requires a credit provider to ensure that, as a matter of fact, the section 129 notice definitely reached the consumer is misconceived.

[48] It is so that section 96(1) requires that notices be delivered "at the address" provided by the recipient. However, this requirement must be understood with due regard to the practical aspects of dispatching a notice by way of registered mail. When a credit provider dispatches a notice in that manner, the notice is sent to a particular branch of the Post Office. That branch then sends a notification to the consumer, indicating that a registered item is available for collection. It is never the case that an item dispatched by registered mail will physically be delivered to an individual – such

delivery only occurs if the item is sent by ordinary mail, which does not suffice for purposes of sections 129 and 130 of the Act.[62] If a consumer elects not to respond to the notification from the Post Office, despite the fact that she is able to do so, it does not lie in her mouth to claim that the credit provider has failed to discharge its statutory obligation to effect delivery.

Clarification of the phrase "contrary indication"

[49] A final aspect of *Sebola* requires clarification. Much was made by counsel of the notion of a "contrary indication":

> "The credit provider's summons or particulars of claim should allege that the [section 129] notice was delivered to the relevant post office and that the post office would, in the normal course, have secured delivery of a registered item notification slip, informing the consumer that a registered article was available for collection. Coupled with proof that the notice was delivered to the correct post office, it may reasonably be assumed *in the absence of contrary indication*, and the credit provider may credibly aver, that notification of its arrival reached the consumer and that a reasonable consumer would have ensured retrieval of the item from the post office."[63]
> (Emphasis added).

[50] Mr Kubyana avers that as soon as there is a "contrary indication" showing, as a matter of fact, that the section 129 notice did not come to the subjective attention of the consumer, that suffices to show that the requirements of section 129 have not been met. Moreover, he contends that when a section 129 notice is returned to the credit provider uncollected,

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[62] Id at para 68.

[63] Id at para 77. See also para 87.

notwithstanding the fact that it was sent to the correct branch of the Post Office and the fact that the Post Office sent a notification to the consumer's address that a registered item was awaiting collection, such a return constitutes a "contrary indication".

[51] This argument cannot be sustained. It is premised on the notion that a credit provider is under an obligation to bring a section 129 notice to the subjective attention of the consumer, which is not the case. It fails to appreciate that, if the purpose of consensual dispute resolution is to be achieved, a consumer must act responsibly when notified of her default – the credit provider does not bear sole responsibility for ensuring that the objective underlying section 129 is achieved. And it does not account for the responsibilities of a reasonable consumer: the Act does not allow a consumer to ignore, or unreasonably fail to respond to, notifications from the Post Office and thereby stave off enforcement proceedings by a credit provider.

[52] Mr Kubyana's argument is also based on a misreading of *Sebola*. The "contrary indication" requirement applies to two inferences that a court may make: the inference that the notification from the Post Office (indicating that a registered item is available for collection) reached the consumer and the inference that a reasonable consumer would have responded to that notification and retrieved the notice. The first inference is based on the

reasonable assumption that when a credit provider has dispatched a notice by means of registered post, has specified the correct address for the consumer and has ensured that the notice is delivered to the correct branch of the Post Office, the notification calling on the consumer to collect a registered item will be delivered to her address. A contrary indication would be a factor showing that, in the circumstances and despite the credit provider's efforts, the notification did not reach the consumer's designated address. The second inference is based on the assumption that a consumer acting reasonably would, having received the notification from the Post Office to retrieve a registered item, proceed to collect the notice. In these circumstances a contrary indication would be a factor showing that the consumer acted reasonably in failing to collect or attend to the notice, despite the delivery of the notification to her address.

[53] Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the Post Office and has shown that a notification was sent to the consumer by the Post Office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It then falls to the consumer to explain why it is not reasonable to expect the notice to have reached her attention if she wishes to escape the consequences of that notice. And it makes sense for

the consumer to bear this burden of rebutting the inference of delivery, for the information regarding the reasonableness of her conduct generally lies solely within her knowledge. In the absence of such an explanation the credit provider's averment will stand. Put differently, even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour.

Conclusion: proof of delivery of a section 129 notice

[54] The Act prescribes obligations that credit providers must discharge in order to bring section 129 notices to the attention of consumers. When delivery occurs through the postal service, proof that these obligations have been discharged entails proof that—

(a) the section 129 notice was sent via registered mail and was sent to the correct branch of the Post Office, in accordance with the postal address nominated by the consumer. This may be deduced from a track and trace report and the terms of the relevant credit agreement;

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection;

(c) the Post Office's notification reached the consumer. This may be inferred from the fact that the Post Office sent the notification to the consumer's correct postal address, which inference may be rebutted by an indication to the contrary as set out in [52] above; and

(d) a reasonable consumer would have collected the section 129 notice and engaged with its contents. This may be inferred if the credit provider has proven (a)-(c), which inference may, again, be rebutted by a contrary indication: an explanation of why, in the circumstances, the notice would not have come to the attention of a reasonable consumer.

Did Standard Bank comply with section 129 of the Act?

[55] We are presently concerned with contested proceedings where the dispute was fully ventilated at trial. All the relevant information on which the parties elected to rely was placed before the High Court. From that information it is apparent that Standard Bank sent the section 129 notice via registered mail to the branch of the Post Office nominated by Mr Kubyana, and the Post Office sent two notifications to Mr Kubyana's designated address indicating that a registered item was awaiting his collection. There was and remains no denial that he received the notifications. In the absence of any explanation from him, we may therefore reasonably assume that the notifications from the Post Office reached his attention. Mr Kubyana's case is only that he did not collect the section 129 notice. He did not give evidence at trial to substantiate this assertion.

[56] It is sufficient to bring the section 129 notice to a consumer's attention for that consumer to have agreed to receive the notice by way of registered mail and then to receive a notification that a registered item is awaiting her

attention. This is the case unless a reasonable consumer would not, in the circumstances, have taken receipt of the notice.

[57] But this defence cannot avail Mr Kubyana, for he elected neither to testify nor to provide an explanation for why he did not respond to the notifications from the Post Office. That being the case, there is no basis upon which we can determine that, notwithstanding Standard Bank's efforts, it was reasonable for Mr Kubyana not to have taken receipt of the section 129 notice. And it must be remembered that the defence is a narrow one: it would apply only if Mr Kubyana were able to prove that, despite the credit provider's attempts at delivery, a reasonable consumer in his position would not have collected the notice or responded to it. In the result, Standard Bank did all that was required of it by the Act. To hold it to a higher standard would be to impose an excessively onerous standard of performance.

[58] Standard Bank has thus complied with the requirements contained in section 129 of the Act. It was entitled to commence legal proceedings and to enforce its claims under the instalment sale agreement when it did. There is therefore no basis to interfere with the order of the High Court.

The access to information argument

[59] This argument, too, must fail. Even if we accept that section 32 of the Constitution is of application in this case, for the reasons set out above there

is nothing before us to indicate that Standard Bank did not do what was required by law in order to provide Mr Kubyana with information regarding his default and his statutory rights. The appeal therefore fails.

Costs

[60] At the hearing counsel for Standard Bank, when pressed by the Bench, agreed to leave the question of costs in the hands of the Court. Mr Kubyana has not been successful in this Court. I am also mindful of the fact that at least some of the grounds on which he sought to appeal the High Court's decision were spurious.[64] That being said, this judgment represents a clarification of the law which is important not only to consumers but also to providers of credit, including Standard Bank. I therefore consider it just and equitable to make no order as to costs.

Order

[61] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

[64] I have in mind the allegation that his trial was unfair, which, from the record, appears to be wholly unfounded and completely opportunistic.

JAFTA J (Moseneke ACJ, Cameron J, Dambuza AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

[62] I have read the judgment prepared by my Colleague Mhlantla AJ (main judgment). While I agree with much of what it says and the order proposed, I have decided to write separately on the interpretation of section 129(1) of the Act and provide further clarification on the judgment of this Court in *Sebola*.[65]

[63] It has become necessary for this Court to clarify its judgment in *Sebola* due to the confusion that has ensued as a result of conflicting interpretations of the *Sebola* judgment by various courts.[66] In *Binneman*, the Western Cape High Court held that *Sebola* has not changed the legal position proclaimed by the Supreme Court of Appeal in *Rossouw*.[67] In that case the Supreme Court of Appeal had held that the delivery requirement envisaged in section 129(1) would be satisfied if the credit provider dispatched the notice by registered mail to the consumer.[68]

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[65] *Sebola and Another v Standard Bank of South Africa Ltd and Another* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) (*Sebola*).

[66] *Nedbank Ltd v Binneman and Thirteen Similar Cases* [2012] ZAWCHC 121; 2012 (5) SA 569 (WCC); *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* [2012] ZAKZDHC 38; 2012 (5) SA 574 (KZD) (*Mkhize*); and *Balkind v ABSA Bank, In re ABSA Bank Ltd v Ilifu Trading 172 CC and Others* [2012] ZAECGHC 102; 2013 (2) SA 486 (ECG).

[67] *Rossouw and Another v First Rand Bank Ltd t/a FNB Homeloans (Formerly First Rand Bank of South Africa Ltd)* [2010] ZASCA 130; 2010 (6) SA 439 (SCA) (*Rossouw*).

[68] Id at para 32.

[64] But the KwaZulu-Natal High Court in *Mkhize* came to the opposite conclusion.[69] The Court held that *Sebola* had overruled *Rossouw* in that it considered the dispatch of the notice by registered mail to be insufficient proof of delivery. Instead, *Sebola* required that a further step, namely, that the registered mail reached the correct local Post Office of the consumer, be established.

[65] In *Balkind*, the Eastern Cape High Court agreed that *Sebola* altered the position stated in *Rossouw*. In *Balkind* the High Court said:

> "Effectively, *Sebola* held that dispatch of the notice by registered post is not enough; more is required. It concluded that proof by means of the post office 'track and trace' report that the registered post reached the correct post office, would constitute proper delivery of the notice to the consumer as contemplated by section 129."[70]

[66] Before determining which of the interpretations given to *Sebola* is correct, I must consider the relevant provisions. Section 129(1) provides:

> "If the consumer is in default under a credit agreement, the credit provider—
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—

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[69] *Mkhize* above n 66 at para 50.

[70] *Balkind* above n 66 at para 12.

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130."

[67] The text of this section reveals that in the event of the consumer being in default of her repayments of the loan, the credit provider is obliged to draw the default to the attention of the consumer. The section prescribes that the notice given to the consumer must be in writing. It further stipulates what the notice must contain. The notice must propose the options available to the consumer who is in financial distress and unable to purge the default. It must point out that, at the election of the consumer, the credit agreement may be referred to a debt counsellor, dispute resolution agent, consumer court or ombud. The purpose of the referral must also be stated in the notice.

[68] The purpose of the referral is to resolve whatever disputes may have arisen from the credit agreement and also to agree on a plan to cure the default and bring the payments up to date. Furthermore, the section makes reference to section 130 which governs the institution of litigation for enforcing credit agreements. Section 129(1) lays down two conditions which must be met before the credit provider may institute litigation. In peremptory terms, the section declares that legal proceedings to enforce the agreement may not commence before—

(a) first providing notice to the consumer; and

(b) meeting further requirements set out in section 130.

[69] The reference to section 130 divulges a strong link between the two sections, hence they are required to be read together for a proper understanding of their scheme. As I see it, the application of these sections is triggered by the consumer's failure to repay the loan. These sections suspend the credit provider's rights under the credit agreement until certain steps have been taken.

[70] The credit provider is not entitled immediately to exercise its rights under the agreement. It is first required to notify the consumer of the default and demand that the arrears be paid. If the consumer pays up the arrears, then the dispute is settled. But it may so happen that the default is occasioned by the consumer's financial difficulties. In that event, instead of enforcing the agreement, the credit provider must afford the consumer an opportunity to refer the agreement to one of the bodies listed in section 129(1)(a).

[71] The opportunity for referral is a prelude to litigation. If the consumer makes use of this opportunity, the dispute relating to the default and the credit agreement are submitted to a debt counsellor, if the consumer so chooses. The debt counsellor helps the parties to reach agreement on how the loan would be repaid and the arrears cleared. This may be achieved by

re-arranging the terms of the credit agreement. If this happens, the credit provider loses the right to enforce the original credit agreement arising from the consumer's default.

[72] However, in many cases, as is the position here, consumers do not take up the opportunity to refer the dispute. Once that happens, the credit provider becomes free to enforce the credit agreement in the ordinary courts. But the credit provider's enforcement of the agreement is subject to conditions stipulated in sections 129 and 130. Section 130(1) provides:

> "Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and—
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> (a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(1), as the case may be;
>
> (b) in the case of a notice contemplated in section 129(1), the consumer has—
>
> (i) not responded to that notice; or
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> (ii) responded to the notice by rejecting the credit provider's proposals; and
>
> (c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127."

[73] It is apparent from the language of section 130(1) that a credit agreement to which the Act applies may be enforced only if the requirements laid down in that section are met. This is irrespective of any

stipulation to the contrary in the agreement itself or another law.[71] When a credit provider seeks to enforce the agreement by means of litigation, it must first show compliance with section 130, which, by extension, refers back to section 129.

[74] The first requirement is that the consumer has been in default for at least 20 business days. Furthermore, a minimum of 10 business days from the date of delivery of the notice to the consumer must have lapsed. And the consumer must have failed to respond to the notice within the period of 10 business days or responded by rejecting the credit provider's proposals. In the case of a lease, secured loan or an instalment agreement, the additional requirement is that the consumer must have failed to surrender the relevant property to the credit provider.

[75] Delivery of the notice is one of the requirements of section 130. The date on which the delivery has occurred is crucial to the calculation of the 10 business days within which the consumer is expected to respond. In this regard, therefore, the meaning of the words "delivered a notice to the consumer" is critical to the application of the section. The Act does not define the word "delivered". Consequently, it must be given its ordinary meaning.

[71] Section 130(3), the text of which is quoted in [84] below.

[76] The Concise Oxford English Dictionary states that "deliver" means "bring and hand over (a letter or goods); provide something (promised or expected); launch or aim (a blow or attack); state or present in a formal manner; assist in the birth of; and save or set free". Of the various meanings, it seems to me that only the first one is relevant to the context in which the word is used in section 130.

[77] It is a fundamental principle of interpretation that words used in a statute or written document must be construed in their proper context.[72] In *Bato Star* this Court held that "the technique of paying attention to context in statutory construction is now required by the Constitution."[73] The Court said:

> "It is no doubt true that it is a primary rule of statutory construction that words in a statute must be given their ordinary grammatical meaning. But it is also a well-known rule of construction that words in a statute should be construed in the light of their context."[74]

[78] The process of interpretation, I emphasise, does not involve a consideration of facts. Matters of evidence do not come into the equation. This is so because statutory construction is an objective process, with no link to any set of facts but in terms of which words used in a statute are

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[72] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*).

[73] Id at para 91.

[74] Id at para 89.

given a general meaning that applies to all cases, falling within the ambit of the statute.[75]

[79] The word "deliver" is commonly used in our law, particularly in the field of contracts and service of court process. In its common sense, deliver means bringing or taking something to a recipient. For example, if a contract of sale requires the seller to deliver a motor vehicle to the purchaser, it is construed to mean that the seller has to take the vehicle to the purchaser. For delivery to take place, it does not follow that the vehicle must have been handed over to the purchaser in person.[76] Depending on the circumstances of the case, taking the vehicle to the purchaser's address may constitute delivery. But the actual taking of the vehicle would constitute factual proof of what was done. And this is a matter of evidence and not interpretation.

[80] It seems to me that in the context of section 130(1) read with section 129(1), delivered means taking a notice to the consumer. As long as steps taken show on a balance of probabilities that the notice is likely to have reached the consumer, the court before which the proceedings are brought may be satisfied that the notice was delivered.

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[75] *CA Focus CC v Village Freezer t/a Ashmel Spar* [2013] ZASCA 136; 2013 (6) SA 549 (SCA) at para 18 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[76] However, what is said about delivery here is limited to matters where sections 129 and 130 of the Act apply. It does not change or affect the methods of delivery known in the common law.

[81] In delivering the notice, the credit provider may follow any method. This is so because sections 130(1) and 129(1) do not specify a particular method of delivery. All that they require is that the notice be delivered. If a particular method is chosen, whatever is done must constitute adequate proof that the notice has reached the consumer. If, for example, the credit provider has chosen to send the notice by ordinary post, proof of the letter reaching the consumer's address would ordinarily constitute delivery contemplated in the relevant sections. These facts would give rise to the presumption that the notice reached the consumer. This type of presumption is recognised in our law.[77]

[82] But if, in defending the action instituted by the credit provider, the consumer establishes that at the relevant time she was lying unconscious in hospital, the credit provider would have failed to prove delivery and therefore the court would not be satisfied that the notice reached the consumer. Absent an explanation of that nature, the court may be satisfied, on a balance of probabilities, that the notice reached the consumer. But, as mentioned earlier, the enquiry here would be directed at establishing proof of delivery and not the meaning of the word.

[83] In the case of registered mail, the delivery of the notice to the consumer's local Post Office, coupled with sending notification to her

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[77] *Phillips v South African Reserve Bank and Others* [2012] ZASCA 38; 2013 (6) SA 450 (SCA) at para 48.

address, may in appropriate cases be regarded as constituting compliance with the delivery requirement. A consumer who receives notification from the local Post Office but decides not to collect the notice should not be permitted to frustrate the purpose of the provisions while, at the same time, the credit provider is precluded from enforcing its rights under the contract. In such a case, a court may as well hold that there was a fictional fulfilment of the requirement. Our courts are familiar with this concept which applies where, for example, a party to a contract deliberately frustrates the fulfilment of a condition, so that the other party cannot enforce its rights.[78]

[84] It is apparent from section 130(3) that it is the court before which the proceedings are instituted which must be satisfied that, among other matters, the notice has reached the consumer. Section 130(3) provides:

> "Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that—
>
> (a) in the case of proceedings to which sections 127, 129 or 131 apply, the procedures required by those sections have been complied with".

[85] If the court is not satisfied that the section 129 notice was delivered to the consumer, it is obliged to adjourn the proceedings and specify steps to be taken by the credit provider before resuming the hearing of the matter.[79]

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[78] *Balkind* above n 66 at para 48 and *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] ZASCA 52; 2007 (5) SA 552 (SCA) at para 16.

[79] See section 130(4) quoted in the main judgment at [25].

This illustrates that enforcement of the credit agreement through litigation is suspended for as long as the credit provider has not complied with the requirements of the relevant sections.

Present facts

[86] The facts are set out in detail in the main judgment. On 16 July 2010 Standard Bank sent a section 129 notice by registered mail to Mr Kubyana. The notice reached his local Post Office which, in turn, sent out a notification to the address nominated by him as his domicilium. The first notification was sent to his address on 20 July 2010 but he failed to collect the registered mail. Seven days later, a second notification was dispatched to his address. Again he failed to collect the mail. On 1 September 2010 the notice was returned to the Bank.

[87] Mr Kubyana did not contest the correctness of these facts by way of evidence in the High Court. That Court approached the matter on the footing that Mr Kubyana received notification of the registered mail but failed to collect it. The Court held that there was compliance with the relevant provisions.

[88] Mr Kubyana's failure to testify and explain why he did not collect the notice drives one to the inescapable conclusion that he deliberately failed to collect it. He cannot be allowed to frustrate the objects of the Act. The

relevant provisions were enacted to protect honest consumers who, for some reason, find themselves in dire financial straits. As indicated earlier, the object of the relevant provisions is not to exempt consumers from their contractual obligations but to afford them the opportunity to renegotiate the terms of the credit agreement in relation to payment of the debt.

[89] A balance must be struck between the rights of the consumer and those of the credit provider when applying sections 129 and 130. The offer of credit is crucial to the economy of this country. Without it the majority of people would not afford to buy houses and other assets necessary to human life. Therefore, the collapse of the system would be detrimental to the country's economy and the majority of its people.

[90] In these circumstances, I agree that the appeal must fail.

The judgment in Sebola

[91] As mentioned, conflicting interpretations have been given to the judgment of this Court in *Sebola*. As a result, uncertainty has been created as to what section 129 means and what it requires credit providers to do to comply, if they wish to enforce credit agreements by legal proceedings. As observed in the main judgment, this case presents an opportunity for this Court to clarify its judgment in *Sebola*. In doing so it is necessary to draw a

distinction between interpretation, on the one hand, and evidential material to prove compliance with the section, on the other.

The meaning of section 129 as construed in Sebola

[92] This Court in *Sebola* read section 129(1) together with section 130(1). In section 130 the word "delivered" is used and this section refers back to section 129 which employs the words "providing notice to the consumer". While section 130 requires that a notice must be delivered to the consumer, section 129 stipulates that the consumer be provided with a notice. The common object of these sections is to prevent the commencement of legal proceedings before the steps defined in section 129 have been taken.

[93] It was in this context that this Court construed section 129 to mean that the credit provider must furnish the consumer with a notice. A perusal of a number of paragraphs suggests that *Sebola* interpreted section 129 to mean that the notice should reach the consumer and not that it actually came to her attention. A reference to two paragraphs illustrates this point.

[94] In one paragraph, the majority said:

> "These considerations drive me to conclude that the meaning of 'deliver' in section 130 cannot be extracted by parsing the words of the statute. It must be found in a broader approach – by determining what a credit provider should be required to establish, on seeking enforcement of a credit agreement, by way of proof that the *section 129 notice in fact reached the consumer. As pointed out earlier, the statute does not demand that the credit provider prove that the notice has actually come to*

the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the section 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer."[80] (Emphasis added.)

[95] And later the majority summed up its interpretation in these terms:

"To sum up: The requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. *The statute, though giving no clear meaning to 'deliver', requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer.* Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If, in contested proceedings the consumer avers that the notice did not reach him or her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed."[81] (Emphasis added.)

[96] As shown earlier, the dispatching of a notice by registered mail, and showing that it has reached the correct Post Office, are facts which do not form part of the interpretation. As facts, ordinarily they are peculiar to certain cases and not universal to all cases in which the Act finds application. But the interpretation is universal. The section carries the same meaning in all cases.

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[80] *Sebola* above n 65 at para 74.

[81] Id at para 87.

[97] Therefore, the ratio of *Sebola*, as I see it, is that the words "providing notice to the consumer" are synonymous with the phrase "delivered a notice to the consumer", which appears in section 130. Both of them mean that the notice must be taken to the consumer. It must reach the consumer but this does not mean that the notice must actually be viewed by the consumer.

Proof of delivery

[98] The determination of the facts that would constitute adequate proof of delivery of a notice in a particular case must be left to the court before which the proceedings are launched. It is that court which must be satisfied that section 129 has been followed. Therefore, it is not prudent to lay down a general principle save to state that a credit provider must place before the court facts which show that the notice, on a balance of probabilities, has reached a consumer. This is what *Sebola* must be understood to state. It follows that the interpretation of *Sebola* in *Binneman* was incorrect.

[99] While it is true that in the quoted paragraphs the majority went to the extent of saying that, where delivery is by registered mail, proof of the fact that the notice reached the correct Post Office would constitute compliance, that is not part of the ratio. The facts in *Sebola* were different in that the notice was sent to the wrong Post Office. Consequently, it was not necessary for this Court to determine whether in circumstances where the notice has reached the correct Post Office, nothing more needs be proved to

show that, on a balance of probabilities, the notice has reached the consumer. The view expressed there was obiter. What is binding in *Sebola* is the interpretation given to section 129. That interpretation is endorsed in this judgment.

[100] It is for these reasons that I concur in the order proposed by the main judgment.

For the Applicant:	Advocate S Wilson instructed by Tswago Inc Attorneys.
For the Respondent:	Advocate S Budlender and Advocate J Ferreira instructed by Norton Rose Fulbright South Africa.
For the Amicus Curiae:	Advocate S Wilson instructed by SERI-SA Law Clinic.

14

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 135/12
[2013] ZACC 34

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION IN GAUTENG PROVINCE	First Applicant
HEAD OF DEPARTMENT: GAUTENG DEPARTMENT OF EDUCATION	Second Applicant
DISTRICT DIRECTOR JOHANNESBURG EAST D9: GAUTENG DEPARTMENT OF EDUCATION	Third Applicant
and	
GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL	First Respondent
RIVONIA PRIMARY SCHOOL	Second Respondent
MS CELE	Third Respondent
MR MACKENZIE	Fourth Respondent
MS DRYSDALE	Fifth Respondent
and	
EQUAL EDUCATION	First Amicus Curiae
CENTRE FOR CHILD LAW	Second Amicus Curiae

SUID AFRIKAANSE ONDERWYSERSUNIE Third Amicus Curiae

Heard on : 9 May 2013

Decided on : 3 October 2013

JUDGMENT

MHLANTLA AJ (Moseneke DCJ, Bosielo AJ, Froneman J, Khampepe J, Nkabinde J and Skweyiya J concurring):

Introduction

[1] Section 29 of the Constitution guarantees everyone the right to a basic education.[1] That is the promise. In reality, a radically unequal distribution of resources – related to a history of systematic discrimination – still makes this constitutional guarantee inaccessible for large numbers of South Africans. The impact of this painful legacy was recognised by this Court in *Ermelo*[2] as follows:

> "Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage.

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[1] Section 29(1) of the Constitution provides:

> "Everyone has the right—
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

[2] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Ermelo*).

> Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us."[3]

[2] Continuing disparities in accessing resources and quality education perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity.[4] The question we face as a society is not whether, but how, to address this problem of uneven access to education. There are various stakeholders, a diversity of interests and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward. The Constitution provides us with a reference point – the best interests of our children.[5] The trouble begins when we lose sight of that reference point. When we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of children.

[3] This case is a reflection of that type of failure. The issues arise from a school admissions dispute that occurred in 2010. The dispute has brought to the fore the right of learners to access basic education. It requires us to strike an appropriate balance between

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[3] Id at para 45.

[4] Id at para 2, where Moseneke DCJ stated:

> "It is trite that education is the engine of any society. And therefore, an unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage."

[5] Section 28(2) of the Constitution provides:

> "A child's best interests are of paramount importance in every matter concerning the child."

the powers and duties of provincial education departments and school governing bodies. Implicated in this are the interests of parents in the quality of their children's education, and the state's obligation to ensure that all learners have access to basic schooling.

Parties

[4] The applicants are functionaries in the Gauteng Department of Education (Department). The first applicant is the Member of the Executive Council for Education in the Province of Gauteng (Gauteng MEC). The second applicant is the Head of the Department of Education in the Province of Gauteng (Gauteng HOD). The third applicant is the District Director Johannesburg East D9: Gauteng Education Department (District Director).

[5] The first respondent is the Governing Body of the Rivonia Primary School (Rivonia Governing Body). The second respondent is Rivonia Primary School (Rivonia Primary). For ease of reference, I say "the school" when referring to the first and second respondents jointly.

[6] The third and fourth respondents are the parents of the learner whose placement at Rivonia Primary is in dispute. The fifth respondent is the principal of Rivonia Primary (principal).

[7] Equal Education is a movement of learners, parents and community members. It advocates for quality and equality in the South African education system. The Centre for Child Law is an organisation established to promote child law and uphold the rights of children in South Africa. Both were admitted jointly as the first and second friends of the court, or amici curiae.

[8] The Suid Afrikaanse Onderwysersunie (Onderwysersunie), admitted as the third amicus curiae, is a registered trade union for educators and school administrators. The Onderwysersunie has more than 34 000 members nationwide, comprising employees from both public and private schools.

Background

[9] Rivonia Primary is a public school situated in a historically privileged suburb of Johannesburg. In 2010, a prospective Grade 1 learner residing within the feeder-area[6] of Rivonia Primary was unsuccessful in finding placement at that school for the academic year starting in 2011. According to the school, it had reached its stated capacity of 120 learners for the grade, as provided for in its admission policy.[7] The learner was

[6] The Gauteng Department of Education Regulations Relating to the Admission of Learners to Public Schools, Provincial Gazette 439, General Notice 61 of 1998 defines the feeder-area of a school as that "area which is closer to that school by any public route than to any other school."

[7] There are two versions of the admission policy on record. One version was certified by the Department on 4 March 2010 and stated that the maximum capacity of the school was 770 learners. Another version of the policy was adopted by the Rivonia Governing Body in August 2010, which states:

> "The Governing Body has determined that Rivonia Primary has the capacity to admit a maximum of 840 learners (120 learners per grade) and in determining the capacity of Rivonia Primary has taken into account all relevant factors relating to the facilities and programmes".

accordingly placed on the waiting list.[8]

[10] The mother of the learner, dissatisfied with the admission processes, complained to the Department. Her complaints set off a range of meetings and correspondence involving the Department, the parents and the school from September to November 2010. By late November 2010, the Department and the school had seemingly settled on the view that the learner had been properly placed on the waiting list and would simply have to wait her turn.[9]

[11] On 5 November 2010, in the course of the fray, the mother of the learner also lodged an appeal with the Gauteng MEC. Due to admitted administrative failures within the Department, the appeal was only brought to the attention of the Gauteng MEC in late January 2011, at which stage the provincial school term had already begun. The Gauteng MEC then referred the matter to the Gauteng HOD.[10] Notwithstanding the resolution that

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According to the school, the difference between the two versions of the policy is explained by the fact that the first did not include an accounting of Grade 0 learners, whereas the second did.

[8] The outcome of the learner's application to the school was communicated to the learner's mother on 5 November 2010 by the principal. The letter from the principal reads in relevant part:

> "Dear Mrs. Cele
>
> According to the School's Admission Policy you have been placed in Waiting List 'A' for parents who reside in our catchment area, as the school has reached its capacity for Grade 1 2011.
>
> . . .
>
> Number on Waiting List 'A': 14 as of 25th October 2011".

[9] See *Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others* [2012] ZASCA 194; 2013 (1) SA 632 (SCA) (Supreme Court Appeal judgment) at para 11 and the discussion at [66] below.

[10] The Gauteng MEC was concerned that it would be premature for her to consider the appeal, since the Gauteng HOD had not yet taken a decision in terms of relevant provincial regulations.

had been reached at the end of November 2010 between the Department and the school, the referral brought the dispute to life again.

[12] When the Gauteng HOD eventually considered the matter, in February 2011, the school year was well underway. By this time the learner had been enrolled at a private school, and Rivonia Primary's 'tenth-day statistics' had become available.[11] It was conveyed to the Gauteng HOD that, according to the tenth-day statistics, the school had admitted 124 learners and had five Grade 1 classes. This meant that there were 24 or 25 learners per Grade 1 class. The Gauteng HOD took the view that the tenth-day statistics demonstrated that, notwithstanding the provisions of its admission policy which purported to restrict Grade 1 enrolment to 120 learners, Rivonia Primary had the capacity to admit the additional learner in one of its five Grade 1 classes. Purporting to exercise his powers in terms of provincial regulations,[12] the Gauteng HOD proceeded to overturn the refusal of the learner's application and issued an instruction to the school that the learner be admitted immediately.[13]

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[11] This is a reference to statistics kept by the Department of learner numbers on the tenth day of the new school year.

[12] Regulation 13(1) of the Gauteng Department of Education Regulations for the Admission of Learners to Public Schools, Provincial Gazette 129, General Notice 4138 of 2001 (Gauteng Regulations). The Gauteng Regulations were issued in terms of the Gauteng School Education Act 6 of 1995 (Gauteng Act). It should be noted that the Gauteng MEC amended the Gauteng Regulations on 9 May 2012 (see Provincial Gazette 127, Government Notice 1160, 9 May 2012). These amended regulations are not before this Court and are not relevant for the purposes of these proceedings.

[13] The letter from the Gauteng HOD, dated 2 February 2011 and communicated to the principal on 3 February 2011, states:

> "Dear Madam
>
> ADMISSION OF [THE LEARNER] TO GRADE ONE AT RIVONIA PRIMARY SCHOOL IN 2011
>
> 1. I have perused all the documents submitted to me and wish to note the following:

[13] As a result, on the morning of 7 February 2011, some four weeks into the new school year, the mother of the learner arrived at Rivonia Primary with her daughter in full school uniform. She insisted that the child be admitted to the school. The principal refused and explained that an urgent meeting of the Rivonia Governing Body had been called to resolve the issue.

[14] On 8 February 2011, the Gauteng HOD purported to withdraw the principal's admission function by delegating it to another official. The Department's representatives proceeded to take control of the situation and physically placed the learner in one of the school's Grade 1 classrooms, seating her at an empty desk that had been installed for a learner with attention and learning difficulties.

[15] The principal was later subjected to a disciplinary hearing for not complying with the Gauteng HOD's instruction. She eventually pleaded guilty, was given a final warning and had a month's salary deducted.[14]

1.1 According to the tenth day school statistics, the school has not reached its capacity.

2. Ms. Cele approached the HOD for assistance in this matter.

3. You are hereby instructed to enrol [the learner] to grade one at Rivonia Primary School without delay."

[14] The Supreme Court of Appeal held that the instruction given to the principal to admit the learner was contrary to the school's admission policy and that the placing of the learner in the school was unlawful. The principal nonetheless received a written notification after the Supreme Court of Appeal decision indicating that the sanction would be implemented. She has indicated that she will appeal the sanction, and the Department agreed to suspend its implementation until this matter has been resolved.

High Court

[16] The school approached the South Gauteng High Court, Johannesburg (High Court) on an urgent basis for declaratory and interdictory relief aimed at the Department's decision to override the school's admission policy, the forced admission of the learner and the withdrawal of the principal's admission function. The school hinged its argument on the power afforded to governing bodies in section 5(5) of the South African Schools Act[15] (Schools Act), which provides:

> "Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school."

[17] The school asserted that determining the capacity of a school is an inherent and necessary incident of any admission policy. Further, there was no statutory or other legal power given to the Gauteng MEC or Gauteng HOD to determine the capacity of a public school. Therefore, school governing bodies have the sole and final say on the maximum capacity of a school, and the Gauteng HOD lacked the power to admit a learner to the school in excess of the capacity fixed in its admission policy.

[18] The High Court (per Mbha J) held that section 5(5) of the Schools Act does not give a school governing body the unqualified and exclusive power to determine finally the school's maximum capacity. Rather, in the light of both the scheme of the

[15] 84 of 1996.

Schools Act and the relevant provincial regulations, the power to determine the maximum capacity of a public school in the Gauteng Province vests in the Department.

[19] The High Court concluded that the Gauteng MEC is the ultimate arbiter as to whether a learner should be admitted to a public school, and that the Department is empowered to intervene where necessary to ensure that children threatened with being deprived of access to schooling may be accommodated. On the facts of the present case, the Court was satisfied that the Department had acted fairly and reasonably.

[20] Regarding the withdrawal of the principal's admission function, the High Court held that the withdrawal was arbitrary and set it aside. The Department did not cross-appeal this aspect of the order, and it is no longer an issue in this Court.

Supreme Court of Appeal

[21] Dissatisfied with the outcome, the school appealed to the Supreme Court of Appeal. That Court (per Cachalia JA) unanimously upheld the appeal. It declared that the instruction given to the principal to admit the learner, contrary to the school's admission policy, was unlawful, as was the placing of the learner in the school.[16]

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[16] The Supreme Court of Appeal made an order in the following terms:

> "It is declared that the instruction given to the principal of the Rivonia Primary School to admit the learner contrary to the school's admission policy, and the placing of the learner in the school, were unlawful."

[22] The Court held that section 5(5) of the Schools Act expressly provides that the admission policy of a school is determined by its governing body, and that this necessarily includes the determination of its capacity. This was made, the Court said, clear by section 5A of the Schools Act, which allows the Minister of Basic Education to prescribe minimum norms and standards for "the capacity of a school in respect of the number of learners a school can admit". According to the Supreme Court of Appeal, the fact that a school governing body is enjoined, in terms of section 5A(3), to compile and review its admission policy in accordance with those norms and standards leaves no doubt that the admission policy of a school governing body includes determining the capacity of the school. The Supreme Court of Appeal accepted that the Gauteng HOD, acting through the relevant principal, is responsible for the administration of the admission process. But the Court reasoned that this must necessarily be done in accordance with the admission policy of the school governing body. Having determined its admission policy, it remains for the Rivonia Governing Body to apply it.

[23] The Supreme Court of Appeal considered section 5(9) of the Schools Act, read with Regulation 14 of the Gauteng Regulations, which allows an appeal to the Gauteng MEC where admission is refused by a principal. It also considered Regulation 13(1)(a), which gives the Gauteng HOD the authority to set aside the decision of the principal before the appeal. All of this, held the Court, had to be done in accordance with the admission policy. The Court held that, if the Gauteng Regulations purported to vest the

Department with the power to compel a school to admit learners in excess of the capacity fixed in the admission policy, the Regulations would be contrary to the statute.

[24] The Court rejected the Department's reliance on section 3(3) and (4)[17] of the Schools Act to contend that the provincial government has the final say on the capacity of a school. Properly understood, said the Supreme Court of Appeal, section 3 deals with compulsory attendance and the obligation to ensure the provision of infrastructure for that purpose. This, held the Court, is completely unrelated to the admission policy of a school (dealt with in section 5 of the Schools Act) and to the authority to override it.

[25] Further, the Court commented that it would be inappropriate for the Department to be vested with a power to use the additional capacity at Rivonia Primary, because that capacity had been created through additional funds raised by the Rivonia Governing Body. It would be a disincentive for parents to contribute to school funds if the increased capacity created by these funds could be used to accommodate more learners than the Rivonia Governing Body wanted to admit.

[17] Section 3 is headed "Compulsory attendance" and provides in relevant part:

> "(3) Every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school as required by subsections (1) and (2).
>
> (4) If a Member of the Executive Council cannot comply with subsection (3) because of a lack of capacity existing at the date of commencement of this Act, he or she must take steps to remedy any such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so."

[26] The Department approached this Court seeking leave to appeal against the judgment and order of the Supreme Court of Appeal.

This Court

Applicants' submissions

[27] According to the applicants, the Supreme Court of Appeal erred in its interpretation of the provisions of the Schools Act. Whilst the applicants no longer contest that the governing body of a school is entitled to determine capacity as part of its admission policy, they submit that the power vested in governing bodies by section 5(5) should not be overstated. They contend that, although the governing body makes admission policies, the Schools Act and provincial legislation make it clear that a decision to reject a learner taken at school level is never final, but is rather subject to confirmation by the Department.[18]

[28] Further, the Department is under a constitutional and statutory obligation to ensure that the existing public-school infrastructure in the province is utilised as efficiently as possible. The Department cannot allow a situation where some public schools operate at levels considerably below the capacity that their infrastructure can and should support, while other public schools are overcrowded and some learners are unable to find places.

[18] The applicants contend that this is implicit in section 5(6) to (9) of the Schools Act, and was made explicit in Gauteng through the Gauteng Regulations read with the Gauteng Act.

[29] The applicants contend that this interpretation of the applicable statutory framework is one required by section 39(2) of the Constitution[19] read with the fundamental rights to equality and education and the duties resting on the state to "respect, protect, promote and fulfil the rights in the Bill of Rights".[20] This is because the fundamental rights to education and equality require school capacity to be determined ultimately at a systemic level by a provincial education department, and not at the level of an individual school by its governing body.

Respondents' submissions

[30] The respondents support the Supreme Court of Appeal's reasoning that the Schools Act vests the power to determine the capacity of a school in the school governing body. They submit that the applicants' interpretation of the Gauteng Regulations conflicts with national legislation, and that the national legislation must prevail. In any event, the Gauteng HOD did not have the right simply to ignore the admission policy and instruct the principal to admit the learner. The Gauteng HOD should have taken steps to set the admission policy aside or withdraw the power from the Rivonia Governing Body.

[31] Further, the respondents emphasise that the scheme of the legislation provides other mechanisms through which the Department should be dealing with the problem of placing additional learners in public schools. There is no evidence that the Department

[19] Section 39(2) of the Constitution requires every court to "promote the spirit, purport and objects of the Bill of Rights" when interpreting any legislation.

[20] Section 7(2) of the Constitution.

attempted to use these mechanisms. The real problem lies with the Department's general failure to fulfil its obligations in terms of the Schools Act.

Leave to appeal and issues for determination

[32] It is clear that this matter raises important constitutional issues concerning the education of children, the determination of the roles and powers of various stakeholders in the governance of schools and the lawful exercise of those powers.[21] There are reasonable prospects of success and it is in the interests of justice that leave to appeal be granted.[22]

[33] There are three material issues for determination by this Court. The first is whether the Gauteng HOD was vested with decision-making power in relation to the admission of learners to public schools. If so, the second question is whether the Gauteng HOD was empowered to depart from the admission policy of the Rivonia Governing Body and admit the learner contrary to the capacity determination in that policy. And if so, the third question is whether the Gauteng HOD's exercise of that power to admit the learner was reasonable and procedurally fair.

[21] *Ermelo* above n 2 at paras 42-3.

[22] See *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[34] The determination of the first issue requires a consideration of the relevant statutory context, which is where my analysis begins.

Statutory context: powers relating to determination of school capacity and admissions

[35] The core of this matter requires a consideration of the respective roles of a school governing body and a provincial department in determining admissions to, and the capacity of, a school. The entry point into this enquiry is the Schools Act. The primary purpose of the Schools Act is to provide for the organisation, governance and funding of schools and to give effect to the constitutional right to education.[23]

[36] The Schools Act envisages that public schools are run by a three-tier partnership consisting of: (i) national government; (ii) provincial government; and (iii) the parents of the learners and the members of the community in which the school is located. As this Court stated in *Ermelo*:

> "An overarching design of the Act is that public schools are run by three crucial partners. The national government is represented by the Minister for Education whose primary role is to set uniform norms and standards for public schools. The provincial government acts through the MEC for Education who bears the obligation to establish and provide public schools and, together with the Head of the Provincial Department of Education, exercises executive control over public schools through principals. Parents of the learners and members of the community in which the school is located are represented in the school

[23] *Ermelo* above n 2 at para 55.

governing body which exercises defined autonomy over some of the domestic affairs of the school."[24] (Footnotes omitted.)

[37] Following the three-tier approach, when the Schools Act addresses issues of admissions and capacity, it does so with reference to national government, provincial government and school governing bodies.

[38] At a national level, the Minister of Basic Education may prescribe minimum uniform norms and standards for the "capacity of a school in respect of the number of learners a school can admit",[25] including norms and standards relating to class size, the number of teachers, and utilisation of available classrooms.[26] Those norms and standards have to date not been prescribed and, regrettably, this case demonstrates the difficulties that may arise in their absence.

[39] At a provincial level, section 3(3) of the Schools Act places an obligation on the relevant provincial MEC to ensure that "there are enough school places so that every child who lives in his or her province can attend school". If the MEC cannot comply with this obligation because of a lack of capacity existing at the commencement of the Schools Act, then, in terms of section 3(4), "he or she must take steps to remedy such lack of capacity as soon as possible and must make an annual report to the Minister on

[24] Id at para 56.

[25] Section 5A(1)(b) of the Schools Act.

[26] Id section 5A(2)(b).

the progress achieved in doing so." Further, section 58C of the Schools Act contemplates that the MEC and the head of department will play a role in ensuring that the admission policy determined by the school governing body complies with the national norms and standards, where prescribed.[27] In terms of section 58C(6), the head of department is under an obligation to determine the minimum and maximum capacity of a public school in accordance with the national norms and standards contemplated in section 5A, and to communicate the determination to the school governing body and the principal.

[40] At school level, the governing body is responsible for determining the admission policy of that school. This is provided for in section 5 of the Schools Act, which reads in relevant part:

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[27] Section 58C of the Schools Act is headed "Compliance with norms and standards" and provides in relevant part:

> "(1) The Member of the Executive Council must, in accordance with an implementation protocol contemplated in section 35 of the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005), ensure compliance with—
>
> (a) norms and standards determined in terms of sections 5A, 6(1), 20(11), 35 and 48(1);
>
> . . .
>
> (2) The Member of the Executive Council must ensure that the policy determined by a governing body in terms of sections 5(5) and 6(2) complies with the norms and standards.
>
> (3) The Member of the Executive Council must, annually, report to the Minister the extent to which the norms and standards have been complied with or, if they have not been complied with, indicate the measures that will be taken to comply.
>
> . . .
>
> (6) The Head of Department must—
>
> (a) in accordance with the norms and standards contemplated in section 5A determine the minimum and maximum capacity of a public school in relation to the availability of classrooms and educators, as well as the curriculum programme of such school; and
>
> (b) in respect of each public school in the province, communicate such determination to the chairperson of the governing body and the principal, in writing, by not later than 30 September of each year."

> "(5) Subject to this Act and any applicable provincial law, the admission policy of a public school is determined by the governing body of such school.
>
> . . .
>
> (7) An application for the admission of a learner to a public school must be made to the education department in a manner determined by the Head of Department.
>
> (8) If an application in terms of subsection (7) is refused, the Head of Department must inform the parent in writing of such refusal and the reason therefor.
>
> (9) Any learner or parent of a learner who has been refused admission to a public school may appeal against the decision to the Member of the Executive Council."

It is immediately clear from section 5(5) that the governing body of a school determines the admission policy. That this may include a determination as to the capacity of the school is no longer a contentious point between the parties. Indeed, as the Supreme Court of Appeal pointed out, having regard to section 5A(3) of the Schools Act,[28] a governing body's admission policy may include a determination as to capacity. And it is significant that school governing bodies are afforded this role. As the Onderwysersunie emphasised before us, the governing body is in a position to have regard, in an admission policy, to a range of interconnected factors relating to the planning and governance of the school as a whole. However, this is only the starting point. Neither the Schools Act nor any related national legislation, such as the National Education Policy Act,[29] goes further than sections 5(5) and 5A(3) in describing a more extensive role for the governing body in the implementation of the admission policy or in the determination of capacity.

[28] See [22] above.

[29] 27 of 1996.

[41] Rather, there is an important textual qualifier in section 5(5) subjecting a school governing body's power to other provisions of the Schools Act, as well as to applicable provincial law. The effect of this is that the determination of admissions may be subject to provincial government's intervention in terms of the Schools Act, or applicable provincial law if the intervention is provided for in those instruments. Of course, it should be emphasised that any powers of the governing body must also "be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress."[30]

[42] Following from the above, subsections 5(7) to (9) of the Schools Act recognise that provincial government plays a direct role when it comes to the implementation of a learner's admission to the school. In terms of these provisions, an application for the admission of a learner to a public school is made to the Department (in a manner determined by the head of department),[31] and it is the head of department who is responsible for informing a parent of a refusal of an application and the reasons for it.[32]

[43] In terms of the Schools Act, the implementation of the admission policy at the school level is the responsibility of the principal, acting under the authority of the head of

[30] *Ermelo* above n 2 at para 61.

[31] Section 5(7) of the Schools Act.

[32] Id section 5(8).

department. This follows from sections 16(3) and 16A(2)(a)(vi) of the Schools Act. Section 16(3) provides that, "[s]ubject to [the Schools Act] and any applicable provincial law, the professional management of a public school must be undertaken by the principal under the authority of the head of department." That the professional management of a school includes the implementation of policy is set out in section 16A(2)(a)(vi), which provides:

> "The principal must in undertaking the professional management of a public school as contemplated in section 16(3), carry out duties which include, but are not limited to the implementation of policy and legislation".

[44] Thus, while the school governing body determines admission policy, individual decisions on admission are taken only provisionally at school level, by the principal acting under the authority of the head of department. Where the need arises, section 5(9) provides a safety valve, which allows the MEC to consider admission refusals and overturn an admission decision taken at school level.

[45] Insofar as applicable provincial law is concerned, the Gauteng Regulations are pertinent.[33] At the relevant time, Regulation 13(1) of the Gauteng Regulations provided that if a principal, acting on behalf of the Gauteng HOD, refused to admit a learner to a

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[33] Section 2 of the Interpretation Act 33 of 1957 provides that "law" shall, unless the context or law under consideration otherwise requires, mean "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law". This wide definition certainly allows for the inclusion of delegated provincial legislation in the meaning of "law". There are no indications in the Schools Act to suggest that the phrase "any applicable law" in section 5(5) should be given a narrower construction. To the contrary, the use of the word "any" in the phrase suggests a broader rather than more restrictive interpretation.

school, he or she had to provide reasons in writing to the Gauteng HOD and the parent. The Gauteng HOD would be required either to confirm or to set aside the decision made by the principal.[34] A learner or parent who was dissatisfied with the decision of the Gauteng HOD was entitled, in terms of Regulation 14, to an appeal to the Gauteng MEC, who then had to make a final determination.[35] Regulation 13(1) provided that the Gauteng HOD could overturn the rejection of a learner's admission to a school. The vexing question is whether the Gauteng HOD was entitled to act contrary to the school's admission policy when he exercised that decision-making power.

Status of a school's admission policy

[46] This matter is the latest instalment in a trilogy of school-related cases in this Court which, at their heart, concern the powers of a provincial department in relation to policies

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[34] Regulation 13 is headed "Refusal of admission" and provides:

> "(1) If a principal, acting on behalf of the Head of Department, refuses to admit a learner to a school, he or she must provide—
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> (a) reasons in writing for his or her decision to the Head of Department and the parent and the Head of Department must either confirm or set aside the decision made by the Principal; and
>
> (b) a copy of these regulations to the parent and the address of the Member of the Executive Council (MEC)."

[35] Regulation 14 is headed "Appeals" and provides:

> "(1) A parent or learner who is dissatisfied with the decision referred to in regulation 13(1) may appeal in writing to the Member of the Executive Council (MEC) against the decision of the Head of Department within 15 days after receipt of the notification of the refusal of admission.
>
> (2) The appellant must furnish the MEC with all relevant information pertaining to the appeal.
>
> (3) The MEC, must, within 15 days of receiving an appeal referred to sub-regulation (1), consider that appeal and must confirm, or set aside the relevant decision and forthwith notify the principal and the parents of his or her decision."

adopted by school governing bodies.[36] The question that keeps coming back to this Court is whether a head of department is entitled to override or depart from a policy adopted by a school governing body.

[47] In *Ermelo*, the head of department was unhappy with the exclusionary effect that a school's single-medium language policy had on learners. The head of department relied on section 25 of the Schools Act in appointing an interim committee to determine a new language policy for the school so as to accommodate both English- and Afrikaans-speaking learners. The Court held that the head of department acted unlawfully, in that section 25 of the Schools Act could not properly be invoked in the circumstances.

[48] In *Welkom*, the head of department was unhappy with the exclusionary effect that certain schools' pregnancy policies had on pregnant learners. Khampepe J[37] held that the head of department was not empowered by any statutory provision to summarily re-admit a learner to a school. The head of department could have relied on section 22(1) to withdraw the relevant function from the school governing body, or section 22(3) if he felt that the matter was urgent, but he did not do so. In the circumstances, the instructions issued by the head of department, which effectively required the principal to ignore the

[36] The predecessors were *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25 (*Welkom*) and *Ermelo* above n 2.

[37] In a judgment concurred in by Moseneke DCJ and Van der Westhuizen J.

two schools' pregnancy policies, were unlawful. In a separate concurring judgment, Froneman J and Skweyiya J[38] agreed that the head of department acted unlawfully. They emphasised that the parties had failed to engage with each other in good faith, to uphold the principles of co-operative governance, and to comply with their concomitant duty to avoid litigation.

[49] Distilling the core of these judgments, the principles that have emerged from the case law can be set out as follows:

(a) Where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it.[39] This is so even where the functionary is of the view that the policies offend the Schools Act or the Constitution. But this does not mean that the school governing body's powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances.[40]

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[38] In a judgment also concurred in by Moseneke DCJ and Van der Westhuizen J.

[39] *Ermelo* above n 2 at paras 73-5. The majority of the Court endorsed this principle in *Welkom* above n 36 (see Khampepe J at paras 74-6 and 79 and Froneman J and Skweyiya J at para 150).

[40] In *Ermelo* above n 2 at para 78 this Court said:

> "Put otherwise, the statute devolves power and decision-making on the school's medium of instruction to a school governing body. *It would, however, be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice.* The Constitution itself enjoins *the State to ensure effective access to the right to receive education in a medium of instruction of choice.*" (Footnote omitted and emphasis added.)

(b) Rather, a functionary may intervene in a school governing body's policy-making role or depart from a school governing body's policy, but only where that functionary is entitled to do so in terms of powers afforded to it by the Schools Act or other relevant legislation. This is an essential element of the rule of law.[41]

(c) Where it is necessary for a properly empowered functionary to intervene in a policy-making function of the governing body (or to depart from a school governing body's policy), then the functionary must act reasonably and procedurally fairly.[42]

(d) Further, given the partnership model envisaged by the Schools Act, as well as the co-operative governance scheme set out in the Constitution, the relevant functionary and the school governing body are under a duty to engage with each other in good faith on any disputes, including disputes

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This Court went on to say at para 81:

> "What is more, the governing body's extensive powers and duties do not mean that the HOD is precluded from intervening, on reasonable grounds, to ensure that the admission or language policy of a school *pays adequate heed to section 29(2) of the Constitution. The requirements of the Constitution remain peremptory*." (Emphasis added.)

See also Khampepe J in *Welkom* above n 36 at para 73 and Froneman J and Skweyiya J at para 149.

[41] See *Ermelo* above n 2 at paras 88-9. See also *Welkom* above n 36 at para 86, where Khampepe J stated:

> "The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process. Accordingly, section 7(2) and the rule of law demand that where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help. I pause to emphasise that this Court has consistently and unanimously held that the rule of law does not authorise self-help." (Footnotes omitted.)

See also para 105.

[42] *Ermelo* above n 2 at para 73. See also *Welkom* above n 36 at para 77 (Khampepe J) and para 150 (Froneman J and Skweyiya J). See also the discussion starting at [59] below.

over policies adopted by the governing body. The engagement must be directed towards furthering the interests of learners.[43]

[50] What then of the present debacle? The applicants submit that an admission policy is not law, but merely policy. As such, it guides decision-making but cannot bind the Department inflexibly. The Gauteng HOD was therefore entitled, when exercising his constitutional and statutory powers, to depart from a capacity determination provided for in the admission policy.

[51] The school submits that interpreting Regulation 13(1) to afford the Gauteng HOD the power to act contrary to the admission policy would result in a conflict between national legislation (the Schools Act and the National Education Policy Act)[44] on the one hand, and provincial delegated legislation on the other. It contends that the relevant national statutory instruments envision that the governing body of a school is responsible

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[43] *Welkom* above n 36 at paras 120-4 (Khampepe J) and the judgment of Froneman J and Skweyiya J.

[44] The respondents rely on the "Admission Policy for Ordinary Public Schools" (*Government Gazette* 19377, General Notice 2432, 19 October 1998) determined by the Minister of Education in terms of the National Education Policy Act. Sections 5 to 7 thereof effectively mirror parts of section 5 of the Schools Act and provide:

> "5. The Head of Department must determine a process of registration for admission to public schools in order to enable the admission of learners to take place in a timely and an efficient manner. The Head of Department and the school governing bodies should encourage parents to apply for the admission of their children before the end of the preceding school year.
>
> 6. The Head of Department is responsible for the administration of the admission of learners to a public school. The Head of Department may delegate the responsibility for the admission of learners to a school to officials of the Department.
>
> 7. The admission policy of a public school is determined by the governing body of the school in terms of section 5(5) of the [Schools Act]. The policy must be consistent with [the Constitution], the [Schools Act] and applicable provincial law. The governing body of a public school must make a copy of the school's admission policy available to the Head of Department."

for the implementation of its admission policy, whereas the Department is merely responsible for the administration of the admission policy process.

[52] As my analysis of subsections 5(7) to (9) above demonstrates,[45] I am not persuaded by this view. Rather, the scheme of the Schools Act in relation to admissions indicates that the Department maintains ultimate control over the implementation of admission decisions. And the Gauteng Regulations afforded the Gauteng HOD the specific power to overturn a principal's rejection of a learner's application for admission.[46]

[53] This finding – that the Gauteng HOD did have the power to admit a learner who had been refused admission to the school – is a key distinguishing factor from the circumstances in *Welkom*. To emphasise, in that case the head of department had no power or authority to ignore the relevant schools' policies, and thereby summarily to order the re-admission of the excluded learners. That is why Khampepe J held that the intervention, which effectively ignored the schools' policies, was unlawful.

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[45] See [42] to [44] above.

[46] It is worth noting that the respondents attempted to persuade the Court that the Department should have followed the processes in Regulation 7 of the Gauteng Regulations rather than depart from the school's capacity determination in its admission policy. This Regulation provides that the Gauteng HOD may, in consultation with representatives of the school governing bodies, determine feeder zones for schools. If a feeder zone is created, then there is a prescribed formula for how to manage admission of learners where a school is oversubscribed. The respondents' reliance on the feeder-zone scheme is untenable. Firstly, the provisions are permissive, not mandatory. Secondly, reliance on Regulation 7 was not raised by the school in its papers before the High Court and, as such, the Department was not placed to deal with that issue on a factual level. Finally, as counsel for the Department submitted before this Court, the feeder zones have not in fact been established.

[54] However, having found that the Gauteng HOD was lawfully empowered to admit learners to Rivonia Primary, the suggestion that the Gauteng HOD was rigidly bound by a school's admission policy when exercising that power is untenable. That a policy serves as a guide to decision-making and cannot bind the decision-maker inflexibly was well expressed in *MEC for Agriculture v Sasol Oil*,[47] where the Supreme Court of Appeal held:

> "As explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,[48] a court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. *Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application in a particular case is that it must not be applied rigidly and inflexibly*".[49] (Footnote omitted and emphasis added.)

[55] In *Akani v Pinnacle Point Casino*[50] the relationship between policy and legislation was soundly expressed as follows:

> "*[L]aws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments.* Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation).

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[47] *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) (*MEC for Agriculture v Sasol Oil*).

[48] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[49] *MEC for Agriculture v Sasol Oil* n 47 at para 19.

[50] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA).

Otherwise the separation between Legislature and Executive will disappear."[51] (Emphasis added.)

[56] In conclusion, the general position is that admission policies must be applied in a flexible manner. The capacity determination as set out in Rivonia Primary's admission policy could not have inflexibly limited the discretion of the Gauteng HOD. If there were good reasons to depart from the policy, it was always open to the principal or the Gauteng HOD to do so.[52] Indeed in this case, the school itself applied the policy flexibly when it admitted four extra learners, thus exceeding the maximum capacity set in its policy.

[57] The Supreme Court of Appeal therefore erred when it concluded that the Schools Act placed admission decisions squarely in the hands of the Rivonia Governing Body and that the Gauteng HOD could not override the admission policy. In other words, the Supreme Court of Appeal erred in finding that the Gauteng HOD could only exercise the Regulation 13(1) power "in accordance with the [school's admission] policy."[53]

[58] However, a decision to overturn an admission decision of a principal, or depart from a school admission policy, must be exercised reasonably and in a procedurally fair

[51] Id at para 7.

[52] See also *National Lotteries Board and Others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 9 and *Britten and Others v Pope* 1916 AD 150 at 158.

[53] Supreme Court of Appeal judgment above n 9 at para 50.

manner. In this regard, O'Regan J's statement in *Premier, Mpumalanga*[54] is particularly apt:

> "This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured."[55]

[59] It is to the analysis of procedural fairness that I now turn.

Procedural fairness

[60] It has not been contested, and rightly so, that the decision of the Gauteng HOD to admit the learner in terms of Regulation 13(1)(a) constitutes administrative action and that the Department has a duty to act fairly.[56] The Department submits that the

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[54] *Premier, Mpumalanga, and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) (*Premier, Mpumalanga*).

[55] Id at para 1.

[56] In terms of section 3(1) of the Promotion of Administrative Justice Act 3 of 2000, "[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair." In this regard, it is worth recalling the dictum in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 216, where it was stated:

> "The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether, in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a 'legitimate expectation of a hearing' exists is therefore more than a factual question. It is not

requirements of procedural fairness were satisfied through the scheme of Regulation 13(1)(a), which requires a principal to provide written reasons for his or her decision to refuse admission to a learner. This the principal did in her letter dated 5 November 2010. According to the Department, it would not be feasible to require a further hearing in every case where the Gauteng HOD exercises the power to confirm or set aside the principal's decision. In this regard, the Department argues as follows:

> "Nor would it have been feasible to have required any further hearing at the Regulation 13 stage. In the scheme of the 2001 Regulations, Regulation 13(1)(a) operated automatically in respect of every learner who was refused admission to any Gauteng public school in the admissions process. So the Head of Department (and his/her delegated officials) would have had to take literally thousands of decisions in terms of Regulation 13(1) within a short period of time *between the end of the school based admissions process and the start of the next school year*. It would have been wholly impractical to have afforded the learner and the school a dedicated hearing in each of these thousands of cases. Any requirements of procedural fairness were satisfied by providing for the Head of Department to have regard to the parents' application and the reasons furnished by the principal for the refusal." (Emphasis added.)

> whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances."

In *Premier, Mpumalanga* above n 54 at para 35, O'Regan J recognised that a legitimate expectation might arise in at least two circumstances:

> "first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing; and, secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made."

As will follow from my analysis at [63] to [68] below, I am of the view that the Gauteng HOD had a duty to act fairly. In the least, the school had a legitimate expectation that it would be heard by the Gauteng HOD prior to a decision being made regarding the placement of the learner.

[61] In addition, the Department contends that there were no special circumstances in this case requiring any further consultation with the school. This is because the Department and its representatives had already consulted with the school from September to November 2010.[57]

[62] It is well established that the requirements of procedural fairness must be determined flexibly, having regard to the facts of the particular case.[58] The Department's concern that it would be overly onerous to require a further hearing in every instance when the Regulation 13(1)(a) power is exercised is an understandable one. Indeed as this Court recognised in *Joseph*:[59]

> "The spectre of administrative paralysis . . . is a legitimate concern. Administrative efficiency is an important goal in a democracy, and courts must remain vigilant not to impose unduly onerous administrative burdens on the State bureaucracy."[60] (Footnotes omitted.)

However, for the reasons that follow, it is plain to me that the Gauteng HOD was required to go further in the circumstances of this case.

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[57] The High Court agreed with the Department's view and was satisfied that the Gauteng HOD had acted procedurally fairly when overturning the learner's rejection by the school in terms of Regulation 13(1). The Supreme Court of Appeal did not deal specifically with the procedural fairness complaint of the school. This was presumably because of that Court's finding that the Gauteng HOD did not have the power to override the school's admission policy at all, and had therefore acted *ultra vires*. As already explained, I differ from the Supreme Court of Appeal regarding the Gauteng HOD's powers. It is therefore necessary for me to consider whether the power in Regulation 13(1)(a) was exercised procedurally fairly.

[58] See, for example, *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 190.

[59] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC).

[60] Id at para 29.

[63] First and most important: timing. As the Department itself has suggested, the Gauteng HOD exercises the power contemplated in Regulation 13(1) mainly in the period "between the end of the school based admissions process and the start of the next school year." This makes sense. The purpose of the power afforded in Regulation 13(1)(a) is to ensure that a learner's refusal of entry to a public school can be corrected, where necessary, so as to ensure placement of the learner in a public school. Ideally this should take place before the school year has begun.[61] This aligns with the view expressed in *Ermelo* that "[p]rocuring enough school places implies proactive and timely steps by the Department. The steps should be taken well ahead of the beginning of an academic year."[62]

[64] However, the circumstances of this case demonstrate a significant departure from what may have been expected in the normal course. Due to the Department's admitted

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[61] This fits in with the scheme contemplated by a circular headed "Management of Admissions to Public Ordinary Schools for 2011", published by the Department and dated 4 June 2010 (Circular). One of the stated purposes of the Circular is to "determine the timeframes within which [registration] processes are to be managed". In terms of the Circular, the principal of a school must communicate with successful or unsuccessful parents "by no later than 05 November 2010." In turn, a parent who wishes to object to the decision of the school principal is expected to do so (by means of a representation to the District Director) within seven days of receiving notification that the application was unsuccessful. Where an appeal against the decision of the District Director is made, the MEC is expected to make a decision on such appeal within 14 days of receipt thereof. I do not place reliance on the provisions of the Circular as the source of obligations on the parties. It merely illustrates the point that, even according to the Department's own policies or guidelines, it was generally envisioned that the objection and appeal processes should have been completed before the beginning of the school year in 2011.

[62] *Ermelo* above n 2 at para 103. See also para 75, where it was stated:

> "In the case of language policy, which affects the functioning of all aspects of a school, the procedural safeguards, and due time for their implementation, will be the more essential. *It goes without saying that excellent institutional functioning requires proper opportunity for planning and implementation.*" (Emphasis added.)

administrative failures, the appeal made to the MEC on 5 November 2010 only filtered down to the Gauteng MEC's office in late January 2011, and was responded to by the Gauteng HOD in February 2011, once the school year had already begun. By this time, the situation at the school was likely to have been different from the situation at the time when the principal offered reasons, in her letter dated 5 November 2010, for the rejection of the learner's application. Almost four weeks into the school year, the dictates of fairness required affording the school an opportunity to address the Gauteng HOD on the impact that such a placement would have on factors such as the quality of education of other learners at the school, access to resources for the learner herself, and the time that may have been required to accommodate the learner effectively. This opportunity was never afforded to the school.

[65] Second, and related to the element of timing, the Gauteng HOD based his decision on the school's tenth-day statistics. Such statistics became available long after the principal had submitted her reasons for the refusal of the learner's application as per the 5 November 2010 letter. The school therefore had no opportunity to consider or make representations on the Gauteng HOD's interpretation of those statistics, or on the implications of the Gauteng HOD acting on the basis of them. I am therefore not persuaded by the submission that the Department was "well aware of the school's attitude in relation to the application for the learner's admission". By the time the Gauteng HOD actually exercised his power in terms of Regulation 13(1)(a) – which was almost three

months after the principal's letter of 5 November 2010 – the school's attitude in relation to the tenth-day statistics was unknown.

[66] Third, I am unpersuaded by the Department's argument, upheld by the High Court, that the consultations held from September to November 2010 satisfy the requirement of procedural fairness in this case. Not only were these discussions held completely independently of the Gauteng HOD's exercise of his Regulation 13(1)(a) power, but the outcome of those discussions actually lends support to the school's position. The final meeting between representatives of the Department and the school regarding the learner's placement was held on 30 November 2010. There was a dispute on the papers regarding the details of that meeting. For our purposes, however, it seems to be common cause that the school's position (that the learner would have to wait her turn on the waiting list) was acknowledged, and that the District Director had indicated a willingness to assist with the alternative placement of the learner should the parent of the learner be in agreement with such a proposal.[63] It is worth noting that the Supreme Court of Appeal made a finding

[63] The school's version of the meeting's consensus goes further. It suggests that the Department's representatives were satisfied that there was no capacity at Rivonia Primary, given its admission policy, and that the learner had properly been placed on the waiting list. The school substantiated this account by attaching two reports of the meeting. One is an unsigned report under the name of the District Director, which indicates that the meeting resolved as follows:

> "Ms Cele will have to patiently wait her turn on the waiting list until a space opens up. [The school governing body] will not move her up the list.
>
> District Office willing to assist with alternative placement if Head Office Interventions can get parent to agree to proposal."

Though a representative of the Department at the meeting denied that the first resolution was completely accurate, he did accept that the school indicated that it was of "the view that Mrs Cele would have to wait on the list". And he did not deny the second of the two resolutions. In reply to the dispute as to the report's accuracy, the school attached its own minutes of the meeting, which support the version of the resolutions expressed in the unsigned Departmental report.

that at the meeting of 30 November 2010 "it appear[ed] to have been accepted that the child would have to wait her turn until a place became available."

[67] The Gauteng HOD's decision in February 2011 constituted an about-turn from the impression which had been created. It came as a rude shock to the school, which had already settled into the school year thinking the matter had been resolved. This is not to say that the Gauteng HOD was not entitled to exercise his power when he did. But the circumstances affect what the demands of procedural fairness were when he made his final decision.

[68] As I see it, the Gauteng HOD should have afforded the school an opportunity to make representations and respond to the tenth-day statistics report, before the learner was forcibly placed in the school. In the result, I find that the decision by the Gauteng HOD was not exercised in a procedurally fair manner.[64] Moreover, little attention seems to have been paid to the partnership and cooperation framework envisaged in the Schools Act, which, as I discuss below, is of essential importance when confronting capacity constraints in our public schooling system.

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[64] In other words, the school's legitimate expectation of a hearing was materially and adversely affected when the Gauteng HOD made his decision without allowing such a hearing.

Systemic capacity issues

[69] Apart from the specific procedural fairness flaws in the circumstances of this case, it is necessary to emphasise that, in disputes between school governing bodies and national or provincial government, cooperation is the required general norm. Such cooperation is rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to a basic education is realised.

[70] Both provincial government and individual schools have to grapple with systemic capacity problems and their impact on education. At school level, parents and governing bodies have an immediate interest in the quality of children's education. And they play an important role in improving that quality by supplementing state resources with school fees. However, the needs and interests of all other learners cannot be ignored. As was recognised in *Ermelo*:

> "The governing body of a public school must . . . recognise that it is entrusted with a public resource which must be managed not only in the interests of those who happen to be learners and parents at the time, but also in the interests of the broader community in which the school is located, and in the light of the values of our Constitution."[65]

[71] At the provincial level, government is under an obligation to ensure that there are enough school places for every child to attend school. However, this obligation must, as the Onderwysersunie submitted, take into account the fact that determination of capacity

[65] *Ermelo* above n 2 at para 80.

is a complex process that applies not only to the school as an entity, but also to each and every grade and class within the school. It involves a consideration of a range of interwoven factors relating to the planning and governance of the school as a whole. Planning and coordination in partnership with school governing bodies is crucial.

[72] Where a provincial department requires a school to admit learners in excess of the limits stated in the school's admission policy, there must be proper engagement between all parties affected. This principle of cooperation permeated this Court's approach in *Ermelo* and was reaffirmed recently by the majority of this Court in *Welkom*, where Khampepe J stated:

> "Given the nature of the partnership that the Schools Act has created, the relationship between public school governing bodies and the state should be informed by close cooperation, a cooperation which recognises the partners' distinct but inter-related functions. The relationship should therefore be characterised by consultation, cooperation in mutual trust and good faith. The goals of providing high-quality education to all learners and developing their talents and capabilities are connected to the organisation and governance of education. It is therefore essential for the effective functioning of a public school that the stakeholders respect the separation between governance and professional management, as enshrined in the Schools Act."[66]

[73] The concurring judgment of Froneman J and Skweyiya J placed a strong emphasis on the relevant stakeholders' constitutional and statutory obligation to engage in good faith before turning to the courts. I can do no better than to repeat those sentiments:

[66] *Welkom* above n 36 at para 124.

"It is salutary to remember that although, formally, this case is a dispute between the school governing bodies and the [head of department], their respective functions are to serve the needs of children in education. Section 28(2) of the Constitution makes it clear that the best interests of children 'are of paramount importance in every matter' concerning children. That applies to education too.

. . .

[W]e consider that there is a constitutional obligation on the partners in education to engage in good faith with each other on matters of education before turning to courts. In the present case they should have done so and that may well have prevented this long journey through the courts.

. . .

The Constitution and applicable legislation thus require the partners in the governance and management of schools to engage with one another in mutual trust and good faith on all material matters relating to that endeavour."[67] (Footnotes omitted.)

[74] This case illustrates the damage that results when some functionaries fail to take the general obligation to act in partnership and cooperation seriously. In the early stages of the tussle there was some engagement between the parties, albeit tense. The value of that engagement was demonstrated by the understanding between the school and the Department reached at the end of November 2010.

[75] By contrast, the manner in which the Gauteng HOD thereafter exercised his powers completely upended the process. The heavy-handed approach he used when making his decision raised the spectre that the Department would use its powers to deal with systemic capacity problems in the province without any regard for the role of school

[67] Id at paras 129, 135 and 152.

governing bodies in the Schools Act's carefully crafted partnership model. It created antagonism and mistrust, causing the Rivonia Governing Body to recoil.

[76] Equally problematic was the Rivonia Governing Body's reaction. Desiring to safeguard its own authority, the school failed to place the interests of the learner first. Instead, it resorted to litigation. Absent from the school's founding papers was any reference to the best interests of the particular learner, and the impact that the relief sought by the school would have on her. Rather, and quite ill-advisedly, the school not only sought a declaratory order to establish the relative powers of the Rivonia Governing Body and the Department to determine admission capacity, but also sought relief requiring the learner to be placed in another primary school until she could be accommodated at Rivonia Primary. However, as counsel for the school conceded before us, ordinarily one additional learner would not burden a school to the point of collapse.

[77] In this case there is particular reason to emphasise the duties of co-operative governance and the impact they might have on the children concerned. The duty on the parties to cooperate and attempt to reach an amicable solution is intimately connected to the best interests of the child. The failure of the Gauteng HOD and the Rivonia Governing Body adequately to engage had a direct effect on the learner. I would imagine that starting Grade 1 is a stressful and scary time for any child. Due to the failure of the parties to engage and reach agreement, the learner was physically placed at a desk and was caught in the middle of a disagreement which may well have been very traumatising

for her. To me this highlights the fact that the principle of co-operative governance is not merely a tool to ensure smoother intra-governmental relations, but one which has a direct effect on the people whom the government serves.

[78] Both parties could and should have done more to prevent the need for litigation. As stated earlier, disagreement is not necessarily a bad thing, and we must expect that in trying to determine what the best interests of learners are there may be differing visions. But one organ of state cannot use its entrusted powers to strong-arm others. All sides are required to work together in partnership to find workable solutions to persistent and complex difficulties – and resorting to court in every skirmish is not going to help in that process.

Disciplinary proceedings against the principal

[79] An application for the review of the disciplinary proceedings instituted by the Department against the principal is not before us. On this issue it is worth reiterating that, in the light of this judgment, there is an expectation that all relevant parties will take heed of this Court's approach to school-based disputes and will resolve them in as cooperative a manner as possible.

Costs

[80] The appeal is upheld, and the Supreme Court of Appeal order is set aside. However, given my conclusions relating to the manner in which the Gauteng HOD

exercised his powers, I am of the view that it would be fair that each party pays its own costs.

Order

[81] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld to the extent set out below.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following order:

   "(a) It is declared that the Head of Department of Education in the Province of Gauteng was empowered to issue an instruction to the principal of Rivonia Primary School to admit the learner in excess of the limit in its admission policy.

   (b) In exercising the power to instruct a principal of a public school to admit a learner in excess of the limit in its admission policy, the Head of Department of Education in the Province of Gauteng must act in a procedurally fair manner.

   (c) It is declared that the Head of Department of Education in the Province of Gauteng did not act in a procedurally fair manner when he issued instructions to the principal of Rivonia Primary School to admit the learner and when he placed the learner in the school."

4. There is no order as to costs.

JAFTA J (Zondo J concurring):

[82] This case concerns a little black girl whose dream was to obtain education at the school closest to her home. Standing in the way of realising that dream was an inflexible application of the school's policy that limited the number of learners who could be admitted in the first grade. This policy was adopted by the Governing Body of Rivonia Primary School (governing body) ostensibly to protect the interests of the school and its learners.

[83] The school in question is a public school which falls under the administration of the applicants who are all organs of state. These applicants have a constitutional obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights."[68] But this duty is also imposed on the school concerned and its governing body because they too are organs of state. One of the rights they are all obliged to protect and fulfil is the little girl's right to a basic education which she wanted to realise.[69]

[84] These parties, instead of cooperating and working towards discharging their constitutional obligation, have fought over whether the school's policy should be applied

[68] Section 7(2) of the Constitution provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[69] Section 29 of the Constitution guarantees the right to a basic education.

rigidly to exclude the girl from the school and who between them had the final say on whether she could be admitted despite the fact that the maximum number of learners to be admitted, set in the policy, had been reached.

[85] The dispute between the school and its governing body on the one side and the girl's parents and the applicants on the other, escalated with no regard to what was in her best interests. From an early stage relations were hostile between the girl's parents and the school. Attempts by the applicants to have the girl admitted to the school failed. Ultimately the applicants adopted robust action to force the school to admit her.

The dispute

[86] When the school refused to admit the girl, her mother approached the applicants for intervention. It was this intervention which gave rise to the dispute between the school and the applicants. On being forced to admit the learner the school approached the High Court for relief. They sought the review of the decision by the Head of Department: Gauteng Department of Education (Head of Department) to admit the girl at the school on the basis that it was inconsistent with the school's policy and therefore beyond his power.

[87] They also sought that the impugned decision be set aside on the basis that it was procedurally unfair because the school or its principal was denied the opportunity to furnish reasons for not admitting the learner. However, no facts were pleaded nor was

there evidence furnished to support the latter claim. I return to this point below. The High Court was not persuaded that any of the claims was established and consequently it dismissed the application.

[88] The governing body and the school appealed to the Supreme Court of Appeal. The Supreme Court of Appeal approached the case on the footing that the principal question for determination was whether the governing body could decide the number of learners to be admitted to the school.[70] The Court interpreted the relevant legislation in the context of section 39(2) of the Constitution.[71] Having adopted a particular interpretation, the Supreme Court of Appeal held that the power to determine the number of learners to be admitted at the school in question vests in its governing body. The power of the Head of Department to intervene, so it was held, was limited to cases where the school has exercised its power unreasonably, unconstitutionally or unlawfully.[72]

[89] Having found that the refusal to admit the girl was done in terms of a policy lawfully adopted by the governing body, the Supreme Court of Appeal issued the following order:

[70] Supreme Court of Appeal judgment above n 9.

[71] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[72] Supreme Court of Appeal judgment above n 9 at para 50.

"It is declared that the instruction given to the principal of the Rivonia Primary School to admit the learner contrary to the school's admission policy, and the placing of the learner in the school, were unlawful."

[90] This is the sole order that forms the subject matter of the appeal before us. It determines the scope of the appeal because in our law an appeal ordinarily lies against orders only. The proposition is so trite that no authority need be cited for it.

In this Court

[91] I have read the judgment prepared by my Colleague Mhlantla AJ (the main judgment). I agree that leave to appeal must be granted and that the appeal ought to succeed. I also support setting aside the order issued by the Supreme Court of Appeal and replacing it with an order declaring that the Head of Department was empowered to instruct the principal to admit the learner in excess of the limit in the school's admission policy. However, I do not agree that the granting of the second and third declaratory orders is justified. In my respectful view the question whether the Head of Department acted in a procedurally fair manner in issuing the instruction to the principal and in placing the learner in the school without giving the school the opportunity to make representations on the tenth-day statistics was not an issue raised in this Court by any of the parties.

[92] Before us the sole issue was whether the order issued by the Supreme Court of Appeal was wrong. The parties themselves focused on that order. The applicants

challenged the order while the school defended it. In these circumstances I am unable to support the second and third declarators issued in the main judgment, even in the light of procedural fairness having been mentioned in argument. This is so because procedural fairness was mentioned in the context of the complaint made by the school in its papers. It asserted that the principal was denied the opportunity to give her reasons for refusing to admit the learner.

[93] It will be remembered that here we are concerned with motion proceedings. It is a fundamental principle of our law that the notice of motion and founding affidavit, together with its annexures, constitute pleadings and evidence which must justify the grant of the relief sought.[73] Therefore, in the founding affidavit, the applicant must set out facts that are sufficient to disclose the cause of action relied on and evidence establishing that cause of action. In *Skjelbreds Rederi,*[74] this principle was stated in these terms:

> "In application proceedings the affidavits constitute not only the evidence but also the pleadings and therefore these documents should contain, in the evidence they set out, all that would have been necessary in a trial."[75]

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[73] *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* [2011] ZASCA 97; 2011 (4) SA 492 (SCA) at para 23 and *Louw and Others v Nel* [2010] ZASCA 161; 2011 (2) SA 172 (SCA) at para 17.

[74] *Skjelbreds Rederi A/S and Others v Hartless (Pty) Ltd* 1982 (2) SA 739 (W) (*Skjelbreds Rederi*).

[75] Id at 742C.

[94] Another basic rule in application proceedings is that the facts necessary to prove a claim must appear in the founding affidavit and its supporting documents. Hence the proposition that an applicant must stand or fall by its petition and the facts alleged in it.[76] However, in exceptional circumstances a court may exercise its discretion to allow the applicant to supplement in reply the allegations in the founding affidavit.[77]

[95] It is now convenient to refer to allegations in the founding affidavit sworn to by the Deputy Chairperson of the governing body. In relevant part she states:

> "[The learner] was enrolled as a Grade 1 learner at Lifestyle Montessori School and on 12 January 2011 started the school year there.
>
> The aforementioned status of the matter was unexpectedly turned on its head on 2 February 2011 when the Second Respondent telefaxed a letter to Drysdale, recording that he had perused all documents submitted to him and that according to the 'tenth day statistics', the school had not reached its capacity. This refers to the number of learners in the school on the tenth day of the new school year and is dealt with more fully hereunder.
>
> He then instructed the school to admit the learner without delay. . . . [A] letter was sent to the school under cover of a memorandum which recorded that its content was the purported outcome of an Appeal from the Head of Department. . . .
>
> I respectfully submit to the above Honourable Court that this could not refer to an appeal process as it is envisaged in the relevant education legislation. As I understand it, such an appeal needs to be resolved within 14 days after the appeal was lodged.

[76] *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636.

[77] *Skjelbreds Rederi* above n 74 at 742D.

The Second Respondent's letter instructing the school to admit the learner refers to the 'tenth day school statistics'. This is a reference to statistics kept by the Gauteng Department of Education of student numbers on the tenth day of the new school year. It now appears to be used by the Department to compare the attendance of a particular school with what it believes to be the capacity for each school.

I humbly submit that this statistic cannot override the admission policy of the First Applicant. Any attempt by the First Respondent to impose a learner upon a school at variance with the First Applicant's admission policy must be *ultra vires*."

[96] This extract sets out the only cause of action pleaded, namely, that the Head of Department's decision to admit the learner at the school based on the tenth-day statistics was contrary to the school's admission policy and therefore *ultra vires*. The focus of this cause of action is the decision-maker's lack of power to make the decision taken. The reason furnished for the contention is that the decision-maker acted beyond his powers. The pleading does not refer at all to procedural fairness.

[97] In fact, barring the recordal of the relief set out in the notice of motion, the founding affidavit does not mention the failure to be heard at all. Even in that regard, the school did not assert that it was denied a hearing in relation to the use of the tenth-day statistics. The claim was that the decision was taken without affording the governing body or the principal the right to furnish reasons for the principal's decision not to admit the learner. The claim for relief was framed in these terms:

"Declaring that the purported appeal to, and decision by, the Second Respondent, dated 2 February 2011, is not in accordance with the provisions of the admissions policy and

> the Circular and was taken without affording the [school governing body] or Principal the right to furnish reasons for the Principal's decision not to admit [the learner] as a Grade 1 learner and was accordingly procedurally unfair."

[98] Apart from the fact that this claim was not properly pleaded in that no facts whatsoever were alleged in the founding affidavit to support it, there is undisputed evidence on record showing that the principal did furnish reasons for refusing admission to the Head of Department. Indeed the main judgment finds that the principal submitted her reasons in November 2010. Therefore the claim for procedural fairness could not succeed even if it had been properly pleaded. It follows that the High Court was right in dismissing this claim on the basis that the principal was afforded the opportunity to furnish reasons for her decision. Without a doubt the pleaded claim for procedural fairness has no merit.

[99] The question that arises sharply is whether a different claim for procedural fairness which was neither pleaded nor established in evidence may be upheld by this Court. This is the core of the differences between this and the main judgment.

Declarator on procedural fairness

[100] Just as they bind other courts, the rules of procedure must be followed in this Court too. In our system of law the issues determined in any court are defined in the pleadings by the parties themselves. Adjudication of issues is undertaken at the instance or request of parties. In other words, it is the parties who decide which cause of action they would

like to pursue in litigation. Where a particular cause of action has been chosen and pleaded by an applicant or plaintiff and it turns out that the evidence adduced in its support does not sustain the action a court cannot, of its own accord, choose a different cause of action and find in favour of a losing litigant. This is simply not open to any court.

[101] Pleadings are crucial to adjudication of civil cases, particularly in constitutional litigation. This principle was affirmed by this Court in many decisions. Writing for a unanimous Court in *Gcaba*,[78] Van der Westhuizen J said:

> "Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in [*Chirwa v Transnet Limited and Others*], and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including, in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court. If, however, the pleadings, properly interpreted, establish that the applicant is asserting a claim under the [Labour Relations Act], one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of

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[78] *Gcaba v Minister of Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC).

> administrative action that is cognisable by the High Court, should thus approach the Labour Court."[79] (Footnotes omitted.)

[102] It is important to note that in *Gcaba*, the applicant's cause of action was based on administrative action but the facts pleaded ostensibly in its support sustained a violation of a right to fair labour practices which falls within the jurisdiction of the Labour Court. This Court upheld the order of the High Court dismissing the applicant's claim on the basis that the pleaded facts did not sustain it. The Court did not, of its own accord, decide the matter on the basis of the unfair labour practice claim, even though the facts pleaded sustained this claim.

[103] The same approach was followed in *Shaik*.[80] In that case the applicant had challenged the constitutionality of section 28(6) of the National Prosecuting Authority Act[81] on the basis that it was inconsistent with section 35(3) of the Constitution. The High Court dismissed the challenge and the applicant sought leave to appeal to this Court. In a unanimous judgment this Court, while accepting that section 28(8) and (10) were inconsistent with the Constitution, refused leave on the ground that the cause of action pleaded targeted section 28(6) instead of section 28(8) and (10).

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[79] Id at para 75.

[80] *Shaik v Minister of Justice and Constitutional Development and Others* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC).

[81] 32 of 1998.

[104] The fundamental principle of deciding cases on the basis of the pleaded cause of action was followed by this Court in other cases as well.[82] Judicial precedent which forms an integral part of the rule of law, one of the values upon which our Constitution is founded, demands that the Court in this matter follow the decisions referred to above. This Court is obliged to follow them until they are overturned. On this point the Court in *Gcaba* said:

> "Therefore, precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot 'rule' unless it is reasonably predictable. A highest court of appeal – and this Court in particular – has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution. The Constitution is the supreme law and has had a major impact on the entire South African legal order – as it was intended to do. But it is young; so is the legislation following from it. As a jurisprudence develops, understanding may increase and interpretations may change. At the same time though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights. This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so."[83]

[105] In these circumstances the main judgment errs in deciding a cause of action which was neither pleaded nor supported by established facts. As illustrated earlier, the cause of

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[82] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC); *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC); *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) (*Bel Porto*); *Prince v President, Cape Law Society, and Others* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

[83] *Gcaba* above n 78 at para 62. See also *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) at para 39.

action pleaded in relation to procedural fairness was that the Head of Department took the impugned decision without affording the governing body or the principal the opportunity to furnish reasons for the principal's decision not to admit the learner.

[106] Moreover, the declaration that the impugned decision was procedurally unfair is premised on the finding that the school was denied the opportunity to make representations on the tenth-day statistics. But there is no evidence on record supporting this finding. This is at odds with a principle entrenched in our law that any relief granted by a court must be based on established facts.

[107] The fact that the present applicants canvassed the procedural fairness point in their argument in this Court does not and cannot justify a determination of an issue that was neither pleaded nor proved in evidence on record. In any event, the applicants' argument shows that the pleaded complaint on procedural unfairness could not succeed because the evidence that the principal was allowed to give reasons for her decision is overwhelming. This can hardly be a basis for holding that the school was denied the opportunity to make representations on the statistics. To hold that the applicants' argument is a legitimate basis for the finding that the impugned decision was procedurally unfair is not only inconsistent with established principles but also prejudicial and unfair to the applicants. That was simply not the case they were called upon to meet in any of the courts before which the matter served.

[108] Moreover, the school did not ask this Court to grant a declaratory order. Both in the opposing affidavit and written argument, the school asked for the dismissal of the application for leave and nothing more. In our law a court ordinarily grants relief at the instance or request of litigants. Yet here the declaratory order on procedural unfairness is granted in circumstances where it was not requested. This is unusual. More so, when the fact that this order is not supported by the proven facts is taken into consideration.

[109] In *Bel Porto*,[84] the majority in this Court declined to grant orders which were proposed by the minority on the basis that the proposed orders were not asked for, nor were they supported by the pleaded cause of action and the evidence adduced. Writing for the majority Chaskalson CJ said:

> "In the joint judgment of Mokgoro J and Sachs J it is said that 'although formally employed by the appellants' schools and not by the Department,' the general assistants employed by the appellants 'were in effect public servants working in government schools' and as such, administrative justice 'required that they be given a right to participate in negotiations as to retrenchments similar to that afforded to their counterparts in other Elsen schools'. Similar comments are made by Madala J in his judgment.
>
> . . .
>
> I am unable to agree with this approach. The general assistants at the appellant schools are not parties to this litigation. Although reference is made to the fact that the scheme is likely to lead to their retrenchment, no claim was made by the appellants on behalf of the employees. The appellants' claim is based on alleged infringement of their own constitutional rights, and the rights of the children of their schools, not their employees' rights. The relief the appellants seek is relief designed to relieve them of the burden of

[84] *Bel Porto* above n 82.

continuing to employ the general assistants, and of having to pay the costs of retrenchments that might take place.

There is no evidence on record as to the terms and conditions of service of the general assistants of the appellant schools, other than that they are different to those of the general assistants employed by the [Western Cape Education Department]. Nowhere is it alleged in the affidavits made on behalf of the appellants that the general assistants were only 'technically' employees of the schools, or that they were in substance 'public servants'. No averment is made anywhere in the affidavits lodged on behalf of the appellants that the general assistants at their schools have any rights against the [Western Cape Education Department], or that they believe that they had such rights."[85] (Footnotes omitted.)

[110] Later in the same judgment Chaskalson CJ refused to grant an order proposed by Ngcobo J. In this regard the Chief Justice said:

"In his judgment Ngcobo J holds that the [Western Cape Education Department] infringed the rights of the appellants by failing to consult with them concerning the implementation of the scheme. Although he concludes that the appellants are not entitled to the relief claimed by them, he would have made a declaration that the rights of the appellants to just administrative action have been infringed and would have directed the parties to submit further affidavits and argument dealing with the appropriate relief in the light of the finding made by him.

Due to the course that the litigation took, the implementation of the scheme was not raised in the founding affidavits and no relief was sought in that regard in the notice of motion. The details of the scheme were placed on record by the [Western Cape Education Department] in [its] answering affidavits lodged on 14 February 2000. The appellants, in replying affidavits lodged some two months later on 17 April 2000, complained that they had not been included in the negotiations that had taken place between the [Western Cape Education Department] and the trade unions. The relief they

[85] Id at paras 75-7.

sought, however, as expressed in the affidavit of Mr van der Merwe, the chairman of the first appellant, was that:

> 'The fair and proper course of action is to first bring the applicant schools in line with all other schools. At that point negotiations between respondents and the trade unions, if necessary, will be meaningful.'

. . .

I am therefore unable to agree with Ngcobo J that the appellants are entitled to relief in the form proposed by him. This was not the relief sought by the appellants in the High Court or in this Court, and it is inconsistent with the attitude adopted by the appellants throughout the litigation."[86] (Footnote omitted.)

Meaningful engagement and cooperation

[111] The main judgment criticises the Head of Department for the manner in which he exercised the power to deal with systemic capacity problems. It is asserted that the Department exercised its powers with no regard to the role of the governing body.[87] This too was never an issue between the parties. Nor did it form part of the sole issue before this Court, namely, whether the Head of Department had the power to overturn the principal's decision and admit the learner to the school. Therefore what is said on this aspect does not form part of the *ratio decidendi*. As something that is said "by the way" it has no binding effect.[88]

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[86] Id at paras 106-7 and 115.

[87] Main judgment at [75] above.

[88] *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 30.

[112] In terms of the doctrine of judicial precedent it is the *ratio decidendi* which has binding authority. The *ratio* comprises the reasoning necessary for the decision of the issues before a court. What is stated in the course of articulating that reasoning but which is not essential to the determination of the issue at hand constitutes *obiter dicta.* The *obiter dicta* have no binding authority.[89]

[113] But apart from the fact that the resolution of the systemic capacity problems was not an issue for determination, the main judgment it seems, conflates this issue with what was done by the Head of Department in setting aside the principal's refusal and admitting the learner to the school. This was not done as part of addressing the systemic capacity problems but as resolution of a particular complaint. But even in the context of systemic capacity problems, the Head of Department can hardly be accused of failing to engage with the school.

[114] When the complaint relating to the refusal to admit the learner was brought to the Department, no less than four consultations were held with the school. None of them produced a positive result because the school refused to relax its admission policy and admit the learner, even though that policy had been relaxed in other cases. The school persisted in a rigid application of its policy despite the Department's plea for a flexible approach. In the founding affidavit, the school said about the meeting of 30 November 2010:

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[89] *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 316-7.

> "The Department called this meeting, apparently after the First and Second Respondents had requested Mabena to intervene in respect of the Fourth Respondent's application. *The meeting was nothing but a plea to the school and the First Applicant to relax its policies in order to grant the learner a place in the school for 2011*." (Emphasis added.)

[115] The evidence on record demonstrates that the Department consulted the school on a number of occasions. On one occasion the Department suggested that the learner's mother be furnished with certain information relating to the waiting list. The school responded to the request by a letter of 8 October 2010, written by the governing body's attorney. In relevant part it reads:

> "Request: Rivonia Primary provide Mrs. Cele with a reviewed number.
> Reply: Our instructions are that the request to review the received waiting list number *was rejected with the contempt it deserves*. . . . Rivonia Primary and [its governing body], will not be part of any *underhand activities*." (Emphasis added.)

[116] Despite the contempt with which the request was treated, the Department was still willing to meet the school and its governing body, hence the meeting of 30 November 2010 in which the plea to relax the application of the admission policy was turned down. These facts illustrate that even in the face of scorn, the Department was willing to cooperate with the school in seeking an amicable solution to the problem. In the meeting of 30 November 2010 when their plea failed, the officials from the Department suggested that they would place the learner at an alternative school if her parents agreed. Apparently they did not agree, hence the impugned decision by the Head of Department.

[117] Against this background, it can hardly be argued that there were no serious attempts to have the problem solved in cooperation with the school. The assertion that the Head of Department adopted the heavy-handed approach to the issue loses sight of what really happened. Faced with a contemptuous governing body and an intransigent principal, it is difficult to imagine that the Head of Department could have acted differently. Once it is accepted that he had the power to overturn the principal's refusal and admit the learner, what was done by the officials in admitting the learner can hardly be described as heavy-handed because the principal refused to carry out the instruction to admit the learner. The principal associated herself with the stance adopted by the governing body.

Legal principles

[118] With reference to *Ermelo*[90] and *Welkom*,[91] the main judgment lists four principles deduced from these cases.[92] I am unable to agree with the formulation of the first principle, especially the part that says a Head of Department cannot act contrary to a policy which in his or her view offends the Constitution. The main judgment indicates that this principle is distilled from certain paragraphs in *Ermelo*.[93] But the reading of the

[90] *Ermelo* above n 2.

[91] *Welkom* above n 36.

[92] Main judgment at [49] above.

[93] *Ermelo* above n 2 at paras 73-5 and 78.

relevant paragraphs does not support the proposition that a Head of Department cannot override or act contrary to a policy that offends the Constitution.

[119] In the first place, paragraphs 73 to 75 in *Ermelo* do not deal with overriding or acting contrary to a school's policy. Instead these paragraphs deal with the revocation of a function entrusted to a school governing body. In these paragraphs *Ermelo* addresses the exercise of power to revoke the authority to make policy. *Ermelo* states that the power to revoke must be exercised on reasonable grounds and in accordance with procedural fairness required by section 22(2) of the Schools Act. Therefore, these paragraphs do not support the principle formulated in the main judgment.

[120] In addition paragraph 73 in *Ermelo* is also cited as supporting the third principle which says when officials intervene or depart from policy, they must act reasonably and in a manner that is procedurally fair. But as already illustrated paragraph 73 deals with revocation of power which must be done on reasonable grounds and in a manner that complies with the procedural fairness in section 22(2). In paragraph 73, *Ermelo* states:

> "Indeed, my conclusion does not entail that the [Head of Department] enjoys untrammelled power to rescind a function properly conferred on a governing body whether by him or by the Schools Act or any other law. The power to revoke will have to be exercised on reasonable grounds. In addition the [Head of Department] must, in revoking the function, observe meticulously the standard of procedural fairness required by section 22(2) and, in cases of urgency, by section 22(3)."[94]

[94] Id at para 73.

[121] What emerges from this paragraph is that the Court in *Ermelo* was stating principles applicable to a revocation of power undertaken in terms of section 22. It was not laying down a general principle relating to a departure from a school governing body's policy.

[122] Reference to *Welkom* does not take the matter further, because the cited paragraphs in *Welkom* draw, as authority for what is stated, from *Ermelo*. I have illustrated that *Ermelo* was interpreted incorrectly in the main judgment, as it was in *Welkom*. I may add that the judgment relied on in *Welkom* does not, in my view, constitute a majority judgment. In my opinion none of the three judgments amounted to a majority judgment. Instead there is an order in that case which was supported by a majority but for different reasons.

[123] Therefore I cannot agree with the principle that says a head of department cannot override or act contrary to a policy which is inconsistent with the Constitution. To require the Head of Department to comply with such policy would be at odds with section 2 of the Constitution.[95] This section proclaims the supremacy of the Constitution and declares that conduct inconsistent with it is invalid.

[95] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[124] *Ermelo* is not authority for the proposition that an unconstitutional policy may not be followed only if the Schools Act is adhered to. The issues in that case were whether the Head of Department had the power to withdraw a language policy adopted by the school governing body and if so, whether the power of withdrawal had been properly exercised. As to the first issue, this Court overturned a finding by the Supreme Court of Appeal and held that the Head of Department had such power. The Supreme Court of Appeal had arrived at a different finding. Regarding the second issue, the Court held that section 25 of the Schools Act, on which the Head of Department relied, did not empower him to withdraw the policy in issue. Because the validity of that policy was not an issue before it, the Court did not declare it invalid but in the exercise of its justice and equity power, the Court directed the school's governing body to amend its language policy to be in line with the Constitution.[96]

[125] For all these reasons I do not support the main judgment, save for the finding that the Head of Department had the power to reverse the principal's decision and admit the learner to the school.

[96] *Ermelo* above n 2 at paras 96-102.

For the Applicants:	Advocate M Chaskalson SC and Advocate N Mji instructed by the State Attorney.
For the First and Second Respondents:	Advocate G Pretorius SC and Advocate A Kemack SC instructed by Shepstone & Wylie Attorneys.
For the First and Second Amici Curiae:	Advocate S Budlender and Advocate J Brickhill instructed by the Legal Resources Centre.
For the Third Amicus Curiae:	Advocate R Keightley instructed by Erasmus Inc Attorneys.

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 104/12
[2013] ZACC 16

In the matter between:

JACOBUS JOHANNES LIEBENBERG N.O. AND 84 OTHERS	Applicants
and	
BERGRIVIER MUNICIPALITY	Respondent
and	
MINISTER FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Intervening Party

Heard on : 12 March 2013

Decided on : 6 June 2013

JUDGMENT

MHLANTLA AJ (Mogoeng CJ, Moseneke DCJ, Froneman J, Nkabinde J, Skweyiya J and Zondo J concurring):

Introduction

[1] This application was brought by 85 landowners (applicants) who farm within the area of jurisdiction of the Bergrivier Municipality (Municipality). The applicants are all members of the Bergrivier Belastingbetalers-vereniging (BBV), a ratepayers' association.

[2] The respondent, the Municipality, was established on 5 December 2000 as a category B local municipality. Its areas of jurisdiction include the towns of Piketberg, Porterville, Velddrif and other smaller towns. A significant proportion of the areas are rural and nearly 40% of the population lives in rural areas.

[3] The intervening party is the Minister for Local Government, Environmental Affairs and Development Planning, Western Cape, who was admitted by this Court and allowed to make submissions limited to the issue of appropriate redress.

[4] The applicants have brought their application to this Court for leave to appeal against a decision of the Supreme Court of Appeal in terms of which that Court dismissed their appeal against a judgment of the Western Cape High Court, Cape Town (High Court), and upheld a cross-appeal by the Municipality.[1] At issue is the validity of certain

[1] *Liebenberg NO and Others v Bergrivier Municipality* [2012] ZASCA 153; [2012] 4 All SA 626 (SCA) (Supreme Court of Appeal judgment).

municipal rates, which the applicants have refused to pay for a period of some eight years.

Background

[5] Prior to the adoption of the interim Constitution, rural landowners were not required to pay municipal rates.[2] That position changed with the transition to democracy. The new dispensation, built up through a variety of constitutionally mandated legislative instruments, established a framework ensuring that all land, including the rural tracts belonging to the applicants, became subject to the authority of municipalities to impose rates on property.[3]

[6] After 5 December 2000, the Municipality began to impose levies and rates in respect of the applicants' rural land in terms of the Local Government Transition Act[4] (Transition Act) and the Local Government: Municipal Finance Management Act[5] (Finance Act). As from 2001, the applicants refused to pay certain of the levies and rates imposed. They did not approach a court to adjudicate their dispute with the Municipality.

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[2] This was because rural properties were not part of the rateable areas within the area of jurisdiction of municipalities.

[3] Section 151 of the Constitution introduced the notion of "wall-to-wall" local government. See *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 79; *City of Cape Town and Another v Robertson and Another* [2004] ZACC 21; 2005 (2) SA 323 (CC) (*Robertson*) at para 39; and *African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal, and Others* [1998] ZACC 2; 1998 (3) SA 1 (CC); 1998 (4) BCLR 399 (CC) at para 9.

[4] 209 of 1993.

[5] 56 of 2003. Most of the provisions of the Finance Act, excluding section 179, commenced on 1 July 2004. Section 179 came into operation on 1 July 2005.

[7] Starting from 2005, the Municipality launched enforcement proceedings in the Piketberg Magistrate's Court against various landowners to collect outstanding levies and rates. The applicants resisted the enforcement proceedings by disputing the lawfulness and validity of the imposts. Since the Magistrate's Court did not have jurisdiction to determine the validity of such levies and rates, the Municipality eventually agreed that it would abandon the enforcement proceedings in the Magistrate's Court and would seek declaratory orders in the High Court with regard to the validity of the levies and rates.[6]

High Court

[8] In 2010, the Municipality sought declaratory orders from the High Court that the levies and rates imposed by it in the financial years from 2001/2002 to 2008/2009 were lawful and valid.[7] To the extent that the relevant imposts may have been declared valid, the Municipality sought an order against the applicants for the enforcement and payment of the outstanding debts. The applicants opposed the granting of the declaratory order.

[9] The High Court (per Binns-Ward J) concluded that the levies imposed in the 2001/2002 and 2002/2003 financial years were not lawfully imposed, but the rates imposed in the 2003/2004, 2004/2005 and 2005/2006 years were recoverable. The Court also concluded that the Municipality had not complied with statutory requirements when

[6] This agreement was reached between the Municipality and the BBV.

[7] The Municipality's financial year runs from 1 July to 30 June.

it imposed the property rates during the 2006/2007, 2007/2008 and 2008/2009 financial years and that these could not be recovered. The High Court granted the applicants leave to appeal in respect of the 2004/2005 and 2005/2006 years, whilst the Municipality was allowed to cross-appeal in respect of the other years.

Supreme Court of Appeal

[10] By the time the matter reached the Supreme Court of Appeal, the rates imposed in respect of the 2001/2002 and 2003/2004 financial years were no longer in issue.[8] The Supreme Court of Appeal (per Lewis JA) rejected all the applicants' challenges. It consequently dismissed the applicants' appeal and upheld the Municipality's cross-appeal with costs.

[11] I will engage in a more detailed discussion of the reasoning of both the High Court and Supreme Court of Appeal as I deal with the merits of the appeal before us.

Issues

[12] The applicants contend that the Municipality failed to act in accordance with the strictures of the Constitution and statutory prescripts when imposing certain rates and levies. According to the applicants, the Municipality acted *ultra vires*[9] the governing

[8] The Municipality had, by this time, conceded that the levies it had sought to impose in the 2001/2002 financial year were not lawfully imposed and the applicants conceded that the rates imposed in the 2003/2004 financial year were good in law.

[9] Acted beyond the powers in the governing legislation.

legislation and the rates were accordingly invalid. Considering the multiple grounds raised in respect of different financial years, it is useful to outline the issues before this Court, which are as follows:

(a) Leave to appeal.

(b) Condonation.

(c) The approach to assessing a municipality's compliance with statutory prescripts.

(d) The interpretation and application of the relevant statutory provisions relating to rates imposed in the financial years 2006/2007 to 2008/2009.

(e) Other challenges raised in respect of each of the financial years under consideration.

Leave to appeal

[13] As previously indicated, the applicants approach this Court for leave to appeal against the decision of the Supreme Court of Appeal. The applicants submit that their challenges are rooted in the principle of legality and, as such, are constitutional matters. They argue that leave to appeal should be granted as the issues raised are important not only to the present litigants, but also to ratepayers and local government generally. They contend that it is in the public interest that this Court pronounce on these issues since the legality of property rates has been challenged in a number of other cases.

[14] Opposing the granting of leave to appeal, the Municipality emphasises that our constitutional framework establishes reciprocal rights and duties between the political structures of the Municipality and members of the local community.[10] Relying on *Pretoria City Council v Walker*,[11] the Municipality characterises the conduct of the applicants as impermissible self-help. The Municipality has suffered a significant reduction in its income as a result of the unlawful conduct on the part of the farm owners, and it is therefore not able to meet its constitutional obligations to the local community effectively. Further, there is no contention that the Municipality failed to comply with its obligation to provide services, from which the applicants benefitted. The Municipality submits that it would not be in the interests of justice for the current state of affairs to be permitted to continue.

[15] In my view, the matter raises important constitutional issues relating to the principle of legality as well as the interpretation and application of a variety of statutes regulating local government. These issues, which are related to the core aspects of the powers and duties of municipalities, impact not only on the parties before us, but on other ratepayers as well. It is accordingly in the public interest that this Court pronounces on these issues.

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[10] The Municipality has a constitutional right and duty to raise revenue, *inter alia*, by imposing levies and rates on property within its area of jurisdiction, in order to enable it to provide services to the local community. In turn, the members of the community have the right, amongst others, to access municipal services and the duty to pay promptly service fees, rates on property and other taxes, levies and duties imposed by the Municipality.

[11] [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) (*Walker*).

[16] It is also significant that the parties agreed that the Municipality would approach the High Court for a declaratory order on the validity of the relevant imposts rather than direct enforcement proceedings. It was within that context – in opposition to the declaratory order – that the applicants raised their challenges and it is those proceedings that are before us now. This is not an instance, therefore, where the Court has to determine whether the applicants have brought a so-called collateral challenge and their entitlement to do so. For these reasons it is in the interests of justice to grant leave to appeal.

Condonation

[17] The applicants were due to file the record in this matter on 10 January 2013. On 20 December 2012 they filed a letter requesting an extension of the filing date to 30 January 2013. The applicants eventually filed the record on 5 February 2013. The explanation offered is that they faced unforeseen logistical and financial constraints in preparation of the record. They submit that the explanation for the delay is reasonable and that minimal prejudice has been suffered by the respondent. In my view, even though this Court had to issue directions to nudge the applicants to comply with relevant timelines, the logistics and costs issues were real and beyond the applicants' immediate control and it is in the interests of justice to grant condonation.

[18] The applicants also failed to meet the deadline for the filing of their written submissions which were due to be filed on 5 February 2013. These were lodged on 8 February 2013. The applicants explain that the delay was caused by an email error as well as transport difficulties. The delay in the filing of the written submissions was only three days and the explanation offered is adequate. There has been no opposition to the condonation sought and it appears that the Municipality did not suffer any substantial prejudice as it was granted an extension for the lodging of its written submissions. It is therefore in the interests of justice to grant condonation for the late filing of the written submissions.

[19] The applicants have, correctly in my view, tendered costs in respect of the condonation applications. A costs order to that effect will be made.

Merits

[20] I turn now to consider the main grounds of the challenge to the Municipality's actions. The applicants contend that the Municipality acted *ultra vires* the governing legislation and the rates were accordingly invalid. A number of grounds were raised in respect of the rates for each financial year.

[21] First, I will outline the broad approach a court should adopt when assessing alleged non-compliance of a municipality with statutory prescripts. Second, I will address the applicants' challenges relating to whether the Municipality relied on the incorrect

legislation when imposing the rates for the financial years from 2006/2007 to 2008/2009. As will be seen, the proper interpretation of the applicable statutory framework regulating local government lies at the heart of much of the applicants' case. Thereafter, I will discuss the merits of the specific challenges raised in respect of each of the financial years under consideration.

Approach to assessing a municipality's compliance with statutory prescripts

[22] The applicants contend that the Municipality failed to comply with various statutory prescripts in respect of the rural levies and property rates imposed. The Municipality submits that should this Court conclude that there were instances of such non-compliance on its part, then this should not necessarily result in the invalidity of the rates imposed. Rather, the test should be whether there has been compliance with the relevant prescripts in such a manner that the objects of the statutory instruments concerned have been achieved.

[23] In *Unlawful Occupiers, School Site v City of Johannesburg*,[12] the Supreme Court of Appeal stated:

> "[I]t is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that

[12] 2005 (4) SA 199 (SCA).

event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved".[13]

[24] This was amplified by the Supreme Court of Appeal in *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association & Others*[14] where it was stated:

> "It is important to mention that the mere failure to comply with one or other administrative provision does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality. . . . To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it."[15]

[25] In *African Christian Democratic Party v Electoral Commission and Others*,[16] this Court, in the context of assessing a local authority's compliance with municipal electoral legislation, held that "[a] narrowly textual and legalistic approach is to be avoided".[17] Rather, the question is whether the steps taken by the local authority are effective when measured against the object of the Legislature, which is ascertained from the language,

[13] Id at para 22. See also further case law as referred to by this Court: *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) (*Weenen*) at para 13 and *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H – 434B.

[14] [2010] ZASCA 128; [2011] 2 All SA 46 (SCA) (*Nokeng*).

[15] Id at para 14.

[16] [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC).

[17] Id at para 25.

scope and purpose of the enactment as a whole and the statutory requirement in particular.[18]

[26] Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.

The applicable statutory framework for the financial years from 2006/2007 to 2008/2009

[27] The Municipality imposed rates for all of the relevant financial years in terms of section 10G(7) of the Transition Act.[19] It is common cause that this was the source of the

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[18] Id citing *Weenen* above n 13 with approval.

[19] Section 10G(7) provides in relevant part as follows:

> "(a) (i) A local council, metropolitan local council and rural council may by resolution, levy and recover property rates in respect of immovable property in the area of jurisdiction of the council concerned: Provided that a common rating system as determined by the metropolitan council shall be applicable within the area of jurisdiction of that metropolitan council: Provided further that the council concerned shall in levying rates take into account the levy referred to in item 1(c) of Schedule 2: Provided further that this subparagraph shall apply to a district council in so far as such council is responsible for the levying and recovery of property rates in respect of immovable property within a remaining area or in the area of jurisdiction of a representative council.
>
> (ii) A municipality may by resolution supported by a majority of the members of the council levy and recover levies, fees, taxes and tariffs in respect of any function or service of the municipality.
>
> (b) In determining property rates, levies, fees, taxes and tariffs (hereinafter referred to as charges) under paragraph (a), a municipality may—
>
> (i) differentiate between different categories of users or property on such grounds as it may deem reasonable;
>
> (ii) in respect of charges referred to in paragraph (a)(ii), from time to time by resolution amend or withdraw such determination and determine a date, not

Municipality's power to impose rates before the 2006/2007 financial year. However, there is a dispute between the parties as to the proper legislation to be applied for that year and the years that followed.

[28] In this regard, the applicants contend that section 10G(7) could not have been the lawful source of the power to impose rates over the 2006/2007 to 2008/2009 periods. They submit that this is because that section was repealed by section 179 of the Finance Act with effect from 2 July 2005. The Municipality, on the other hand, contends that the life of section 10G(7) was extended by the transitional provisions of the Local

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earlier than 30 days from the date of the resolution, on which such determination, amendment or withdrawal shall come into operation; and

(iii) recover any charges so determined or amended, including interest on any outstanding amount.

(c) After a resolution as contemplated in paragraph (a) has been passed, the chief executive officer of the municipality shall forthwith cause to be conspicuously displayed at a place installed for this purpose at the offices of the municipality as well as at such other places within the area of jurisdiction of the municipality as may be determined by the chief executive officer, a notice stating—

(i) the general purport of the resolution;

(ii) the date on which the determination or amendment shall come into operation;

(iii) the date on which the notice is first displayed; and

(iv) that any person who desires to object to such determination or amendment shall do so in writing within 14 days after the date on which the notice is first displayed.

(d) Where—

(i) no objection is lodged within the period referred to in paragraph (c)(iv), the determination or amendment shall come into operation as contemplated in paragraph (b)(ii);

(ii) an objection is lodged within the period referred to in paragraph (c)(iv), the municipality shall consider every objection and may amend or withdraw the determination or amendment and may determine a date other than the date contemplated in paragraph (b)(ii) on which the determination or amendment shall come into operation, whereupon paragraph (c)(i) shall with the necessary changes apply."

Government: Municipal Property Rates Act[20] (Rates Act). One of the key differences between the parties, therefore, is whether section 10G(7) survived the enactment of the Rates Act as a result of these transitional provisions.

[29] Section 179 of the Finance Act, which came into operation from 1 July 2005, provides in relevant part as follows:

> "**Repeal and amendment of legislation**
>
> (1) The legislation referred to in the second column of the Schedule is hereby amended or repealed to the extent indicated in the third column of the Schedule [including section 10G].
>
> (2) Despite the repeal of section 10G of the Local Government Transition Act, 1993 (Act 209 of 1993), by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is enacted." (Emphasis added.)

[30] Section 179 states that legislation appearing in the second column of the Schedule to the Finance Act is amended or repealed to the extent indicated in the third column of the Schedule. This Schedule reflects three Acts in the second column (including the Transition Act). In the third column, it states: "The repeal of section 10G." Section 179(2), however, delays the coming into force of the repeal of certain parts of

[20] 6 of 2004.

section 10G – more specifically, section 10G(6), (6A) and (7) – until the legislation envisaged in section 229(2)(b) of the Constitution is enacted.[21]

[31] The literal meaning of section 179 is that the provisions of section 10G were, save for section 10G(6), (6A) and (7), repealed with immediate effect. Those three subsections would remain in force until the enactment of legislation in terms of section 229(2)(b) of the Constitution. This legislation later turned out to be the Rates Act, which came into force on 2 July 2005.

[32] The Rates Act includes various transitional provisions. Amongst these are sections 88 and 89, which provide in relevant part as follows:

> "**88. Transitional arrangement: Valuation and rating under prior legislation.**
>
> (1) Municipal valuations and property rating conducted before the commencement of this Act by a municipality in an area in terms of legislation repealed by this Act, may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that area prepared in terms of this Act takes effect in terms of section 32(1). (Emphasis added.)
>
> . . .
>
> **89. Transitional arrangement: Use of existing valuation rolls and supplementary valuation rolls.**

[21] Section 229(2) of the Constitution provides as follows:

> "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."

(1) Until it prepares a valuation roll in terms of this Act, a municipality may—

(a) continue to use a valuation roll and supplementary valuation roll that was in force in its area before the commencement of this Act; and

(b) levy rates against property values as shown on that roll or supplementary roll.

(2) If a municipality uses valuation rolls and supplementary valuation rolls in terms of subsection (1) that were prepared by different predecessor municipalities, the municipality may impose different rates based on different rolls, so that the amount payable on similarly situated properties is more or less similar.

(3) The operation of this section lapses six years from the date of commencement of this Act, and from that date any valuation roll or supplementary valuation roll that was in force before the commencement of this Act may not be used."[22]

[33] The High Court upheld the argument of the applicants that when the Rates Act came into operation, the plain meaning of section 179 of the Finance Act meant that section 10G(7) ceased to apply and the Municipality was required to levy rates in terms of the Rates Act.

[34] The Supreme Court of Appeal disagreed and reversed the decision of the High Court. It noted that the transitional provisions of the four statutes on municipal governance were "complex and confusing".[23] Nonetheless, the Supreme Court of Appeal held that these statutes showed a clear purpose to empower rating in every municipality through a variety of mechanisms until uniform and permanent systems were put in place.

[22] The combined effect of these provisions was that a municipality could, in terms of legislation repealed by the Rates Act, continue to conduct property rating based on a valuation roll in force before 2 July 2005 until it had prepared a valuation roll in terms of the Rates Act (which had to be prepared by 30 June 2011).

[23] The four relevant statutes referred to by the Supreme Court of Appeal are the: Local Government: Municipal Structures Act 117 of 1998 (Structures Act); Local Government: Municipal Systems Act 32 of 2000; Finance Act; and Rates Act.

The Court held that the transitional provisions of both the Finance Act and the Rates Act kept the empowering provisions of section 10G(7) alive until the period referred to in section 89(3) had expired and that throughout that period section 10G(7) empowered the Municipality to impose rates. The Court concluded that the interpretation by the High Court would lead to the absurd result that the bridging mechanism in sections 88 and 89 of the Rates Act would be available to municipalities that relied on old-order rating legislation (for example, old-order provincial Ordinances) but it would not avail municipalities which were using section 10G(7).

[35] In this Court, the applicants submit that section 179 of the Finance Act repealed section 10G(7) on 2 July 2005 and the Municipality ought to have complied with the provisions of the Finance Act and the Rates Act when imposing rates in respect of the 2006/2007, 2007/2008 and 2008/2009 financial years respectively.

[36] The Municipality, on the other hand, urges us to adopt the view of the Supreme Court of Appeal. The Municipality argues that the Court correctly interpreted the various statutes which facilitated the transition from the old-order provincial Ordinances to the current rating legislation. It further contends that a purposive approach to interpretation supports reading the phrase "legislation repealed by this Act" in section 88(1) of the Rates Act as not only including legislation specified in the Schedule of repealed legislation, but also referring to legislation repealed by the Rates Act by virtue of the fact of its commencement – such as section 10G(7).

[37] The argument advanced by the applicants cannot be sustained. I recognise that the term "repealed by this Act" could be construed narrowly to mean "in terms of this Act", and this narrow interpretation might have us turn our attention to legislation specifically repealed in terms of the relevant Act.[24] Indeed, had the phrase "in terms of this Act" in fact been used by the Legislature, we may well be straining the text too far to suggest that there could be any other reasonable construction. However, that is not the wording that we are presented with here.

[38] Rather, the ordinary meaning of the phrase "repealed by this Act" does not preclude the possibility of a broader construction as referring to legislation "repealed by the coming into effect of this Act" or "repealed as a result of this Act". Further as I explain below, the narrower interpretation potentially results in absurdity whereas the broader interpretation better meets the purposes of the legislative scheme.

[39] It is established that the ordinary meaning of the words in a statute must be determined in the context of the statute (including its purpose) read in its entirety.[25] It is important when considering the legislative purpose of the Rates Act not only to have regard to the provisions of that Act but also to take into account the broader context

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[24] In this case, section 95 of the Rates Act read with the Schedule to that Act.

[25] See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 61 and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90.

within which it was passed and the relationship between the various statutory enactments that have sought to restructure local government.

[40] A municipality's authority to impose rates and levies is derived from section 229 of the Constitution.[26] The purpose of a municipality's revenue-raising powers is to finance a municipality's performance of its constitutional and statutory objects and duties as set out in sections 152(1) and 153 of the Constitution. These include the provision of services to communities in a sustainable manner, promoting social and economic development and providing for the basic needs of the community. These objects are integral in the task of constructing society in the functional areas of local government.[27]

[41] The statutory framework for the transition to democratic local government envisaged a staggered process implemented over several years. The first step in this process was the adoption of the Transition Act. This Court stated in *Executive Council,*

[26] Section 229(1) of the Constitution, under the heading "[m]unicipal fiscal powers and functions", provides:

> "Subject to subsections (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 authorised by national legislation, other taxes, levies and duties appropriate to local government 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."

[27] *Democratic Alliance and Another v Masondo NO and Another* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) at para 17.

Western Cape Legislature, and Others v President of the Republic of South Africa and Others:[28]

> "The Transition Act was intended and drafted to govern the reconstruction of local government from A to Z. . . . Its principles and terms were separately negotiated. It was then passed by the 'old' Parliament as part of the statutory scaffolding agreed upon by the negotiating parties as necessary before, during and after the transition of national and provincial government."[29]

[42] In 1996, a number of provisions were inserted into the Transition Act by the Local Government Transition Act Second Amendment Act.[30] In particular, section 10G(6) and (7) were introduced to regulate the powers of local government to impose rates and levies and conferred a freestanding rate-levying competence on municipalities. The primary purpose of these subsections was "to ensure that every municipality conducts its financial affairs in an effective, economical and efficient manner, with a view to optimising the use of its resources in addressing the needs of the community."[31]

[43] The Transition Act was due to lapse on 30 April 1999. However, the life of its financial provisions was extended on at least two occasions. The first instance was in 1998, by means of a constitutional amendment,[32] which extended the life of the whole of

[28] [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

[29] Id at para 162.

[30] 97 of 1996.

[31] *Robertson* above n 3 at para 41.

[32] Constitution of the Republic of South Africa Amendment Act 65 of 1998.

the Transition Act for a limited period. The second was by an amendment to the Structures Act, which kept in place section 10G for an indefinite period.[33] During this period, the old-order legislation in terms of which municipalities could levy rates on property remained in force.[34]

[44] The extension of the life of section 10G demonstrates a recognition that municipalities would need time to develop systems and processes required by the new legislative framework and an intention to assist municipalities with the transition to the new regime. The legislative scheme has been directed at ensuring a facilitated rating mechanism for municipalities until uniform and consistent rating systems have been put in place. As the final step in that process, the Rates Act recognises that it still needs to accommodate for transitional adjustment. It does so through its transitional arrangements relating to valuation and rating[35] and the use of existing valuation rolls.[36]

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[33] Local Government: Municipal Structures Amendment Act 33 of 2000. Section 93(4) was inserted into the Structures Act and provides:

> "Despite anything to the contrary in any other law and as from the date on which a municipal council has been declared elected as contemplated in item 26(1)(a) of Schedule 6 to the Constitution—
>
> (a) section 10G of the Local Government Transition Act, 1993 (Act No. 209 of 1993), read with the necessary changes, apply to such a municipality; and
>
> (b) any regulation made under section 12 of the Local Government Transition Act, 1993 (Act No. 209 of 1993), and which relates to section 10G of that Act, read with the necessary changes, apply to such a municipality."

At the same time as this step was taken, further provisions were inserted in the Transition Act relating to property valuations for the purpose of the imposition of rates.

[34] In this case, the relevant legislation is the Municipal Ordinance (Cape) 20 of 1974.

[35] Section 88 of the Rates Act.

[36] Id section 89.

[45] It is significant that section 179(2) of the Finance Act does not simply provide a date on which the legal force of the repeal would be effected. Rather, the Legislature specifically built a scheme where the legislative trigger for the repeal would lie in one statute (Finance Act), but it would only be the coming to life of another legislative enactment (Rates Act) that would give final legal force to the repeal. Viewed in this manner, it must be accepted that but for the enactment of the Rates Act, the repeal of section 10G(7) would never have taken effect.

[46] Counsel for the applicants persisted with the submission that if the purpose of section 88 of the Rates Act were to keep alive section 10G(7) then its language would have made this clear by listing section 10G(7) under the Schedule to the Act. This, however, misses the point. The Legislature did not have to refer back specifically to section 10G(7) or to the Finance Act, since the very scheme of the transitional legislation already contemplates that they work hand-in-hand. In this unique legislative suite, it is necessary to read the Rates Act and the Finance Act in tandem and to recognise that the various provisions in the different statutes work together in a coordinated scheme.

[47] This principle is aptly captured in *Rates Action Group v City of Cape Town*:[37] "where a particular statute forms part of a suite of statutes, then it is logical to analyse that suite as a whole in order to determine what the overall legislative scheme is."[38]

[37] 2004 (5) SA 545 (CPD) (*Rates Action Group*). This decision was confirmed on appeal in *Rates Action Group v City of Cape Town* 2006 (1) SA 496 (SCA).

[48] The applicants sought to rely on *Rates Action Group*[39] as authority for the view that section 10G(7) was meant to play no further role once the Rates Act came into effect. I see it differently. It is true that in that case the suggestion was made that the relevant provisions of the Transition Act would no longer serve any purpose once the Rates Act came into operation. But one has to recognise that the transitional provisions of the Rates Act – in particular section 88 – were not under consideration there. And therefore the extent to which the Rates Act itself provided for the continuation of the life of section 10G(7), amongst other provisions, was not within that Court's sights.

[49] The recognition that it is only once "the [Rates Act] has been enacted, [that] the relevant provisions of the [Transition Act] will finally fall away"[40] drives home the point that the repeal of section 10G(7) was provided for not only through the Finance Act, but also through the coming into force of the Rates Act. The purpose of the legislative scheme and the Rates Act has been to provide for a facilitated rating mechanism and consistency in the rating process by local government. As the final step in that process, the Rates Act recognises that it still needs to accommodate for transitional adjustment. And it does so through its transitional arrangements relating to valuation and rating, and the use of existing valuation rolls.

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[38] *Rates Action Group* above n 37 at para 41; see also paras 39-45 more generally.

[39] Id.

[40] Id at para 46.

[50] I therefore agree with the Supreme Court of Appeal that it is difficult to comprehend why the Legislature would have intended to allow valuation and rating to continue under the old-order legislation, but to exclude municipalities that were operating under the Transition Act from that benefit. As counsel for the Municipality argued before us, this would be at odds with the broader objectives of trying to help, rather than hinder, the ability of municipalities finally to come into line with the Rates Act. It would also sit uncomfortably with the provisions allowing for the continued use of old valuation rolls by municipalities that had been imposing rates in terms of the Transition Act.

[51] To conclude on this point: on a proper interpretation, section 179(2) of the Finance Act suspended the legal operation of the repeal of section 10G(7) and provided for its continued existence alongside the Finance Act. The repeal of section 10G(7) depended on the enactment of the Rates Act and was subject to the transitional provisions of section 88 of that Act. It follows that section 10G(7) applied throughout the period covering the contested imposts and the applicants' attack on the validity of the rates on the ground described above fails.

[52] I have read the dissenting judgments of my brother Jafta J as well as my sister Khampepe J. Both would conclude that section 10G(7) was repealed by the Finance Act and did not survive the coming into effect of the Rates Act. However, they hold different views as to the construction and effect of the word "enacted" used in section 179(2).

While respectfully differing from Khampepe J on her final conclusion relating to the survival of section 10G(7), I would align myself with the approach she adopts to the interpretation of "enacted" as used in section 179(2) – it cannot have been intended that for 13 months there should be no regulation of the rating of rural properties by municipalities.

[53] The next leg for consideration is whether the Municipality complied with statutory prescripts when it imposed the property rates during the relevant financial years. I consider each challenge in chronological order.

Challenges in respect of each financial year

(a) Unauthorised amendment of rates in the 2002/2003 financial year

[54] On 13 June 2002, the Municipality's Council (Council) approved the budget for the 2002/2003 financial year. It approved a rural levy for properties calculated by means of a sliding scale,[41] as opposed to a calculation based on a valuation roll. This was done because the rural properties had not yet been valuated. On 21 June 2002, the Municipality published notices of its budget, rates and tariffs for the 2002/2003 financial year, including the sliding-scale rural levy, and indicated that written objections must be lodged within 14 days.

[41] This was based on the size of the affected land unit subject to a maximum imposition of R4500, regardless of the number of land units of which the farm might be comprised.

[55] On 29 July 2002, after receiving objections, the Municipality confirmed the sliding-scale determinations but also resolved to obtain a provisional valuation of all properties. This valuation exercise was completed during 2002 and the Municipality published notices in local newspapers advising that a general valuation roll was open for inspection and invited objections in terms of the relevant provincial property valuation ordinance.[42] On 26 May 2003, before the end of the financial year and in accordance with the general valuation, the Council resolved that rural properties would be subject to a property rate of 0.2474c in the Rand for the 2002/2003 year rather than the sliding-scale levy. The amounts paid in terms of the sliding-scale levy would be set off against the payment of the rate in accordance with the valuation roll.

[56] Before turning to an assessment of the complaints raised by the applicants, it is useful to set out the scheme of section 10G(7) insofar as it is relevant to this discussion. Section 10G(7)(a)(i) empowers a municipality to impose, by resolution, property rates in respect of certain immovable property. Section 10G(7)(a)(ii) empowers a municipality, by resolution, to impose levies, fees, taxes and tariffs in respect of any function or service of the municipality. Section 10G(7)(c) provides that, after a resolution as contemplated in sections 10G(7)(a)(i) or 10G(7)(a)(ii) is passed, a notice must be displayed stating the general purport of the resolution, the date on which the resolution shall come into operation, the date on which the notice is first displayed, and inviting objections within 14 days after the date on which the notice is first displayed. Section 10G(7)(b)(ii) allows

[42] Property Valuation Ordinance, 1993 (Cape).

a municipality to amend or withdraw a determination in respect of imposts other than property rates and determine the commencement date of the resolution, which must be at least 30 days after the date on which the resolution was taken. Section 10G(7)(d)(ii) provides that where an objection is lodged, the municipality must consider the objection and may withdraw or amend the determination. It may also determine a date other than that provided for in section 10G(7)(b)(ii) on which the determination or amendment shall come into operation, whereupon a notice must be displayed stating the general purport of the resolution.

[57] The High Court and the Supreme Court of Appeal agreed with the applicants' contention that the sliding-scale levy determined by the Municipality on 29 July 2002 was not in fact a levy, but an unlawfully imposed rate. This is because a levy could only be determined in respect of "any function or service of the municipality." The sliding-scale 'levy' imposed by the Municipality was not based on any such service or function, but rather was based on property ownership. It was therefore truly a property rate.[43]

[58] It has been the applicants' position that the 26 May 2003 resolution amounted to an amendment of the earlier property 'rate'. They argue that—

[43] See *Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

(i) section 10G(7)(b)(ii) confines the power of amendment to charges other than property rates, and therefore the 26 May 2003 resolution amounted to an unauthorised amendment of an earlier property rate and was accordingly *ultra vires*;

(ii) the Municipality failed to publicly give notice of its 26 May 2003 resolution in terms of section 10G(7)(d)(ii); and

(iii) the resolution purported to take effect immediately (ie on 26 May 2003), whereas section 10G(7)(b)(ii) required that it had to determine a date 30 days or more after the date of the resolution on which it would come into operation.[44]

[59] The Supreme Court of Appeal rejected the applicants' first argument. It held that the applicants could not, on the one hand, argue that the levy was invalid as it was in truth a rate and, on the other hand, complain that "when it was replaced by a lawful rate, that it should have been amended as if it were a levy."[45] I agree. The applicants cannot have it both ways and their contention on this score must fail. The Supreme Court of Appeal did not deal with the other complaints of the applicants in respect of this financial year. I do, however, find it necessary to address the other contentions.

[44] This point was not taken in the farm owners' answering affidavit, but was raised in argument before the Supreme Court of Appeal and in their papers in this Court. The Municipality did not object to the point being raised.

[45] Supreme Court of Appeal judgment at para 34.

[60] The High Court found in favour of the applicants that the 26 May 2003 resolution was an amendment of the earlier resolution, and was not authorised by section 10G(7). The High Court's reasoning focused on the concern that the Municipality did not, after amending its determination in the light of objections received and valuations process undertaken, display a notice "stating the general purport of the resolution" as required by section 10G(7)(d)(ii) read with section 10G(7)(c)(i) of the Transition Act. The High Court held that this constituted material non-compliance with the requirements of section 10G(7).

[61] In my view, the High Court failed to properly assess whether the steps taken by the Municipality in relation to that financial year's imposts were, ultimately, substantially effective when measured against the purpose of the relevant provisions and the scheme as a whole. It is true that the Municipality did not display any notice regarding the resolution of 26 May 2003. However, the Legislature could not have envisaged that this non-compliance should void the whole process in circumstances where the Municipality had in fact engaged in a public participation process and was responsive thereto. After receiving objections to the notification of the sliding-scale levy, the Municipality engaged with the public and undertook to complete the valuations process, which it did. It issued notices regarding that valuation and made an amendment in line with the outcome thereof. In line with the approach set out earlier, the measures taken by the Municipality were substantially effective in achieving the objects of section 10G(7) in particular and the legislative scheme as a whole.

[62] In respect of the third contention by the applicants, once again their complaint relies exclusively on provisions relating to the amendment of imposts other than rates (ie section 10G(7)(b)(ii)). For the reasons set out above,[46] it is not open to the applicants to argue both that the levy was invalid as it was in truth a rate and then also complain that it should have been amended as if it were a levy.

(b) Failure to call for objections before the date of commencement of rates for the 2004/2005 financial year

[63] The notice of the resolution levying rates for the 2004/2005 financial year was published in local newspapers on 8 July 2004. The date of commencement of the rates was 1 July 2004. The notice provided for objections by 30 July 2004. It further stated that payment for rates had to be made on or before 30 September 2004 or in 12 monthly payments payable before or on the 25th day of each month.

[64] The applicants contend that the fact that the rates had become due before the commencement of the 14-day objection period provided for by section 10G(7)(c)(iv) was a fatal flaw and effectively amounted to a retrospective imposition of rates. They rely on the minority reasoning in *Kungwini Local Municipality v Silver Lakes Home Owners*

[46] See [59] above.

Association and Another[47] and argue that they were faced with an accomplished fact and, as a result, were in a weaker position to object.[48]

[65] The High Court and the Supreme Court of Appeal rejected the minority opinion in *Kungwini*, concluding that the resolution remained open for amendment and that there was therefore a valid purpose in calling for objections. I agree. The ratepayers were not required to make payment on 1 July 2004. The period afforded for payment allowed sufficient time for reconsideration of the rate in the light of any objections received to the notice and the relevant resolutions could be amended where necessary. There was therefore substantial compliance with the statutory requirements and a meaningful purpose to the objections process. The attack accordingly fails.

(c) The general purport requirement of the rating resolution notices in the 2004/2005 to 2008/2009 financial years

[66] The chief executive officer of the municipality is, in terms of section 10G(7)(c)(i), obliged to cause a notice to be displayed stating the "general purport" of a rates resolution after it has been passed.

[67] The applicants challenge the validity of the notices published by the Municipality in respect of the rates for the 2004/2005 to 2008/2009 financial years, inclusive, in that

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[47] 2008 (6) SA 187 (SCA) (*Kungwini*).

[48] Id at para 31.

these notices failed to specify the general rural rebate (that is, the general rebate on ordinary residential rates applying to all farm properties). By failing to specify the general rebate in the notice itself, the applicants submit that the notices did not indicate the general purport of the resolution. The applicants rely on *Kungwini*, where the Supreme Court of Appeal stated that the object of the general purport requirement is that ratepayers "should know what rates they would have to pay, and from when those rates would be payable."[49]

[68] The High Court and the Supreme Court of Appeal held that the notices adequately reflected the general purport of the resolution since interested parties were advised that the resolutions were available for inspection.

[69] I agree that the argument on behalf of the applicants is flawed. Their reliance on *Kungwini* is misplaced as the facts of that case are distinguishable. *Kungwini* was concerned with a notice that itself had contradictory content and which could mislead ratepayers.[50] That is not the situation here. The notices in this case indicated that the rates referred to all rateable properties, although it did not refer to rural properties and mention the rural rebates in particular. It did, however, state that rebates would be applied to certain properties and that the detail of the resolutions was available for

[49] Id at paras 53 and 55.

[50] Id at paras 38 and 55.

inspection. It follows that the information was readily available. Therefore, there was due compliance with the general purport requirement.[51]

(d) Levying rates in terms of the procedures set out in the Finance Act for the 2005/2006 to 2008/2009 financial years

[70] As previously stated, most of the provisions of the Finance Act came into operation on 1 July 2004. For the financial years following the commencement of the Finance Act, the Municipality continued to impose rates on the basis of section 10G(7). There were instances, however, where the Municipality only complied with the requirements of the Finance Act in the manner that it levied the rates.

[71] The applicants contend that, to the extent that the Municipality relied on section 10G(7) as the source of its power, it should have complied with the procedures therein. In this regard the applicants argue that the notices published in respect of the rating resolutions for these years omitted to state that objections could be lodged within 14 days after the date on which the notice is first displayed, which is a requirement set out in section 10G(7)(c)(iv).

[72] The applicants submit that the Finance Act process is not inconsistent with the Transition Act. The former allows for a notice and comment procedure before the

[51] See also *Nokeng* above n 14 at para 24.

resolution imposing property rates is passed whilst the latter regulates the process after the passing of such resolution. Therefore both should be followed.

[73] This argument is fallacious and I agree with the High Court and the Supreme Court of Appeal. The High Court as well as the Supreme Court of Appeal held that the Municipality was not required to comply with both statutes (Finance Act and Transition Act) at the same time. The Courts stated that Chapter 4 of the Finance Act regulated the manner of levying rates from the date of commencement. The Finance Act imposed requirements inconsistent with the Transition Act and, to the extent that this was so, the provisions of the Finance Act prevailed.

[74] In my view, it would be absurd for the Legislature to have intended the Municipality to perform the notice and comment exercise twice (both before and after the final budget had been adopted). That would place an undue administrative burden on local government. In the result, the Municipality complied with the requirements of the Finance Act and, in any event, substantially complied with the objects of the requirements in section 10G(7). This is because the requisite notices were published, they stated that the documents were available for public inspection, and they called for objections from the public.

(e) Failure to promulgate rates resolutions for the 2006/2007 to 2008/2009 financial years

[75] The applicants submit that the Municipality was obliged, in terms of section 14(2) of the Rates Act, to promulgate resolutions levying rates by publishing the resolution in the *Provincial Gazette*. Furthermore, they contend that the Municipality's failure to promulgate the resolutions for the rates imposed in the years 2006/2007 to 2008/2009 is inconsistent with the rule of law and therefore fatal to those rates. This argument was premised on the contention that section 10G(7) was repealed by section 179 of the Finance Act and the Rates Act therefore applied to the levying of rates after 2005.

[76] The High Court upheld the argument of the applicants. The Supreme Court of Appeal disagreed and held that it was not necessary for the Municipality to comply with the Rates Act since section 10G(7) was still in operation by virtue of the transitional provisions in the Rates Act. It was therefore not necessary to comply with the Rates Act.

[77] I have already dealt with the interpretation of the relevant statutory provisions and have concluded that section 10G(7) survived the commencement of the Rates Act. It follows that the Municipality was not obliged to comply with section 14(2) of the Rates Act. The applicants' argument on this issue must therefore fail.

[78] As has become clear from the above, I find that the applicants' challenges have no merit. The appeal therefore falls to be dismissed. Before proceeding to the order, however, there is one final issue that I find necessary to address.

[79] In the light of the nature of the issues raised in this matter, it is opportune to recall the sentiment of this Court expressed by Langa DP in *Walker*:

> "Local government is as important a tier of public administration as any. It has to continue functioning for the common good; it, however, cannot do so efficiently and effectively if every person who has a grievance about the conduct of a public official or a governmental structure were to take the law into his or her own hands or resort to self-help by withholding payment for services rendered. That conduct carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution implies also the exercise of responsibility towards the systems and structures of society. A culture of self-help in which people refuse to pay for services they have received is not acceptable. It is pre-eminently for the courts to grant appropriate relief against any public official, institution or government when there are grievances. It is not for the disgruntled individual to decide what the appropriate relief should be and to combine with others or take it upon himself or herself to punish the government structure by withholding payment which is due."[52]

[80] Effective cooperation between citizens and government at local level is a foundational building block of our democracy. The State must of course uphold the rule of law and ensure its obligations are discharged. But, at the same time the culture of non-payment for municipal services has, as this Court has said before, "no place in a

[52] *Walker* above n 11 at para 93.

constitutional State in which the rights of all persons are guaranteed and all have access to the courts to protect their rights."[53]

Order

[81] In the result, the following order is made:

1. Condonation is granted.
2. The applicants are ordered to pay the costs of both condonation applications.
3. Leave to appeal is granted.
4. The appeal is dismissed.
5. There is no order as to costs in the appeal.

JAFTA J:

[82] I have read the judgments prepared by Mhlantla AJ (the main judgment) and Khampepe J. I agree that leave to appeal and condonation should be granted. However, I disagree with the main judgment that the appeal should be dismissed. The difference between us lies in the construction of the word "enacted" used in section 179(2) of the Finance Act and the interpretation of section 88 read with section 95 of the Rates Act.

[53] Id at para 92. See also *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 11, where this Court stated that "[n]o one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails".

[83] The main judgment construes section 88 of the Rates Act as preserving and extending the operation of section 10G of the Transition Act to 2 July 2011. I read the Rates Act differently and conclude that the remnants of section 10G were repealed before the Rates Act came into force.

[84] The main judgment interprets the word "enact" in section 179(2) of the Finance Act to mean the date on which the Rates Act came into force. Proceeding from this premise, the main judgment holds that the phrase "repealed by this Act" in section 88 of the Rates Act must be accorded a broader construction which includes "repealed by the coming into effect of this Act".[54] I am unable to agree. In the first place, there is no link, in my view, between section 88 of the Rates Act and section 10G of the Transition Act. As illustrated in this judgment, section 10G was repealed a year before the Rates Act came into operation.

[85] As to the meaning of "enacted", I demonstrate in this judgment that this word has been read and understood by this Court to mean the signing of a Bill into law by the President. Therefore, the date on which a statute is enacted is the date on which the Bill is assented to and signed into law by the President. It is not, in my view, the date on which the statute comes into effect. Having given this summary, it is now convenient to

[54] Main judgment at [38] above.

set out in detail my reasons for reaching a conclusion different to the one arrived at in the main judgment.

Litigation background

[86] The Municipality instituted these proceedings in the High Court for an order declaring that the rural levies it imposed on properties falling within its area of jurisdiction for the financial years 2001/2002 and 2002/2003 were lawful and valid. The properties in respect of which the levies were imposed belong to the applicants (landowners). In addition, the Municipality sought an order declaring that the rates imposed in respect of the same properties for the financial years commencing in July 2003 to June 2009 were lawful and valid. A financial year of a municipality starts on 1 July of each year and ends on 30 June of the following year.

[87] The landowners opposed the application on various grounds, including legality and non-compliance with procedural requirements of a number of statutes. But before the hearing in the High Court, the landowners conceded that rates for the 2003/2004 financial year were lawfully imposed. For its part, the Municipality conceded that levies for the 2001/2002 financial year were not lawfully imposed. This meant that there was no longer a *lis* between the parties in respect of these financial years.

[88] The "levies" for the financial year 2002/2003 were still in dispute. As were the rates for the years 2004/2005, 2005/2006, 2006/2007, 2007/2008 and 2008/2009. The

High Court found that the levies for the 2001/2002 financial year and the rates for the 2002/2003 financial year were not lawfully imposed. This finding was reached despite the fact that the Municipality had conceded unlawfulness in respect of the 2001/2002 financial year. The High Court found that the rates for the 2004/2005 and 2005/2006 years were lawfully imposed and ordered the landowners to pay them. In respect of the years 2006/2007, 2007/2008 and 2008/2009, the High Court held that the rates were not lawfully imposed because statutory requirements were not followed in imposing them.[55]

[89] The High Court granted parties on both sides leave to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed the appeal by the landowners and upheld the cross-appeal by the Municipality. The Supreme Court of Appeal declared that the rates for 2002/2003 and the other financial years were lawfully imposed and ordered the landowners to pay them.

[90] In this Court the landowners seek leave to appeal against the order of the Supreme Court of Appeal. There can be no doubt that the matter raises constitutional issues. It involves the exercise of public power, and legality was raised as a defence against the exercise of such power. The interests of justice also favour the granting of leave because there are prospects of success.

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[55] *Berg River Municipality v Liebenberg NO and Others* [2011] ZAWCHC 371 (High Court Judgment).

Issues

[91] The first issue for determination is the question of legality. I consider this to be the main issue because, on my construction, it covers five of the seven financial years in dispute. These are the 2004/2005, 2005/2006, 2006/2007, 2007/2008 and 2008/2009 financial years. The issue is whether the Municipality was empowered by section 10G(7) to impose the impugned rates. The second issue is whether the rates imposed for the 2002/2003 financial year were invalid because they were not authorised by legislation.

Legality

[92] At the outset it is important to define the content of the legality point raised. The landowners' argument is not that the Municipality had no authority to impose the rates in question. Indeed in respect of the period after 2 July 2005, the Rates Act authorised municipalities to impose rates on rural immovable property. Rather the question is whether the impugned rates were unlawful because the provision on which the Municipality relied for imposing them was no longer in force. In other words, whether the authority for imposing the rates in question existed elsewhere, other than in the provision relied on. It is common cause that the Municipality relied on section 10G(7) as the source of its authority to impose rates for the entire period. Therefore, the issue is whether section 10G(7) was in force at the relevant time.

[93] Before addressing the question, it is useful to make one observation. In our law, administrative functions performed in terms of incorrect provisions are invalid, even if

the functionary is empowered to perform the function concerned by another provision.[56] In accordance with this principle, where a functionary deliberately chooses a provision in terms of which it performs an administrative function but it turns out that the chosen provision does not provide authority, the function cannot be saved from invalidity by the existence of authority in a different provision.

[94] This general rule admits of only one exception. This is where it is clear from the facts that the functionary had elected to rely on the correct provision but mistakenly referred to an incorrect provision.[57]

[95] The general principle was affirmed by this Court in *Minister of Education v Harris*.[58] In issuing a notice preventing children from commencing schooling before the year in which they turned seven, the Minister of Education invoked a provision which did not empower him to issue the notice. Having realised the error, the Minister sought to rely on the right provision. This Court rejected the argument that the reliance on the wrong provision was immaterial because the power was conferred on the Minister by another provision. The Court held that the notice was invalid because the provision in terms of which it was issued did not empower the Minister to issue the notice.

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[56] *Administrateur, Transvaal v Quid Pro Quo Eiendomsmaatskappy (Edms.) Bpk.* 1977 (4) SA 829 (A) at 841.

[57] *Howick District Landowners Association v uMngeni Municipality* 2007 (1) SA 206 (SCA) and *Latib v Administrator, Transvaal* 1969 (3) SA 186 (T).

[58] [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC).

[96] As mentioned earlier, in this case the Municipality deliberately relied on section 10G(7) as authority for imposing the rates. This is the footing on which the case was pursued in the High Court and the Supreme Court of Appeal. If it turns out that section 10G(7) was no longer in force, it follows that the imposition of the rates must be invalid. The reason being that it was not authorised and consequently amounted to a breach of the principle of legality.

Relying on section 10G

[97] The landowners argued in the other courts and in this Court, that section 10G(7) was repealed on 2 July 2005 when the Rates Act came into operation. They submitted that the rates imposed after that date were invalid because the provision on which the Municipality relied was no longer in force. As appears below the submission is not accurate insofar as it refers to the date on which section 10G(7) was repealed. That section was repealed on the date on which the Rates Act was enacted.

[98] Relying on section 89 of the Rates Act, the Supreme Court of Appeal rejected the argument advanced by the landowners. It held that the construction that says section 10G(7) ceased to operate when the Rates Act came into force fails to give meaning to section 89 of the Rates Act. The Court said:

> "That interpretation fails, in my view, to give meaning to section 89: that section specifically states that a municipality may, until it prepares a valuation roll in terms of the Rates Act, continue to use a valuation roll in force before the commencement of the Act,

and to levy rates against property values as shown on that roll. The clear implication of this is that the Municipality could continue to levy rates in terms of section 10G(7) of the Transition Act and to use the valuation roll prepared pursuant to that section. The rating provisions of the Transition Act were thus in force until 2 July 2005: and the Transition Act was designed for the very purpose of bridging the period between the operation of the provincial ordinances and the enactment of the legislation envisaged in the Constitution. Moreover, section 10G was introduced to ensure that municipalities conducted their affairs in an effective fashion, using the rating provisions to ensure their financial resources, and to meet their developmental obligations. It would be most odd if its provisions fell away in 2005 whereas those of the Ordinances remained in place. It would be particularly odd as its effect would be to remove the legislation introduced in part to enable rating of rural properties that had fallen outside the rating ordinances, thereby once more excluding those properties from rating. There is nothing to indicate that it had been decided to exclude rural properties from rating and that this was the purpose of this provision."[59]

[99] My first difficulty with the statement by the Supreme Court of Appeal is that the Court read section 89 of the Rates Act[60] as authorising the levying of rates when this is not the position. The heading of section 89 makes it plain that the section is concerned with a transitional arrangement relating to the continued use of existing valuation rolls

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[59] Supreme Court of Appeal judgment above n 1 at para 18.

[60] Section 89 of the Rates Act provides:

> "(1) Until it prepares a valuation roll in terms of this Act, a municipality may—
>
> (a) continue to use a valuation roll and supplementary valuation roll that was in force in its area before the commencement of this Act; and
>
> (b) levy rates against property values as shown on that roll or supplementary roll.
>
> (2) If a municipality uses valuation rolls and supplementary valuation rolls in terms of subsection (1) that were prepared by different predecessor municipalities, the municipality may impose different rates based on the different rolls, so that the amount payable on similarly situated properties is more or less similar.
>
> (3) The operation of this section lapses six years from the date of commencement of this Act, and from that date any valuation roll or supplementary valuation roll that was in force before the commencement of this Act may not be used."

and supplementary valuation rolls. The section authorised municipalities to use existing valuation rolls until one of two events occurred. The one event was until a valuation roll is prepared in terms of the Rates Act and the other was until section 89 lapsed, which occurred on 2 July 2011.

[100] The words "levy rates against property values as shown on that roll or supplementary roll" must be read in the context of the section. That context is the use of existing valuation rolls. Read in this context those words did not empower municipalities to levy rates but indicated the restricted use to which the existing rolls could be put. They could be used for levying rates only and nothing else. It will be recalled that rates may be imposed only on immovable property reflected on a valuation roll. And for a valuation roll to be used in terms of section 89, it must have been in force immediately before the commencement of the Rates Act.

[101] Section 88 is the provision that permitted the continued use of legislation which applied before the Rates Act came into force.[61] I return to this section when dealing with differences between this judgment and the main judgment.

[102] The second difficulty I have with the passage quoted above from the judgment of the Supreme Court of Appeal is that it holds that the Transition Act was "designed for the very purpose of bridging the period between the operation of the provincial ordinances

[61] Section 88(1) is quoted in [106] below.

and the enactment of the legislation envisaged in the Constitution."[62] This is inaccurate and section 179 of the Finance Act illustrates this point. In terms of that section, the Transition Act was repealed but the provincial ordinances were left intact. These ordinances were repealed a year later by the Rates Act.

[103] The Supreme Court of Appeal found it odd that section 10G would have ceased to operate in 2005 whereas the ordinances were kept in operation by the transitional provisions of the Rates Act. Proceeding from this premise the Court said:

> "To hold thus that the Ordinances were operative before 2 July 2005, and were repealed on that date by the coming into operation of the Rates Act, but that their operation continued because of the transitional provisions, whereas section 10G was not covered by the transitional provisions, does give rise to an absurdity. In my view, the transitional provisions of both the Finance Act and the Rates Act clearly kept the empowering provisions of section 10G alive until the period referred to in section 89(3) had expired. Throughout the period in issue, therefore, section 10G(7) empowered the Municipality to impose rates. However, when the Finance Act came into operation it determined the procedures to be followed in the municipal budgetary process including rating."[63]

[104] The finding by the Supreme Court of Appeal in this passage, to the effect that section 10G(7) empowered municipalities to levy rates throughout the period in issue, contradicts the Court's earlier finding. As mentioned before, the Court held that section 89 of the Rates Act empowered municipalities to charge rates. I do not share the absurdity noted by the Supreme Court of Appeal in the construction of the transitional

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[62] Supreme Court of Appeal judgment above n 1 at para 18.

[63] Id at para 19.

provisions of the Rates Act that says the ordinances remain in force in circumstances where section 10G(7) is no longer in operation. As is apparent below, section 10G(7) was repealed a year before the Rates Act came into force. Therefore, its operation could not be extended by the Rates Act, no matter how absurd this may be perceived to be. Accordingly I find that none of the bases on which the Supreme Court of Appeal relied, for holding that section 10G(7) applied for the entire period, is valid.

[105] The main judgment holds that section 88 must be interpreted to mean that section 10G(7) continued to apply after the Rates Act had come into force. I have two difficulties with this interpretation. The first is that section 88 extends the operation of legislation repealed by the Rates Act only. An inquiry into whether the Rates Act repealed section 10G(7) reveals that it did not. The second difficulty is that when the Rates Act came into operation, section 10G(7) was no longer in force. I elaborate on each of these below.

Did section 88 of the Rates Act keep section 10G(7) in operation?

[106] The answer to this question lies in the interpretation of section 88(1) read with section 95 of and the Schedule to the Rates Act.[64] Section 88(1) provides:

[64] Section 95 provides:

> "The legislation specified in the Schedule is—
>
> (a) amended to the extent indicated in the third column of the Schedule; and
>
> (b) repealed to the extent indicated in the third column of the Schedule."

> "Municipal valuations and property rating conducted before the commencement of this Act by a municipality in an area in terms of legislation repealed by this Act, may, despite such repeal, continue to be conducted in terms of that legislation until the date on which the valuation roll covering that area prepared in terms of this Act takes effect in terms of section 32(1)."

[107] The plain reading of this section shows that it retains the use of previous legislation in the valuation of property and also in imposing rates. The section states that municipal valuations may continue to be conducted in terms of the previous legislation. It adds that the rating of property may continue to be conducted in terms of such legislation subject to two conditions. The first condition is that the legislation must have been used to conduct the valuations and rating before the commencement of the Rates Act. The second condition is that the legislation in question must have been repealed by the Rates Act.

[108] Both conditions must be met before section 88(1) may be invoked. This is so because the section merely preserves the use of legislation that was applied before the Rates Act came into operation, provided that such legislation was repealed by the Rates Act. In other words the two conditions are jurisdictional facts which must be present before section 88 can be applied. In this case, the Municipality has not established that it had previously used section 10G(7) to valuate and charge rates on rural immovable property. It was certainly its first attempt to impose rates on the properties which is the subject matter of these proceedings. Initially and for the first two financial years (2001/2002 and 2002/2003), the Municipality imposed levies on the properties in

question and not rates. Yet, section 88 specifically retains the charging of rates under the previous legislation. However, the High Court found that the impost for 2002/2003 constituted a rate and not a levy.

[109] Section 229 of the Constitution[65] distinguishes rates from other levies. In its ordinary meaning the word rates does not include levies.[66] Therefore, the use of

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[65] Section 229 of the Constitution reads:

"(1) Subject to subsections (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 authorised by national legislation, other taxes, levies and duties appropriate to local government 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.

(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.

(3) When two municipalities have the same fiscal powers and functions with regard to the same area, an appropriate division of those powers and functions must be made in terms of national legislation. The division may be made only after taking into account at least the following criteria:

(a) The need to comply with sound principles of taxation.

(b) The powers and functions performed by each municipality.

(c) The fiscal capacity of each municipality.

(d) The effectiveness and efficiency of raising taxes, levies and duties.

(e) Equity.

(4) Nothing in this section precludes the sharing of revenue raised in terms of this section between municipalities that have fiscal power and functions in the same area.

(5) National legislation envisaged in this section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered."

[66] *Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another* 2003 (2) SA 344 (SCA).

section 10G(7) in charging a levy for the first financial year cannot be taken as proof of the use of the section for purposes of imposing rates before the Rates Act came into operation.

[110] Even if the first requirement were established, the Municipality would still be required to show that section 10G(7) was repealed by the Rates Act. To determine this issue, regard must be had to section 95 of the Rates Act together with the relevant Schedule. Differently put, one must look within the four corners of the Rates Act when determining which legislation it repeals. Section 95 is the only provision in the Rates Act which repeals other legislation.

[111] Section 95 of the Rates Act indicates legislation it repeals by referring to the relevant Schedule where the lists of repealed legislation are contained. An examination of this Schedule reveals that section 10G(7) is not one of the pieces of legislation repealed by section 95. The Schedule does not refer to section 10G(7) at all. And since there is no other provision in the Rates Act which repeals legislation, there can be no basis for holding that the Rates Act repeals legislation that falls outside the list in the Schedule. Nor is there justification for examining other statutes for purposes of determining which legislation is repealed by the Rates Act.

[112] Accordingly, both conditions for applying section 88 of the Rates Act have not been established. This does not, however, show that the Municipality was not

empowered by section 10G(7) to impose the impugned rates. Instead, what this finding means is that section 88 cannot be invoked.

Did section 10G(7) empower the Municipality to impose the impugned rates?

[113] The answer to this question depends on the interpretation of section 179 of the Finance Act. It provides in relevant part:

> "(1) The legislation referred to in the second column of the Schedule is hereby amended or repealed to the extent indicated in the third column of the Schedule.
>
> (2) Despite the repeal of section 10G of the Local Government Transition Act, 1993 . . . by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is *enacted*." (Emphasis added.)

[114] As at the time the Finance Act came into effect in July 2004, only section 10G of the Transition Act was still in operation. Therefore, the proposition that it would be absurd to interpret the Rates Act as keeping alive the ordinances but not the Transition Act lacks merit. When the Rates Act came into operation, no provision of the Transition Act was still in force. The entire Act had been repealed.

[115] Section 179(1) of the Finance Act repeals one full statute, the Municipal Accountants Act,[67] and two single sections of other statutes. These include section 10G. However, section 179(3) delays the coming into operation of the repeal of the Municipal

[67] 21 of 1988.

Accountants Act to a date to be determined by the Minister of Finance and published in the *Government Gazette*.

[116] Similarly section 179(2) holds in abeyance the repeal of three subsections of section 10G. It lists the saved subsections as subsections (6), (6A) and (7). Section 179(2) stipulates that these subsections would remain in force until a specified event occurred. This event was the enactment of "legislation envisaged in section 229(2)(b) of the Constitution".

[117] What remains to be determined is the date on which the relevant legislation was enacted. The word "enacted" is crucial to this enquiry. But before interpreting this word in the context in which it has been used, it is necessary to point out that it is common cause that the Rates Act amounts to legislation referred to in section 179(2) of the Finance Act. Consequently, it is essential to determine the exact date on which the Rates Act was enacted.

[118] The word "enact" is commonly used in our jurisprudence with reference to the process of passing legislation. It is employed to denote the process of transforming a Bill passed by Parliament into an Act. That transformation occurs when the President assents to and signs a Bill into law. When that happens it is usually said that legislation has been

enacted. In *Khosa*,[68] this Court remarked that a Bill that was passed by Parliament and signed into law by the President constitutes "a duly enacted Act of Parliament".[69] This was stated in circumstances where the Act had not been put into operation. This Court could not have made this statement if the date of enacting was the date on which the Act came into effect.

[119] The principle that when the President assents to and signs a Bill, it becomes an enacted Act of Parliament, was later affirmed by this Court in *Doctors for Life International v Speaker of the National Assembly and Others.*[70] In that case this Court pointed out that a law is enacted when the President signs a Bill into law, but before such law comes into operation. The Court said:

> "There are three identifiable stages in the law-making process, and these are foreshadowed in the questions on which the parties were called upon to submit argument: first, the deliberative stage, when Parliament is deliberating on a Bill before passing it; second, the Presidential stage, that is, after the Bill has been passed by Parliament but while it is under consideration by the President; and third, the period after the President has signed the Bill into law but before the enacted law comes into force."[71]

[120] Consistent with the decisions of this Court in *Khosa* and *Doctors for Life*, the Supreme Court of Appeal in *Howick District Landowners Association* held:

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[68] *Khosa and Others v Minister of Social Development and Others, Mahlahule and Others v Minister of Social Development and Others* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (*Khosa*).

[69] Id at paras 90-2.

[70] [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

[71] Id at para 40.

"In 2004 Parliament enacted the final piece of legislation in the set of statutes that gave effect to local government reform, the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act). The Constitution gave Parliament power to regulate by statute a municipality's constitutional authority to impose property rates. It was common cause that the Rates Act is such legislation. The statute was assented to on 11 May 2004 and was brought into operation on 2 July 2005. It makes express provision for a category of 'newly rateable properties', on which rates were not levied before. It requires that rates on these properties must be phased in over three financial years (section 21(1)(a)) and provides for rebates for *bona fide* farmers on agricultural properties (section 15(2)(f)). The statute also regulates the transition between its commencement (with repeal of the relevant provisions of the Ordinance) and the eventual implementation of the rating system it embodies (section 88*ff*)."[72] (Footnotes omitted.)

[121] Since the Rates Act was assented to and signed by the President on 11 May 2004, it follows that the Rates Act was enacted on that day. This means that section 10G(7) was repealed with effect from 11 May 2004. This was more than a year before the Rates Act came into force. As a result and as mentioned earlier, the Rates Act cannot be construed as repealing section 10G(7) because the section was no longer in operation when the Rates Act came into force. This is the reason why the relevant part of the Rates Act does not even mention section 10G when listing legislation repealed by it.

[122] Accordingly, the repealed section 10G(7) did not empower the Municipality to charge rates for the financial years commencing in July 2004 to June 2009. This covers

[72] *Howick District Landowners Association* above n 57 at para 5.

five financial years. Since the Municipality relied solely on section 10G(7) in imposing the impugned rates, the declarations it sought for those five financial years must fail.

[123] During argument, it was submitted that the legality ground did not cover the 2004/2005 and 2005/2006 financial years, on the assumption that the Rates Act was enacted on 2 July 2005, when it came into effect. The assumption was based on two mistaken premises. The first is that the Rates Act was enacted in July 2005. It was in fact enacted in May 2004. The second is that when the Municipality took the resolution to charge the impugned rates, section 10G(7) was still in force. It was not. But even if it was in operation when the notice in respect of the 2004/2005 financial year was issued, its repeal with effect from 11 May 2004 would have been fatal to the exercise of the power it conferred, if done after that date or implementing a decision taken on its authority after the date in question. A functionary cannot extend the operation of a statutory provision by taking the necessary decision whilst it is in force, for the decision to take effect after the provision has been repealed. Once repealed, a provision cannot be invoked as authority unless there is a transitional provision preserving its continued operation.

Validity of rates for 2002/2003

[124] The resolution in terms of which the rates for the 2002/2003 financial year were imposed, was challenged on, among others, the ground that section 10G(7)(b)(ii) did not authorise the levying of rates. It was contended that the section dealt with amendment or

withdrawal of levies and other charges. In essence the challenge was, because the Municipality had described this impost as a levy and had originally attempted to impose it in terms of section 10G(7)(b)(ii), it could not amend it into a rate, following objections that it was not a levy but a rate. The Supreme Court of Appeal rejected the challenge for the reason that the landowners could not raise an objection that it was not a levy but in truth a rate and, when it was replaced with a rate, they argue that it should have been amended as a levy.

[125] I am not persuaded that the challenge was wrongly rejected by the Supreme Court of Appeal. But that is not the end of the matter because the applicants challenged the validity of the rates of the relevant year on a further ground. They contended that when imposing the amended rates, the Municipality failed to comply with statutory provisions requiring the facilitation of public participation in processes such as the imposition of rates. Therefore the Supreme Court of Appeal was mistaken in holding that the landowners raised a single ground in challenging the validity of these rates. In its judgment the High Court correctly pointed out that the present challenge was based on a number of grounds, including the failure to give proper notice of the amending resolutions taken by the Municipal Council on 29 July 2002 and 26 May 2003.

[126] In upholding the applicants' contention, the High Court said:

> "The respondents challenged the legality of the council's impost in respect of the 2002/3 budget year on a number of grounds. In view of the conclusion that I have reached it is only necessary to treat with one of them; *viz.* the municipality's failure to publish a notice of its determination made on 29 July 2002 in the context of its reconsideration of the size related sliding scale impost, as required in terms of section 10G(7)(d)(ii) of the [Transition Act]."[73]

[127] I agree with this finding. In passing a resolution that imposes rates, a municipal council does not perform an administrative function but a legislative one.[74] Facilitation of public participation is fundamental to a legislative process in all spheres of government. In respect of the national and provincial legislatures, this requirement is entrenched in the Constitution.[75] In respect of local government, section 152 of the Constitution requires municipalities to "encourage the involvement of communities and community organisations in the matters of local government."[76]

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[73] High Court judgment above n 55 at para 26.

[74] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC).

[75] See sections 59 and 118 of the Constitution.

[76] Section 152 of the Constitution provides:

> "(1) The 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 organisations in the matters of local government.
>
> (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

[128] The constitutional obligation to facilitate public participation is given effect to in a number of related statutes. First, the Local Government: Municipal Systems Act[77] (Systems Act) prescribes the manner in which a municipality must communicate with the local community. Whenever a municipality is required to notify the local community of something, section 21 of the Systems Act proclaims that it must be done—

> "(a) in the local newspaper or newspapers of its area;
> (b) in a newspaper or newspapers circulating in its area and determined by the council as a newspaper of record; or
> (c) by means of radio broadcasts covering the area of the municipality."

[129] In addition, the section requires notification in official languages determined by the municipality in accordance with language preferences and usages within the area.[78] More importantly, the invitation for the local community to submit representations or written comments must state that those who cannot write may come to the offices of the Municipality where a staff member named in the invitation will assist in reducing their representations to writing.[79] This makes it clear that a municipality must facilitate participation of even disadvantaged members of the local community.

[77] 32 of 2000.

[78] Id section 21(2).

[79] Id section 21(4).

[130] Section 10G(7), in terms of which the Municipality passed the relevant resolutions, obliged its chief executive officer to display the notice at a designated spot in the offices of the Municipality. The notice was required to state—

> "(i) the general purport of the resolution;
> (ii) the date on which the determination or amendment shall come into operation;
> (iii) the date on which the notice is first displayed; and
> (iv) that any person who desires to object to such determination or amendment shall do so in writing within 14 days after the date on which the notice is first displayed."[80]

[131] The primary purpose of this notice was to facilitate participation of the local community in the process of imposing rates. This was consistent with the constitutional obligation to involve the local community in the affairs of the Municipality. Notably, since the process of imposing rates constitutes a legislative process, a failure to comply with the relevant statutory requirements was fatal to the validity of the rates imposed because the relevant provisions were obligatory.

[132] Moreover, the failure to make the requisite invitation did not only breach the relevant provisions but it also violated the Municipality's constitutional obligation to facilitate public participation in this legislative process. The importance of public participation in a democratic system such as ours which places a premium on the

[80] Section 10G(7)(a) of the Transition Act.

principle of participatory democracy was underscored by this Court in *Doctors for Life*. There the Court said:

> "Therefore our democracy includes, as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent, and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy."[81]

[133] Recently in *South African Property Owners Association v Johannesburg Metropolitan Municipality and Others*[82] the Supreme Court of Appeal held that the imposition of rates in circumstances similar to the present was invalid for failure to comply with the public participation requirement. The Court further declared that in the future the Johannesburg Metropolitan Municipality must comply with the relevant provisions when it amends a proposed budget after it has been advertised for public comment. In that case the dispute was about the amendment of the rates imposed without complying with the provisions requiring facilitation of public participation. The original rates imposed and which were advertised for public comment contained a 10% increase. But when the Municipality realised that there was going to be a shortfall in revenue collection, it amended the rates and imposed an additional increase of 18% on the rates charged.

[81] Above n 70 at para 116.

[82] 2013 (1) SA 420 (SCA) (*SAPOA*).

[134] The judgment of the Supreme Court of Appeal in *SAPOA* is at variance with its judgment in the present case. Here, although the Supreme Court of Appeal did not deal with the relevant attack because it mistakenly held that only one ground was raised, that Court nonetheless upheld the substantial compliance principle in respect of a similar challenge. But it must be emphasised that the challenge in question related to the inadequacy of the notice issued. Had the Supreme Court of Appeal in the present case considered the failure to issue notices in respect of the amending resolutions of 29 July 2002 and 26 May 2003, it probably would have declared the 2002/2003 rates invalid. I say this because the author of the Supreme Court of Appeal judgment in the present matter was part of the panel which held in *SAPOA* that the failure to give notice, for public comment, of a resolution amending rates was fatal to the rates imposed.

[135] In the present case the landowners' complaint is that the Municipality failed to give notice of not one but two amendments of rates. The first was effected in terms of a resolution of 29 July 2002 and the second was contained in the resolution of 26 May 2003. In these circumstances I agree with the High Court that the rates imposed for the 2002/2003 financial year were ineffectual. It follows that the declarator sought by the Municipality in this regard must also fail.

[136] For these reasons, save for the imposition of rates for 2003/2004 which was not contested, I would uphold the appeal with costs.

KHAMPEPE J:

Introduction

[137] I have had the benefit of reading the judgments prepared by my sister Mhlantla AJ (main judgment) and my brother Jafta J. I agree that both leave to appeal and condonation should be granted. I share my sister Mhlantla AJ's view that the challenges to the imposts for the years 2004/2005 and 2005/2006 should fail. However, I am unable to agree with the conclusion reached in the main judgment that the appeal should be dismissed in its entirety. For the reasons he sets out, I agree with my brother Jafta J that the challenge to the imposts for 2002/2003 should succeed. Like him I also disagree with the interpretation of the various legislative provisions put forward in the main judgment regarding the date of repeal of section 10G(7) of the Transition Act. However, I disagree with the main judgment for somewhat different reasons to those of my brother Jafta J, hence this judgment. On the basis of my understanding of the date and effect of the repeal of section 10G(7), I would uphold the applicants' legality challenges in relation to the imposts for the years 2006/2007 to 2008/2009.

The statutory regime: the repeal of section 10G(7) and the coming into effect of the Rates Act

[138] For the reasons put forward by my brother Jafta J,[83] I am of the opinion that section 10G(7) – the provision that initially authorised the Municipality to impose rates on the applicants' land[84] – did not survive the coming into effect of the Rates Act. To my mind it is clear, upon consideration of section 179 of the Finance Act[85] read with the Schedule to that Act,[86] that the Finance Act repealed section 10G(7). Furthermore, section 10G(7) of the Transition Act was *not* repealed by the Rates Act – neither section 95 of the latter statute nor the Schedule thereto (which, read together, identify the

[83] At [98] – [107] and [110] – [111] above. For the reasons set out below, however, we disagree on the effective date of the repeal of section 10G(7).

[84] The relevant parts of the provision have been set out in n 19 above.

[85] Section 179 reads as follows:

> "**Repeal and amendment of legislation**
>
> (1) The legislation referred to in the second column of the Schedule is hereby amended or repealed to the extent indicated in the third column of the Schedule.
>
> (2) Despite the repeal of section 10G of the Local Government Transition Act, 1993 (Act No. 209 of 1993), by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229(2)(b) of the Constitution is enacted.
>
> (3) The repeal of the Municipal Accountants Act, 1988 (Act No. 21 of 1988), takes effect on a date determined by the Minister by notice in the *Gazette*."

[86] The Schedule appears as follows:

REPEAL AND AMENDMENT OF LEGISLATION

(Section 179)

No. and year of Act	Short title of Act	Extent of repeal or amendment
Act No. 91 of 1983	Promotion of Local Government Affairs Act, 1983	The repeal of section 17(D).
Act No. 21 of 1988	Municipal Accountants Act, 1988	The repeal of the whole.
Act No. 209 of 1993	Local Government Transition Act, 1993	The repeal of section 10G.

individual items of legislation to be repealed or amended by the Rates Act) makes any mention of section 10G(7). I therefore cannot agree with the interpretation of sections 88 and 89 of the Rates Act advanced by the Municipality and accepted in the main judgment,[87] at least to the extent that the interpretation is used to support the contention that the Rates Act repealed section 10G(7) of the Transition Act.

[139] This notwithstanding, I disagree with my brother Jafta J that section 10G(7) of the Transition Act was repealed with effect from 11 May 2004. He reaches that conclusion because section 179(2) of the Finance Act states that section 10G(7) would remain in force until the enactment of the Rates Act, and the Rates Act was assented to and signed by the President (and therefore enacted) on 11 May 2004.[88] While Jafta J's exposition on the meaning of the word "enact" is correct, in my view that is not the only relevant consideration for present purposes.

[140] Section 180 of the Finance Act empowers the Minister of Finance to determine the date on which the provisions of the Finance Act will take effect, and allows for the possibility of different provisions of that Act having different effective dates.[89] Pursuant

[87] At [43] – [51] above.

[88] At [113] – [121] above.

[89] Section 180 of the Finance Act reads as follows:

> "**Short title and commencement**
>
> (1) This Act is called the Local Government: Municipal Finance Management Act, 2003, and takes effect on a date determined by the Minister by notice in the *Gazette*.
>
> (2) Different dates may in terms of subsection (1) be determined for different provisions of the Act."

to a notice published in the *Government Gazette*,[90] the Minister of Finance duly exercised his power under section 180 and determined that section 179 of the Finance Act would take effect on 1 July 2005. Because section 179 of the Finance Act only became effective law on 1 July 2005, and because that section is the statutory provision that repealed section 10G(7), I am of the opinion that the repeal of section 10G(7) only took effect on 1 July 2005. Indeed there would have been no reason for suspending the coming into effect of section 179 of the Finance Act other than to delay the repeal of section 10G(7) (and the other legislation referred to in the Schedule) until an appropriate date as determined by the Minister. Thus in *Howick District Landowners Association v uMngeni Municipality and Others*[91] Cameron JA held as follows:

> "The landowners' main argument was based on s 179 of the [Finance Act]. This repealed s 10G of the [Transition Act], but provided that that section's principal provisions would remain in force 'until the legislation envisaged in s 229(2)(b) of the Constitution is enacted'. . . . [T]he landowners contended that the legislation in question (the Rates Act) was 'enacted' in terms of s 179 as soon as it received assent and was published on 11 May 2004 – and not only on the date it was brought into operation on 2 July 2005: with the result that when the council met in December 2004, s 10G had already been repealed. . . . [T]he argument proceeded from the mistaken premise that s 179 was in operation when the council met in December 2004. This was not so. Most of the provisions of the [Finance Act] were brought into operation on 1 July 2004, but the repealing provision took effect only on 1 July 2005. So, when the council passed the resolutions now contested, s 10G was still in force."[92] (Emphasis added; footnotes omitted.)

[90] GN 772 published in *Government Gazette* 26510 of 25 June 2004.

[91] 2007 (1) SA 206 (SCA).

[92] Id at paras 9-10.

[141] I do not think that the purpose of the Finance Act was to impose the repeal envisaged in section 179 with retroactive effect. No rational or legitimate purpose would be served by – and only undesirable consequences would flow from – retroactively invalidating municipalities' conduct in imposing rates and levies over the 13-month period between the date of enactment of the Rates Act and the date on which section 179 came into force. This conclusion regarding the date of repeal accords with the "strong presumption" in our law that new legislation is not meant to "[invalidate] what was previously valid".[93]

[142] Accordingly, in my view, the Municipality was authorised by the Transition Act to impose rates and levies until 30 June 2005.[94] This authorisation was, of course, supplementary to the Municipality's original power, granted by the Constitution, to levy rates on land within its area of jurisdiction.[95]

[143] The President assented to the Rates Act on 11 May 2004. Following a notice published in the *Government Gazette*,[96] the whole of the Act took effect on 2 July 2005.

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[93] *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 65.

[94] As set out in [140] above, section 179 of the Finance Act came into force on 1 July 2005. In terms of section 13(2) of the Interpretation Act 33 of 1957, this means that the repeal of section 10G(7), as contained in section 179, occurred "immediately on the expiration of" 30 June 2005.

[95] Section 229(1)(a) of the Constitution provides that "a municipality may impose rates on property". As is evident from a reading of the remaining provisions of section 229, the exercise of this rating power is not dependent on the enactment of further legislation by Parliament – it is an original power vested in municipalities by the Constitution. However, in terms of section 229(2)(b), should Parliament elect to regulate the exercise of that power (as it subsequently did in the form of the Rates Act), municipalities would be obliged to comply with the resultant legislation when levying rates (as they subsequently were).

[96] Proclamation R. 28 published in *Government Gazette* 27720 of 29 June 2005.

From that date onwards the exercise by any municipality of its rate-levying powers under section 229 of the Constitution had to be discharged pursuant to the requirements of the Rates Act, including those set out in section 14:

> "**Promulgation of resolutions levying rates**
>
> (1) A rate is levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.
>
> (2) A resolution levying rates in a municipality must be promulgated by publishing the resolution in the *Provincial Gazette*.
>
> (3) Whenever a municipality passes a resolution in terms of subsection (1), the municipal manager must, without delay—
>
> (a) conspicuously display the resolution for a period of at least 30 days—
>
> (i) at the municipality's head and satellite offices and libraries; and
>
> (ii) if the municipality has an official website or a website available to it as envisaged in section 21B of the Municipal Systems Act, on that website; and
>
> (b) advertise in the media a notice stating that—
>
> (i) a resolution levying a rate on property has been passed by the council; and
>
> (ii) the resolution is available at the municipality's head and satellite offices and libraries for public inspection during office hours and, if the municipality has an official website or a website available to it, that the resolution is also available on that website."

[144] Thus, from 2 July 2005 onwards, in order for the Municipality to impose rates validly, it had to (a) do so pursuant to a resolution passed by a majority of the members of the Municipal Council; (b) promulgate the resolution by publication in the *Provincial*

Gazette; and (c) undertake the public information and advertising process stipulated in section 14(3).[97]

Did the Municipality comply with its obligations in terms of section 14(2) of the Rates Act for the years 2006/2007 to 2008/2009?

[145] It was not contended that the Municipality promulgated rates resolutions for the years 2006/2007, 2007/2008 and 2008/2009 in the *Provincial Gazette*. Put differently, it was not argued that the Municipality complied with the letter of section 14(2) of the Rates Act.

[146] Nevertheless, with regard to the 2006/2007 year, the Municipality contended that it substantially complied with section 14(2) because: (a) it published a notice in a local newspaper regarding its draft budget in April 2006, which budget presumably included some information regarding the proposed rates for the forthcoming year; (b) it undertook a public participation process regarding the draft budget, including inviting comments from the public and holding public meetings; and (c) in June 2006 it published a second notice in the same local newspaper regarding the rates for the forthcoming year. The Municipality contended that because it had complied substantially with the prescripts of section 14(2) of the Rates Act, the relevant statutory objects had been achieved and therefore the impugned imposts were validly imposed. The Municipality reiterated this

[97] It should be noted that between the repeal of section 10G(7) and the coming into effect of the Rates Act (that is to say, on 1 July 2005) the Municipality retained its constitutional power to levy rates from residents in its area of jurisdiction, pursuant to section 229(1)(a) of the Constitution. See n 95 above.

argument in relation to the years 2007/2008 and 2008/2009, as in those years it also undertook an advertising and participation campaign similar to the one just described. For the reasons set out below I am of the opinion that the substantial compliance argument proffered by the Municipality must fail.

The promulgation of laws

[147] The Constitution empowers municipalities to exercise original legislative powers, including the power of taxation. As explained in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*:[98]

> "Under the interim Constitution (and the 1996 Constitution) a local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself. . . . The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates. . . . It seems plain that when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates . . . it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies. It is a power that is exercised by democratically elected representatives after due deliberation."[99]

[98] [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*), per Chaskalson P, Goldstone J and O'Regan J.

[99] Id at paras 26, 38 and 45.

[148] The power of a municipality to impose rates is an exercise of an original legislative power. Legislative acts depend for their legal efficacy on due promulgation. This is an incident of the rule of law that has long been part of South African jurisprudence, as illustrated by the review of a few relevant cases in which I shall now engage.

[149] In *Ismail Amod v Pietersburg Municipality*[100] the Transvaal Supreme Court was faced with an appellant who had been found guilty of contravening certain provisions of a municipal by-law. The appellant challenged his conviction on the basis that the relevant by-law, although it had gone through a public-notification process and had been assented to by the Lieutenant-Governor, was not effective law as it had not been duly promulgated by publication in the *Gazette*. Innes CJ noted that the by-laws under consideration were intended to regulate an important aspect of public life, but was constrained to uphold the appeal. He thus held that, after there had been a proper public-notification process and the Lieutenant-Governor had approved the relevant by-laws—

> "[the] due publication or promulgation [of the by-laws] is necessary before they can have the force of law. Even if the statute had contained no such provision, the common law would have required some publication of such bye-laws. By the Roman-Dutch law, as indeed by any civilised system of jurisprudence, a law before it can take effect requires to be promulgated. The expression of the will of the legislative authority does not acquire the force of law unless and until it has been promulgated in due form for the information of those whom it is to affect. . . . In my opinion there has been no due promulgation of these bye-laws, and on that ground the appeal must be allowed. I regret to have to come

[100] 1904 TS 321 (*Amod*).

> to this conclusion, because the appellant has contravened a very useful provision for the protection of the public health. But proper steps were not taken to legalise that provision, and the Court has therefore no option in the matter. This decision may have wide results, for apparently the same procedure has been followed in a great many other cases. But that is a thing which the Court cannot remedy."[101]

[150] Some years later the position in *Amod* was restated by Innes CJ – by then Chief Justice of a territorially unified South Africa – in *R v Gluck*,[102] namely that "[a] law must be promulgated before it can come into operation. That is a principle well established in our practice and no authority is needed to support it. But it is the enacting instrument, the decree of the law-giver which needs to be promulgated."[103]

[151] In *Byers v Chinn and Another*[104] the Appellate Division had to determine whether certain resolutions and regulations adopted by a Village Management Board under a particular statute needed to be promulgated in order to be effective. The following principles were enunciated by the Court. First, any law, regulation or by-law intended to have the force of law must generally be promulgated, and this promulgation should occur by way of publication in the *Government Gazette*.[105] Second, it is usually "not enough that an individual may have knowledge in some other way of the alleged law, regulations

[101] Id at 323-6.

[102] 1923 AD 149.

[103] Id at 151.

[104] 1928 AD 322.

[105] Id at 327-9.

or order . . . there must be promulgation".[106] Third, there are two exceptions to the promulgation requirement: (i) where the statute provides for an alternative to publication in the *Government Gazette* and (ii) where the instrument concerned is "not a 'law' within the meaning of the rule requiring promulgation of a law."[107] The Court held that promulgation via publication in the *Gazette* was not required in the circumstances of that case because the relevant statute contemplated no publication process of the Village Management Board's decisions, because the decisions would only affect a very small number of people and because the decisions would be taken "upon the spot" in the presence of those affected.[108] In other words, the decisions could be seen as instruments falling outside the category of laws requiring promulgation.[109]

[152] In *R v Busa en Andere*[110] the Appellate Division considered the distinction between formal promulgation requirements and procedural notice-and-comment or public-participation obligations. The Court found that while requirements regarding formal promulgation (such as publication in the *Gazette*) are peremptory such that non-compliance will lead to the law in question never acquiring legal force, a requirement to ensure that the public is informed about its legal obligations may be directory and non-

[106] Id at 328, quoting Kotze J in *R v Koenig* 1917 CPD 235.

[107] Id at 328 and 330.

[108] Id at 328.

[109] Id at 330.

[110] 1959 (3) SA 385 (A) (*Busa*).

compliance therewith may not affect the legal efficacy of the statute under consideration.[111]

[153] From the above, the position at common law is clear: statutory laws – whether they be Acts of Parliament or municipal by-laws – must be duly promulgated in order to have legal force, and this promulgation occurs by way of publication in the relevant *Gazette*. Of course, Parliament may allow for alternative forms of promulgation, and may impose additional publicity requirements. Courts and organs of state should, however, be wary of any approach to enacting legislation that detracts from the general principle of gazetting statutes as a prerequisite for the legal force thereof.

[154] The Interpretation Act preserves the common-law position and gives it statutory force.[112] Section 13(1) thus provides that a law has legal effect on "the day when the law was first published in the *Gazette* as a law."[113] Ordinarily, therefore, all that is required for a law to come into operation is publication in the appropriate *Gazette*.[114]

[111] Id at 389-92. See also the discussion of *Busa* in the High Court judgment at n 48.

[112] See *S v Manelis* 1965 (1) SA 748 (AD) at 752G.

[113] Section 2 of the Interpretation Act defines a "law" as "any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law". It should be noted that the Interpretation Act contains an exception to the general rule set out in section 13(1): section 16A(1) provides that, in exceptional circumstances, the President may make rules for the promulgation of laws other than by way of publication in the *Gazette*. See Du Plessis *Re-Interpretation of Statutes* (Butterworths, Durban 2002) at 67.

[114] *Manelis* above n 112 at 753G-H. As the Court noted: "The mere act of promulgation would determine the date of commencement. The common law, and sec. 13(1), by necessary implication, would take care of that."

[155] The position has not changed since the advent of the Constitution. Section 162(1) of the Constitution, for example, provides that a "municipal by-law may be enforced only after it has been published in the official gazette of the relevant province."[115] This promulgation requirement is in addition to and separate from the obligations regarding a public-comment procedure set out in section 160(4) of the Constitution.[116] The Constitution thus enshrines both the promulgation requirement and the importance of due publication with regard to the legal efficacy of legislative acts. The common-law and statutory position set out above is, in my view, wholly consistent with section 162(1) of the Constitution.[117]

[156] In *National Police Service Union and Others v Minister of Safety and Security and Others*[118] the Supreme Court of Appeal had to determine whether a certain scheme for the rationalisation of various police forces (in terms of the interim Constitution) had to be promulgated by publication in the *Government Gazette* in order to have legal force.

[115] Section 162, entitled "Publication of municipal by-laws", reads as follows:

> "(1) A municipal by-law may be enforced only after it has been published in the official gazette of the relevant province.
>
> (2) A provincial official gazette must publish a municipal by-law upon request by the municipality.
>
> (3) Municipal by-laws must be accessible to the public."

[116] Section 160(4), contained in the provision entitled "Internal procedures", states that "[n]o by-law may be passed by a Municipal Council unless all the members of the Council have been given reasonable notice; and the proposed by-law has been published for public comment."

[117] The applicants put forward no challenge regarding the Municipality's failure to promulgate the rates imposed prior to 2 July 2005. Furthermore, no challenge was raised against section 10G(7) of the Transition Act on the basis of its inconsistency with section 162(1) of the Constitution or pursuant to a more general legality attack. This judgment therefore does not deal with the Municipality's failure to promulgate rates resolutions for the years 2001/2002 to 2005/2006 (the years during which the imposition of rates by municipalities was governed by section 10G(7)).

[118] 2000 (3) SA 371 (SCA) (*NPSU*).

Smalberger JA confirmed the continued applicability under our constitutional dispensation of the common-law and statutory position set out above:

> "It is a requirement of both the common law and statute that subordinate legislation, even if it has been validly enacted, is not of binding force and effect in law until it has been promulgated. The requirement is subject to qualification".[119]

[157] The qualifications referred to are those expressed in *Byers*.[120] In *NPSU* the Supreme Court of Appeal ultimately determined that promulgation was not required in the circumstances of the case because the determination of the scheme was administrative rather than legislative in nature.[121]

[158] What the above discussion establishes is that in South Africa, as a matter of common law and statutory law, and further in terms of the Constitution, legislative enactments must be duly promulgated by publication in the relevant *Gazette* in order to have the force of law. Parliament may impose additional requirements for promulgation, and, in exceptional circumstances, an alternative form of promulgation may be used. Accordingly, close attention must be paid to the applicable statutory regime in order to determine the effects of non-compliance with obligations regarding the publication of a

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[119] Id at para 17. See also *Supreme Gaming CC v Minister of Safety and Security and Others* 2000 (3) SA 608 (SCA).

[120] See [151] above.

[121] *NPSU* above n 118 at para 20. In the alternative the Court concluded (at para 22) that promulgation was not required because the scheme conferred a benefit rather than imposed an obligation and because it affected a limited class of persons who could easily be made aware of the content of the scheme by means of a notification procedure other than publication in the *Gazette*. Thus, as was the case in *Byers*, the scheme could be seen as an instrument falling outside the category of laws requiring promulgation.

law. While there may be less stringent requirements for the effectiveness of administrative acts, the prescribed validity requirements for legislative enactments must be strictly observed.

Did the Municipality lawfully impose the rates during the years 2006/2007 to 2008/2009?

[159] The Municipality claims that it imposed the rates lawfully for the years 2006/2007 to 2008/2009 because it published notices of the relevant rates in local newspapers and therefore substantially complied with the requirements of section 14(2) of the Rates Act. Put differently, the Municipality contends that an organ of state need only substantially comply with its statutory obligations regarding the promulgation of taxes in order for the imposition of those taxes to be lawful. While I accept that the doctrine of substantial compliance as described by my sister Mhlantla AJ[122] has its place in determining the general effects of non-compliance with statutory obligations, in the circumstances of this case I cannot agree with the Municipality's defence, in the light of both the applicable statutory scheme and the relevant general principles. I shall deal with the statutory scheme first, and thereafter consider the general principles.

[160] Section 14 of the Rates Act clearly imposes, in peremptory terms, three distinct requirements for the proper promulgation of rates. Subsection (1) functions to ensure that rating decisions are democratically made by elected representatives. This gives effect to

[122] At [22] – [26] above.

section 160(2)(c) of the Constitution.[123] Subsection (2) is aimed at ensuring that the constitutive act of legality – promulgation by means of publication in the *Provincial Gazette* – is undertaken, in order to give effect to the rates resolution as a source of law for the relevant period. This reflects the general principle of our law that legislative enactments must be duly promulgated by publication in the *Gazette* in order to have the force of law. Finally, subsection (3) sets out a municipality's obligations with regard to informing the public of its rates obligations for the forthcoming year. This, of course, ensures that members of the public are not expected to comply with laws of which they might not ordinarily have knowledge.

[161] In accordance with the jurisprudence set out above, strict compliance with formal promulgation prescripts is required and "substantial compliance" can offer the Municipality no defence. There is, furthermore, no indication in the Rates Act that section 14(2) is merely directory in nature – the requirement it contains is stated in unambiguous and mandatory terms. Publication in a local newspaper was therefore insufficient to discharge the Municipality's obligation to promulgate the rates resolutions by publication in the *Provincial Gazette*.

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[123] Section 160(2) reads as follows:

> "The following functions may not be delegated by a Municipal Council:
>
> (a) The passing of by-laws;
>
> (b) the approval of budgets;
>
> (c) the imposition of rates and other taxes, levies and duties; and
>
> (d) the raising of loans."

[162] Moreover, section 14 clearly imposes discrete and peremptory obligations. Discharge of one such obligation cannot, on its own, constitute discharge of another. Whilst publication in a local newspaper may suffice to satisfy the requirements of section 14(3)(b),[124] it certainly cannot discharge the obligation set out in section 14(2). Similarly, just as notifying the public of rates for the forthcoming year could not satisfy the obligation set out in section 14(1) of the Rates Act,[125] neither could it satisfy the obligation set out in section 14(2). Holding otherwise would contravene the very clear prescripts of the Rates Act.

[163] In addition, even if one were to adopt a "substantial compliance" approach in relation to the section 14(2) obligation, the Municipality's conduct would still be found wanting. The object of that provision is not to inform the public for participation purposes, but to ensure that the rates for a particular year are formally constituted as legislative enactments. Accordingly, publication in a local newspaper would not achieve the purpose of section 14(2) because such a newspaper is not the official and authoritative record of the conduct of the State.

[164] I now turn to consider the general principles that inform my rejection of the Municipality's defence. Where the State purports to extract taxes from its citizens –

[124] As set out in [143] above, section 14(3)(b) stipulates that a duly passed rates resolution must be advertised in the media and the Municipal Manager must, in the advertisement, inform the public that a rates resolution has been passed and that it is available for inspection at specified locations.

[125] As set out in [143] above, subsection (1) prescribes that a rate-levying resolution must be "passed by the municipal council with a supporting vote of a majority of its members."

conduct which goes to the very heart of the social contract between a government and its people – that extraction must be done in a lawful manner. Where a local authority purports to impose rates, that imposition must be done in accordance with the constraints that Parliament has imposed. If we are to give cognisance to the fact that the Constitution now empowers municipalities to exercise original legislative powers, we must also accept that municipal authorities may no longer adopt an informal approach to the exercise of their powers. Similarly, it cannot be the case that municipalities are empowered to extract taxes pursuant to "laws" that they devise, when citizens are unable to find those laws anywhere in the statute books. That is wholly inconsistent with a State founded on the principle of legality. The High Court captured the point well:

> "It seems to me that the provisions of s 14(2) of the [Rates Act] were enacted acknowledging the enhanced executive and legislative status of municipal councils under the new constitutional order. Whereas a less formal approach might have historically characterised the approach to publication of municipal bylaws under the old order, its continuation finds no justification under the current constitutional framework."[126] (Footnotes omitted.)

[165] Indeed, with the principle of legality lying at the heart of our modern constitutional dispensation,[127] I fail to see how we could or should adopt a less exacting standard for the

[126] High Court judgment at para 59.

[127] See *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 68; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 148; and *Fedsure* above n 98 at paras 56-8.

legality of legislative acts than the standard observed in the Transvaal in 1904 and in the Union in 1922.

[166] In the light of the above it is my view that, because the resolutions in terms of which the Municipality purported to levy rates for the years 2006/2007, 2007/2008 and 2008/2009 were not duly promulgated by publication in the *Provincial Gazette* as required by section 14(2) of the Rates Act, those rates were unlawfully imposed and the Municipality has no entitlement thereto. I would accordingly uphold the legality challenges against the imposts for those years.

For the Applicants:	Advocate A Breitenbach SC and Advocate M Schreuder instructed by Malan Lourens Lemmer Viljoen Inc.
For the Respondent:	Advocate J Heunis SC and Advocate E Van Huyssteen instructed by De Klerk & Van Gend Inc.
For the Intervening Party:	Advocate G Budlender SC and Advocate M Bishop instructed by the State Attorney.

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