

SOUTH AFRICA / JUDGMENT

Lombardy Development (Pty) Limited and Others v City of Tshwane Metropolitan Municipality and Another (A150/22) [2024] ZAGPPHC 17; 2025 (2) SA 516 (GP) (12 January 2024)

[2024] ZAGPPHC 17

COURT

North Gauteng High Court, Pretoria

BEFORE

SJ Cowen, L M Molopa-Sethosa, R Mkhabela

CASE / FILE NUMBER

A150/22

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FLYNOTES:

MUNICIPALITY – Rates – Enforcement
of court order –
Alleged
breach of constitutional obligations – Explanation as to how
amounts now levied are calculated – Evidence
shows that
there is a bona fide dispute as to whether there has been
compliance with court order – Appellants cast
serious doubt
on whether City has complied and are unable to meaningfully engage
City on whether there has been compliance
– Appellants
established that City is yet to adhere to and take all steps
necessary to give effect to review orders
– Appropriate
remedy – Relief akin to statement and debatement of account
granted – Serves to ensure review
orders are complied with
and authority of court is vindicated – Declaratory relief
granted – Local Government: Municipal Property Rates Act 6
of 2004, s 27.
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA

(1)
REPORTABLE: Yes
(2)
OF INTEREST TO OTHER JUDGES: Yes
(3)

REVISED:

DATE
12 January 2024
SIGNATURE
Appeal
Case No: A150/22
Court
A Quo Case Number: 794621/2018
In
the matter between
LOMBARDY
DEVELOPMENT (PTY) LIMITED
First Appellant
KARIN
GELDENHUYS
Second Appellant
JOHANNES
FREDERIK GELDENHUYS
Third Appellant
CECILIA
LOOTS
Fourth
Appellant
LISA
HOPKINSON
Fifth
Appellant
LYN
CHER CALLE
Sixth
Appellant
EMILY
MATHILDA BEZUIDENHOUT
Seventh
Appellant
NICOLAAS
MATHILDA BEZUIDENHOUT
Eighth
Appellant
LIZA
HAMMAN
Ninth
Appellant
HUGH
ARUNDEL VAN DER WESTHUIZEN
Tenth

Appellant
JOHAN
SIEBERT VAN ONSELEN
Eleventh
Appellant
MARION
GRASSINI
Twelfth
Appellant
CARLOS
ARTURO GRASSINI
Thirteenth
Appellant
MARCOS
ARTURO GRASSINI
Fourteenth
Appellant
and
CITY OF TSHWANE
METROPOLITAN
MUNICIPALITY
First
Respondent
MUNICIPALITY
MANAGER OF TSHWANE
METROPOLITAN
MUNICIPALITY
Second
Respondent

Summary: Proceedings to enforce court order – retrospective

recategorisation of properties for purposes of Local Government: Municipal Property Rates Act 6 of 2004 in breach of court order – declaratory relief granted - Municipality’s failure meaningfully to engage with appellants in the face of a bona fide dispute about whether the Municipality had correctly complied with order to credit accounts, in breach of duty to adhere to and take all steps necessary to give effect to the court order – section 172(1)(b) of the Constitution – relief akin to statement and debatement of account granted.
The Appellants appealed against a decision of this Court dismissing an application to declare the respondents in breach of their obligations to adhere to and take all necessary steps to give effect to orders granted in review proceedings in 2016 and to seek relief for contempt of court. In the review proceedings, the Court set aside two

valuation rolls, a 2012 special valuation roll (SVR) and a 2013 general valuation roll (GVR) pursuant to which the first respondent recategorised the appellants' properties from residential to vacant resulting in significantly increased rates. It was common cause that the effect of the review orders was to require the respondents to credit the land-owners' accounts to reflect the residential rate for the period of the 2012 SVR. The 2013 GVR was remitted to the first respondent. On an interpretation of the review orders, the Appeal Court held that after the 2013 GVR period had lapsed it was no longer open to the first respondent to recategorise the appellants' properties as vacant. The Appeal Court considered four issues and upheld the appeal. Firstly, it held that the court a quo erred when it concluded that the application was moot when the appellants abandoned the contempt of court relief because the compliance relief still presented a live controversy. Secondly, the Appeal Court held that the court a quo had erred in concluding that the appellants had impermissibly sought to make their case out in reply. Thirdly, the Appeal Court found that the first respondent was in breach of its constitution obligations to adhere to and take all steps necessary to give effect to the review orders both in respect of the 2012 SVR period and in respect of the 2013 GVR period. In respect of the 2013 GVR period, the first respondent had retrospectively recategorised the appellants' properties as vacant after the institution of proceedings in breach of the review orders by enacting a new extraordinary valuation roll (EVR). In respect of the 2012 SVR period, the first respondent had failed meaningfully to engage with the appellants in the face of a bona fide dispute about whether the City had complied with the review orders and had thereby failed to all steps necessary to give effect thereto. The fourth issue concerned what relief should be granted pursuant to section 172(1)(b) of the Constitution. The court granted declaratory relief in respect of the 2013 GVR period in circumstances, inter alia where there are pending review proceedings impugning the EVR. In respect of the 2012 SVR period, it granted relief akin to an order for a statement and

debatement of account.

ORDER

1.

The appeal is upheld.

2.

The order granted by Tsatsi AJ is set aside and replaced with an order in the terms set out below.

2.1.

In relation to the first respondent's adoption of the 2013 Extraordinary Valuation Roll, it is declared that the first respondent is in breach of the constitutional obligation to adhere to and take all necessary steps to give effect to the court order handed down by Tuchten J on 31 May 2016 under case number 40019/2013, confirmed by the Supreme Court of Appeal on 31 May 2018 under case number 724/2017.

2.2.

In relation to the first respondent's passing of credits on the applicant's accounts for the period of the 2012 Special

Valuation Roll:

2.2.1.

The first respondent is ordered to furnish each of the applicants with a written account in terms of section 27(1) of the Local Government: Municipal Property Rates Act 6 of 2004, which written account must specify the amount due for rates payable; the date on or before which the amount is payable; how the amount was calculated; the market value of the property; and any other relevant information required to understand the basis upon which the amount payable was calculated.

2.2.2.

The accounts must be provided to each of the applicants within 30 days of this order.

2.2.3.

The first respondent is directed to debate the adequacy of the accounts with the applicants within one month from the date on which it is rendered.

2.2.4.

The debatement of account referred to above may take place before a judge of the Gauteng Division of the High Court alternatively an arbitrator appointed by agreement between the applicants and the respondents.

2.3.

The applicants are authorised to re-enrol the matter for further relief on supplemented papers.

2.4.

The costs of the application are to be paid by the first respondent.

3.

The costs of the appeal are to be paid by the first respondent.

JUDGMENT

COWEN J (Molopa-Sethosa J and Mkhabela AJ concurring)

Introduction

1. This appeal brings into focus the scope and contours of a court's power to grant effective relief when a state functionary fails to comply or to comply fully or correctly with a court order. The issues arise in context of a dispute between land-owners in a development called Lombardy Estate and the City of Tshwane Metropolitan Municipality (the City), about the lawful basis upon which the City may levy their rates.
2. In short, the land-owners are attempting to enforce orders of this Court granted by Tuchten J in review proceedings in 2016, some seven years ago. To do so, the land-owners instituted contempt of court and compliance proceedings, which were heard and dismissed on 6 August 2021 by Tsatsi AJ. With leave of the SCA, the appellants now appeal that dismissal before this Court.[1]
3. The appellants are fourteen property owners in a development called Lombardy Estate within the jurisdiction of the City. The first appellant is Lombardy Development (Pty) Ltd (Lombardy), the developer, and at relevant times, the owner of many of the properties affected by this appeal. The remaining appellants are or were property owners in Lombardy Estate. The City is the first respondent and the second respondent is the City's Municipal Manager. In 2013, the City took a decision to recategorise the appellants' properties as 'vacant' pursuant to a 2012 Special Valuation Roll (the 2012 SVR) and a 2013 General Valuation Roll (the 2013 GVR). In consequence, the City invoiced the appellants for significantly increased rates.
4. The appellants thereafter instituted review proceedings in this Court, which were successful before Tuchten J.[2] Tuchten J's decision was upheld on appeal before the SCA.[3] I refer to Tuchten J's orders, as upheld, as the review orders. The review orders set aside the recategorisation decisions and directed that until the appellants' properties were lawfully recategorised, the appellants were to pay municipal rates calculated at the residential tariff. The review orders also remitted the 2013 GVR to the City to reconsider the appropriate tariff. The 2012 SVR was not remitted because its effective term had lapsed.

5. Although the appellants commenced proceedings before Tsatsi AJ seeking relief grounded in the civil contempt process, they ultimately sought more limited and amended relief. The relief ultimately sought was firstly, a declaratory order that the City is in breach of its constitutional obligations to adhere to and take all necessary steps to give effect to the review orders. Secondly, they sought an order directing the City to take such steps within 30 days of the order and then report to the Court on those steps. Thirdly, and by way of an amendment to the notice of motion, the appellants also asked that the City be directed to furnish them with written accounts and debate the adequacy of those accounts. The Court a quo dismissed the application.
6. The following issues arise for decision on appeal:
 - 6.1. Whether the Court a quo was correct in finding that the application was moot;
 - 6.2. Whether the Court a quo was correct in finding that the appellants had impermissibly introduced a new case and new matter in reply;
 - 6.3. Whether the City is in breach of its constitutional obligations to respect and adhere to Court orders and to take all necessary steps to give effect to those orders;
 - 6.4. If so, what remedy is appropriate and the application of section 172(1)(b) of the Constitution, including whether a remedy requiring the City to provide a written statement of account to each appellant, and to debate the adequacy of those accounts, is appropriate in the circumstances;
 - 6.5. Whether any of the relief sought is precluded because of factual disputes on the affidavits and the rules governing motion proceedings.

Background

facts and the review proceedings

7. The events start with the disestablishment in July 2011 of the Kungwini Municipality and its incorporation into the City. In its valuation system, the Kungwini Municipality categorised the appellants' vacant properties as residential.[4] In July 2012, the City adopted a supplementary valuation roll, the 2012 SVR. The 2012 SVR purported to recategorise properties in the former Kungwini Municipality as vacant land for the purposes of municipal rates. In 2013, the 2012 SVR was replaced by a general valuation roll, the 2013 GVR, which also categorised the appellants' properties as vacant on the basis of the 2012 SVR. As a result of the recategorisation of the appellants' properties from residential to vacant, the City charged the appellants' rates at a tariff several hundred percent higher than what they had previously been charged. For example, the seventh and eighth appellants had paid R853 per month prior to the recategorisation, but under the City's system were charged R6000 per month and arrears of R66 000.[5] There is no dispute that these increased rates are unaffordable for some of the appellants and that they depressed the market.

8. On 31 May 2016, Tuchten J reviewed and set aside the 2012 SVR and the 2013 GVR to the extent that they categorised the appellants' properties as vacant and directed the appellants to pay municipal rates at the tariff applicable immediately prior to the 2012 SVR (the residential tariff) until the applicable rate is changed in accordance with the law.[6] Tuchten J reviewed and set aside the 2012 SVR on the basis that the City had failed to comply with the notice requirements prescribed by the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act).[7] Tuchten J reviewed and set aside the 2013 GVR on the basis that it relied on the 2012 SVR.[8] He remitted the 2013 GVR to the City for the process to be commenced afresh. He did not do so in relation to the 2012 SVR because it had, by effluxion of time, run its course. In circumstances where Tuchten J had held that the City has no power, retrospectively, to impose rates, no purpose would be served by a remittal to allow that process to be rerun.[9]
9. The respondents then appealed the orders granted by Tuchten J. On 31 May 2018, the SCA unanimously confirmed Tuchten J's orders.[10] In the judgment, Ponnar JA confirmed the finding that the 2012 SVG was invalid due to non-compliance with the notice requirements of the Rates Act. On the purpose of the notice requirements, the SCA held: "They are intended to ensure that the persons directly and individually affected by the changes to the valuation roll are given reasonable notice of the changes and an opportunity to respond to them by exercising the right of objection provided for in [the Rates Act]."[11] The SCA affirmed the reasoning of Tuchten J regarding the invalidity of the 2013 GVR.[12] Importantly, by the time that the SCA handed down its judgment on 31 May 2018, the 2013 GVR had lapsed due to the effluxion of time.
10. The application was brought in circumstances where, the appellants contended, the City had done nothing to implement the review orders. In this regard:
 - 10.1. On 15 June 2018, the appellants' attorneys, Adams and Adams, wrote to the City's attorneys, Ndobela & Lamola Inc, to demand that the City implement the necessary adjustments. They supplied two lists of individuals they represent. There was no response.
 - 10.2. On 9 July 2018, the appellants' attorneys again wrote to the City's attorneys demanding rectification of the unlawful imposition of rates. Again, there was no response.
 - 10.3. On 7 August 2018, the appellants' attorneys yet again wrote to the City's attorneys demanding compliance. In the letter, the appellants noted a discussion between their attorney, Mr Molver, and a legal representative of the City, Mr Mathebula, who conveyed that the City accepts that it must give effect to the previous orders and rectify the accounts of both the applicants and other affected property owners and that he would revert shortly with the proposed way forward.
 - 10.4. On 10 August 2018, the City's attorneys responded confirming the City's intention to comply with the review orders and undertaking to correct the appellants' accounts. The City indicated that it did not consider itself to be obliged to correct any other affected property owner's account. The letter specified that the City would rectify the imposition of rates on the appellants'

properties in respect of rates imposed in terms of the 2012 SVR and the 2013 GVR. The appellants were informed that the City intended to amend the 2013 GVR and asserted its entitlement to levy rates in accordance with a duly amended roll. The letter also confirmed that in the meantime, the appellants would pay rates applicable to their properties prior to the operation of the 2012 GVR and for the entire duration of the 2013 GVR.

10.5. On 27 August 2018, the appellants' attorneys wrote to the City's attorneys focusing on the appellants' position and requesting how and when the accounts would be rectified. A proposal was made in that regard including as regards interest. A request was made to furnish calculations prior to effecting any adjustments.

10.6. On 31 August 2018, the City's attorneys responded. The letter refers to the fact that the City is overburdened with administrative challenges, which impeded the attorney's ability to provide a detailed response. The letter again confirmed the City's intention to give effect to the judgment in respect of the appellants' properties. It was confirmed that this would entail crediting the appellants' accounts and reversing interest charged. The City requested a list of accounts in the names of the appellants to assist the process, and declined the request to provide calculations prior to effecting adjustments citing increased administrative burden and delay in compliance as reasons. The attorneys again drew attention to the City's intention to amend the 2013 GVR.

10.7. On 7 September 2018, the appellants' attorneys wrote to the City noting the lapse of time since the SCA decision and demanding confirmation of the adjustments by 14 September 2018. The attorneys took issue with the City's claims that the delays and the refusal to provide calculations were justified by administrative burdens. There was no response.

10.8. On 27 September 2018, the appellants' attorneys provided the City with a final opportunity to comply with the review orders by 5 October 2018. The City remained non-responsive.

10.9. On 11 October 2018, the appellants' attorneys informed the City that they would institute contempt proceedings.

10.10. On 24 October 2018, the City issued a press release advising that it is taking "all preparatory steps to implement [the review orders]". Specifically, it was advised that the accounts of the appellants would be credited (referred to as a process requiring intricate calculations which was at an advanced stage) and the City would issue an extraordinary valuation roll by end of November 2018 reclassifying properties as vacant as from the date of the 2013 GVR.

11. On 31 October 2018, the appellants instituted contempt proceedings.

The proceedings before Tsatsi AJ

12. In the founding affidavit, deposed to by Mr Walid Nasser, the appellants emphasised that the City was notified of the SCA's order on 15 June 2018, but despite acknowledging its obligation to give effect to the review orders, had still failed to do so despite repeated demands. In the correspondence referred to above, and from the outset, the appellants had indicated that they would approach the Court for relief if there was non-compliance. By the time the

proceedings were instituted, some five months had lapsed since the SCA's decision, yet the review orders had not been complied with.

13. The notice of motion at that stage included the following substantive relief:

13.1. An order declaring the respondents to be in contempt of the review orders. (Prayer 1)

13.2. An order committing the second respondent to imprisonment for 90 days suspended to allow the respondents to purge their non-compliance. (Prayer 2)

13.3. Alternatively:

13.3.1. A declaration that the respondents are in breach of their constitutional obligations to adhere to and take all necessary steps to give effect to the review orders;

13.3.2. The second respondent is directed, within 30 days, to take all steps necessary to give effect to the court orders and report to the Court under oath on compliance. (Prayer 3)

13.4. An order authorising the applicants to re-enrol the matter for further relief on supplemented papers. (Prayer 4)

14. The City delivered its answering affidavit on 12 December 2018. The City – through its Director of Litigation Management, Mr Simon Tshepo Sithole – acknowledged that it had been aware of the SCA judgment since June 2018 and that it had at all times intended to comply with the review orders. The City contended that there had been a delay in part due to the initial dispute between the parties regarding whether the orders required correction of all affected rate-payers or only those of the appellants. The City further insisted that it was entitled, still, to reissue the then lapsed 2013 GVR in compliance with the relevant procedures in the Rates Act.

15. The City informed the Court that, on advice, its officials had been instructed to rectify only the appellants' accounts and to amend the 2013 GVR. Mr Sithole pointed out that it was difficult for the City to implement the instructions due to their workload and daily administrative burden. The City firmly refuted any obligation to provide the appellants with its calculations prior to effecting the adjustments, and took issue with the appellants' failure to provide them with lists of their accounts.^[13] The City explained that its officials had managed to compile a comprehensive list of the adjustments effected on the appellants'

accounts on or about 2 November 2018, in other words shortly after the application was instituted. There remained errors in the process, however, an updated list was provided on 4 December 2018 for purposes of the answering affidavit. These are set out in an Annexure CTM7 in respect of which the City avers: "... In respect of the [appellants] all debits, resulting from the 2012 SVR were credited as well as the interest and collection charges for the whole period (for the period 1 July 2013 to 30 June 2017) until the [EVR] became effective."

16. The respondents tendered the costs occasioned by the institution of the application up until the date of delivery of the answering affidavit. Notably, it is apparent from correspondence dated 29 November 2018, ie prior to the delivery of the answering affidavit, that the respondents' attorneys intended to provide the appellants with

a list of all the adjustments made in respect of their accounts for the period 1 July 2011 to 30 June 2013 (ie for the 2012 SVR period).

17. The appellants did not accept the tender. In the final result, the appellants delivered a replying affidavit a year later, on 13 December 2019. The affidavit is deposed to by Mr Nasser. The appellants also delivered a notice of amendment to their notice of motion, which was unopposed. The appellants then amended their notice of motion to introduce the following additional relief as prayers 4A to 4D:

"4A The City is ordered to furnish each of the appellants with a written account in terms of section 27(1) of the Rates Act, which written account must specify the amount due for rates payable; the date on or before which the amount is payable; how the amount was calculated; the market value of the property and any other relevant information required to understand the basis upon which the amount payable was calculated (the account).

4B The account must be provided to each of the appellants within 30 days of the order.

4C The City is directed to debate the adequacy of the account with the appellants within one month from the date on which it is rendered.

4D The debatement and statement of account referred to above may take place before a judge of the Gauteng Division of the High Court alternatively an arbitrator appointed by agreement between the appellants and the respondents."

18. In the replying affidavit, the appellants dispute that the City has effected all of the credits the appellants were entitled to. They maintain that the City has not complied with the review orders in at least two major respects:

18.1. First, the adjustments and credits applied were limited to the period July 2011 to June 2013. This was due to the EVR which purported retrospectively to recategorise the affected properties as vacant from July 2013. The appellants say this is unlawful and in breach of section 78 of the Rates Act.

18.2. Second, they say that the adjustments and credits applied are inadequate even in respect of the period of July 2011 to June 2013, a situation made worse by the fact that the appellants had not been provided with any details or substantiation to explain the City's quantification of the credited amounts.

19. Mr Nasser explained the difficulties in some detail. The main complaints - there are others - can be grouped into the following categories:

19.1. Several of the appellants had, during the relevant period, transferred their properties to new owners and were required to pay disproportionately high clearance figures which they paid under protest. The credits that the City then passed were applied for the benefit of the new owners and not the appellants.

19.2. A complaint about insufficient credit. This includes a complaint that credits were calculated merely by deducting the residential rate from the vacant property rate without fully taking into account the amounts previously paid when recalculating interest and penalties.

19.3. Complaints that no credits had been passed. In this regard, various of the appellants' properties do not appear on Annexure CTM7.

20. In the replying affidavit, the appellants explain that on 16 August 2019, their attorneys wrote to the City's attorneys to explain their concerns. In the letter, the appellants demanded that the City immediately abort the imposition of the EVR and agree to a statement and debatement of each of the appellants' accounts. The appellants' attorneys indicated that if the City failed to comply with these demands, the appellants would persist with the contempt application and amend the relief sought so as to include relief to compel the City to participate in a statement and debatement process.
21. The City responded on 3 September 2019. The City's attorneys advised that the City was not willing to withdraw the EVR, but was willing 'to sit down and debate' the adjustments and credits passed to the accounts by way of a meeting "as they are eager to find a final solution to the ongoing litigation".
22. On 13 September 2019, the appellants' attorneys responded. The appellants persisted in disputing the City's entitlement to impose the EVR and advised that while they would welcome an opportunity to debate the complaints regarding the adjustments and credits, no meaningful engagement could ensue until the City first provided the necessary details or substantiation to explain the City's quantification of the credited amounts. The appellants relied for their entitlement to this information on, centrally, section 27(1)(c) of the Rates Act. The City was informed that if it did not agree to this, the relief would be amended to compel compliance with the obligations in section 27(1)(c) of the Rates Act for purposes of participation in the statement and debatement process.
23. The City did not respond and did not provide the details. The first appellant, Lombardy, then commissioned Adams and Adams Forensics to prepare a comparison of what was charged and what should have been charged in respect of its properties, which amount to some 100 properties during the relevant period. The following was established for the period July 2011 to September 2019:
 - 23.1. An amount of R27 443 522.76 was charged for property rates;
 - 23.2. An amount of R4 799 894.10 was charged for property rates adjustments resulting from the retrospective imposition of vacant property rates from July 2011 to June 2013;

23.3. The total amount charged for property rates for the period July 2011 to September 2019 and the retrospective adjustments was therefore R32 243 416.86.

23.4. The City was only entitled to charge a total amount of R4 839

413.55 for property rates for the period July 2011 to September 2019 with the result that the first appellant was overcharged R27 404 003.31 in respect of rates alone.

23.5. The first appellant is entitled to an amount of R5 847 520.87

as repayment of interest.

23.6. The City has only credited the properties with a total net credit amount of R1 036 373.42 for the period July 2013 to September 2019 with the result that an amount of R26 367 629.89 remains owing.

24. A calculation was also done for the more limited period of July 2011 to June 2013, in other words the period before the EVR purportedly takes effect. Even in respect of this limited period, the appellants explained that an additional amount of R9 121 967.15 should be credited to Lombardy.
25. The calculations were done by a Prof Johannes Daniel van Romburgh of Adams & Adams Forensics with the assistance of forensic accountant Annerie Marx, also of Adams & Adams Forensics. Prof van Romburgh deposed to a confirmatory affidavit dated 6 January 2020 confirming the affidavit of Mr Nassir.
26. The appellants contended that they had now established the requirements for a statement and debatement of account in that the appellants are entitled to receive accounts in terms of section 27 of the Rates Act and the City had failed, despite demand, to render such accounts.
27. In the replying affidavit, the appellants expressly invited the City and the second respondent to file a further affidavit to respond to the notice of amendment and the contents of the replying affidavit. The respondents declined to do so.

The decision of the Court a quo and the grounds of appeal

28. Tsatsi AJ dismissed the application in an order and judgment dated 5 August 2021. In doing so, she approached the application by framing the main issue as being whether the appellants were required to plead in their founding affidavit the nature of the relationship between the appellants and the City so as to ground a duty to provide statements and debate accounts. The other issue, the Court a quo held, was whether the appellants could succeed with the prayers in the amended notice of motion when they were not canvassed in the founding papers. In this regard, the Court a quo held that the appellants had abandoned the contempt application and only pursued a new cause of action pleaded in the replying affidavit.

29. After considering the facts, the parties' submissions, various case law and legislation, Tsatsi AJ held that:

29.1. The appellants abandoned their application for contempt of court and in the result, the application was moot.

29.2. The general rule is that an applicant must make out its case in the founding affidavit, thereby sufficiently informing the other party of the case it is required to meet. The filing of further affidavits is within the sole discretion of the Court. In circumstances where there are no reasons advanced for filing a further affidavit, the application should be refused.

29.3. An applicant cannot make out a case in the replying affidavit. In this case, the appellants failed to canvass the issue of the statement and debatement of accounts in their founding papers. The case for a statement and debatement of accounts was made only in the replying affidavit, including with reference to annexures, which is impermissible. The respondents were prejudiced as they had no opportunity to rebut the case in respect of a statement and debatement of account. Even if the respondents had applied to deliver a further affidavit in response to the replying affidavit, this would not have resolved the appellant's failure to make out their case in the founding affidavits.

29.4. The affidavit of Prof Romburgh, which purported to be a confirmatory affidavit to the replying affidavit, was in substance a supplementary founding affidavit, and no application was made to court to file it.

29.5. Section 27 of the Rates Act does not confer any right to debate an account, only to receive an account. The appellants failed to plead the existence of any right to a debatement of the account.

29.6. The 2013 GVR had to be implemented afresh by way of the EVR in order to implement the review orders. It had been set aside and remitted.

30. The order granted by the Court a quo is in the following terms:

30.1. Paragraphs 4A, 4B, 4C, 4D and 5 of the applicants' amended notice of motion are dismissed with costs, such costs to include the costs of two counsel.

30.2. The applicants are ordered to pay the respondents' costs incurred in opposing the previous contempt of court application from 30 November 2018 to the date of hearing, which is 2 June 2021, such costs to include the costs of two counsel.

30.3. Paragraphs 1, 2 and 3 of the applicants' amended notice of motion of the contempt of court application, are declared moot and set aside.

30.4. The applicants' condonation application of the late filing of the replying affidavit is granted.

31. The appellants' grounds of appeal are extensively pleaded. However, as submitted by counsel, there are two fundamental questions which underpin the appeal, foreshadowed above.

32. The first is whether the Court a quo erred in finding that the relief sought in the founding affidavit was moot. Put simply, the appellants submit that although they abandoned prayers 1 and 2 of the notice of motion, they did not abandon the alternative relief in prayer 3, which remained live. The appellants submit that the Court a quo ought to have considered whether the respondents were in breach of their constitutional obligations to give effect to the review orders and if not, to grant effective, just and equitable relief. In this regard, they submit that the Court a quo should have found, on the affidavits, that the respondents were in breach of their duties as they had failed duly to rectify the applicants' accounts and had imposed retrospective rates in defiance of the review orders.
33. The second is whether the Court a quo erred in concluding that the appellants had sought to make out their case in reply and impermissibly introduced new matter in reply. In this regard, the appellants plead that they did not do so. The amendment introducing prayers 4A to 4D, they say, was effected to give content to what would be a just and equitable remedy. The cause of action remained the same: that sought in prayer 3. The factual matter contained in the replying affidavit, they say, is permitted in reply in accordance with established authority, specifically *Finishing Touch 163 (Pty) Ltd v BHP Billiton*.^[14] In any case, the appellants plead, a court has a discretion to allow the introduction of new matter of the kind ordinarily prohibited.^[15]
34. If either of these two issues are determined in the appellant's favour, the appeal Court is effectively required to consider whether the appellants were entitled to any relief.

The first issue: the mootness of prayer 3

35. The first issue is whether the Court a quo was correct in finding that the application, specifically prayer 3, was moot. There is no dispute that the appellants did not persist with relief in terms of prayers 1 and 2 in the Court a quo, these being the prayers framed under the civil contempt process. In this regard, the appellants informed the Court a quo at the commencement of the hearing that it would not pursue prayers 1 and 2 because, on the *Plascon Evans* rule,^[16] it would not be possible to find that the City's failure to comply with the review orders was either *mala fide* or wilful. These are two requirements for a finding of contempt of court and are matters in respect of which an alleged contemnor bears an evidentiary burden.^[17]
36. However, the appellants did not abandon prayer 3. To recap: In prayer 3, the appellants sought, in the alternative to prayers 1 and 2, a declaratory order that the respondents are in breach of their constitutional obligations to adhere to and take all necessary steps to give effect to the review orders and an order against the second respondent, within 30 days of the order, to take all necessary steps to give effect to the review orders and to report to the Court and the appellants' attorney, on oath, regarding compliance.

37. As Mr Ferreira submitted on behalf of the appellants, a matter is moot when the Court's judgment will have no practical effect on the parties: Where a matter presents a live or existing controversy, it is not moot.[18] I agree with the appellants that when the relief in prayer 3 was sought, it concerned, and still concerns, a live or existing controversy. Put simply, the parties remained (and still remain) in dispute as to whether the City has complied with the review orders and whether

further steps are required to give effect thereto. Indeed, in the City's heads of argument, counsel effectively concedes that the finding of mootness was technically incorrect. The City rather submits that the application for the relief in prayer 3 should have been dismissed on the merits. But that is a different question.

38. I accordingly agree with the appellants that the Court a quo erred in finding that the relief sought in prayer 3 was moot.[19] In the result, it falls upon the appeal Court to decide whether the relief sought in prayer 3, and any related relief, should have been granted.

The second issue: A new case and new matter in reply?

39. The second issue is whether the Court a quo was correct in finding that the appellants had impermissibly made out their case in reply and impermissibly introduced a new cause of action in reply. The appellants submit that they did not. The City submits that the Court a quo was correct in finding that they did. In my view, they did neither, and the Court a quo accordingly erred in this regard too.
40. The case that was advanced in the founding affidavit and ultimately persisted with in the Court a quo is relief based on prayer 3 and specifically a finding that the respondents are in breach of their constitutional duties to adhere to and take all necessary steps to give effect to the review orders. The primary factual pillar grounding this relief is the City's alleged failure to effect adjustments and credits to the appellants' accounts so as to give effect to the review

orders.

That case was advanced in the founding affidavit in circumstances where the City had not effected any adjustments when the review proceedings were instituted at the end of October 2018. That was so both as regards the period from July 2011 to June 2013, this being the period governed by the 2012 SVR (the 2012 SVR period) and the period from July 2013 to September 2019, this being the

period governed by the 2013 GVR and later the EVR (the 2013 GVR period).

41. In the answering affidavit, the City distinguished between its mode of alleged compliance in the 2012 SVR period and the 2013 GVR period. In respect of the former, it claimed it had complied with reference to Annexure CTM7. In respect of the latter, it contended that it could now lawfully impose rates as it had previously done (in other words on the vacant property rate) in view of the EVR which it had introduced in order to comply with the review orders.
42. Once this defence is appreciated, it is difficult to see how the matter introduced in reply – which responds to the defence – can be regarded as impermissible. In respect of the 2012 SVR period, the replying affidavit effectively contains a factual response to the defence – in answer – that the City had effected the necessary adjustments and corrections. Mr Nasser disputes this by seeking to demonstrate that in fact the City had not done so. In respect of the 2013 GVR period, Mr Nasser contends that the retrospective imposition of rates was unlawful and in breach of the review orders. Mr Nasser’s evidence was based, in important measure, on calculations effected by Adams and Adams Forensics, confirmed by Prof van Romburgh in his confirmatory affidavit of 6 January 2020. That affidavit was delivered separately to the replying affidavit – apparently after the December/ January break – but is clearly in the form of a confirmatory affidavit. Its late admission ought to have been dealt with as part and parcel of the condonation application for the late delivery of the replying affidavit, which was granted.
43. Mr Nasser’s responses are within the domain of a permissible reply on accepted legal principle.[20] Moreover, to the extent that the matter consisted of new matter including so as to provide further grounds for the relief sought, the Court a quo had a discretion to allow it. In *Finishing Touch*, the SCA unanimously confirmed (per Mhlantla JA) that the rule that all necessary allegations upon which an applicant relies must appear in a founding affidavit is not an absolute one:
- “The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and one in which facts alleged in the respondents’ answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. See Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger.”[21]*
44. The Court a quo erred by not approaching the matter on this basis and thereby both applied an incorrect principle of law and omitted to exercise

its discretion. In my view, the material was permissible in reply, and to the extent that it provided new matter including further

grounds for the relief sought, this is a case that warranted the exercise of discretion in the appellants’ favour.

45. The appellants amended their notice of motion without objection. In doing so, they amended their relief to introduce an additional remedy albeit grounded on the same cause of action – an alleged failure to adhere to and take all steps necessary to give effect to a court order. This is not a case where a wholly new cause of action was introduced.[22] The appellants could not have dealt with the matter in their founding affidavit as the events dealt with had not yet taken place. The nature of the case is also relevant. It concerns compliance with this Court's orders, which are binding on all persons to whom and organs of state to which they apply.[23] The case implicates the rule of law[24] and the authority, dignity and effectiveness of courts.[25] In circumstances where the process of compliance ensues while proceedings are ongoing, it promotes compliance with court orders and protects the dignity of courts to allow the issues to be fully and fairly ventilated. On the facts of this case, the appellants informed the respondents that they would not oppose any request to respond to the evidence of Mr Nasser confirmed by Prof van Romburgh. But the respondents did not seek that opportunity.

The third issue: Has the City breached its constitutional obligation to adhere to and take all necessary steps to give effect to the review orders?

46. The third issue is whether the City has failed to comply with its constitutional obligation to adhere to and take all necessary steps to give effect to the review orders. This issue underlies prayer 3 of the notice of motion. Because the Court *quo* omitted to consider whether prayer 3 should have been granted, it falls on the appeal Court to do so.
47. There can be no real debate that a failure by an organ of state to adhere to and take all steps necessary to give effect to a court order constitutes a breach of constitutional obligations, specifically section 165(4) and section 165(5) of the Constitution. In this regard, the appellants aptly drew this Court's attention to the following holding of the Constitutional Court in *Tasima*: [26]

"The obligation to obey court orders 'has at its heart the very effectiveness and legitimacy of the judicial system.' Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built."

48. Moreover, there is a particularly high duty on organs of state to comply with court orders, both because of the duties imposed by section 165(4) of the Constitution and because the state must lead by example and observe the law scrupulously so as to uphold the rule of law, a foundational value of the Constitution.[27]
49. In order to determine whether there has been non-compliance, this Court must interpret the review orders. The Constitutional Court held in *SOS Support Public Broadcasting*: [28]

"Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. That must be the starting point in interpreting a court order."

50. The correct approach to interpreting court orders was stated as follows in *Finishing Touch*[29] and has been endorsed by the Constitutional Court:[30]

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”

51. To consider the import of the review orders, it is necessary to distinguish between the period of the 2012 SVR and the period of the 2013 GVR. It is convenient to deal first with the 2013 GVR period.
52. In respect of that period, I agree with the appellants’ submission that before the 2013 GVR period lapsed, the City would have been entitled to reconsider the applicable rates imposed. Once it had lapsed, however, the only parts of the review orders that could remain operative in respect of the 2013 GVR were a) the part of order 3 that declared it invalid and set it aside to the extent that it categorised the affected properties as ‘vacant’; b) order 4, which declared invalid and set aside the respondents’ imposition of the assessment rate applicable to the appellants, and;
- c) order 7, which directed the appellants to pay rates in respect of the affected properties at the rate immediately preceding the coming into operation of the 2012 SVR.[31] Put differently, it was only open to the City to revisit the 2013 GVR for the period of its intended duration. That interpretation flows from the findings of the Court that justified the remittal. In paragraph 58 of the judgment, Tuchten J held:

“Counsel for the City asked that if I set aside the valuation rolls aside (sic), I should remit the matter to the City for the process to be commenced afresh. This will be appropriate in relation to the [2013 GVR] but not in the case of the [2012 SVR]. This is because the 2012 supplementary valuation roll has by effluxion of time run its course and in the light of my finding against the City in relation to retrospectivity, no purpose will be served by a recapitulation of that process.”

53. Although the Court a quo did not entertain the relief in paragraph 3 of the notice of motion, it made a finding on this issue in that it concluded[32] that the 2013 GVR had to be implemented afresh by way of the EVR in order to implement the review orders. That finding, in my view,

entailed a misunderstanding of the review orders as once the 2013 GVR had run its course, the remittal served no purpose. Rather, the 2013 GVR was invalid and set aside with retrospective effect,[33] and prayer 7 then determined the basis upon which the appellants still had to pay their rates.

54. In any event, it was not open to the City in implementing the review orders retrospectively to recategorise the appellants' properties: Any recategorisation that may lawfully have ensued could only operate prospectively from the date of adoption of a new system. That issue was determined in the review proceedings,[34] and in circumstances where Tuchten J was mindful of the applicable legislation, specifically the Rates Act.[35]
55. Accordingly, on the respondents' own version,[36] the City has failed to give effect to the review orders in respect of the 2013 GVR period and is accordingly in breach of its constitutional obligations.
56. In respect of the period of the 2012 SVR, it is common cause, and I agree, that on a proper interpretation of the review orders, and specifically prayers 2 and 7,[37] read with the SCA's decision on appeal, the City was obliged to credit the appellants' accounts to reflect the residential rate for the period during which the 2012 SVR was in effect. What is in dispute is whether the City did so correctly. During the hearing, Mr Ferreira informed the Court that the appellants conceded that there is a dispute of fact on the affidavits on whether the City has correctly adjusted the appellants' accounts for the period of the 2012 SVR. Moreover, he did not ultimately invite the Court to determine that dispute in the appellants' favour applying the principles articulated in *Plascon Evans and Wightman*. [38] That, notwithstanding the submission in the heads of argument that the respondents' version can be rejected on the papers.
57. In the result, Mr Ferreira also did not ultimately persist with seeking a declaratory order to the effect that, in respect of the 2012 SVR period, the City is in breach of its constitutional obligation to comply with the review orders. Mr Strydom submitted that that is the end of the matter relying on *Plascon Evans*. However, Mr Ferreira submitted that the Court should nevertheless grant relief directed at ensuring the City provides the appellants with an explanation for the accounts in respect of the 2012 SVR period and directing a debatement. This, it was suggested, is necessary to give effect to the court orders in circumstances where a determination cannot accurately be made as to whether the City is in breach of its obligations, and if so, to what extent.
58. The submission rests on two legal premises. First, a statutory duty to comply with section 27(1) of the Rates Act, which the appellants had sought to enforce after delivery of the answering affidavit and before delivery of the replying affidavit, to no avail. Section 27 is entitled 'Accounts to be furnished' and section 27(1) provides:
- "(1) A municipality must furnish each person liable for the payment of a rate with a written account specifying-*
- (a) the amount due for rates payable;
 - (b) the date on or before which the amount is payable;
 - (c) how the amount was calculated;

- (d) the market value of the property;
- (e) if the property is subject to any compulsory phasing-in discount in terms of section 21, the amount of the discount; and
- (f) if the property is subject to any additional rate in terms of section 22, the amount due for additional rates.”

59. The respondents submit that section 27 only applies to written accounts furnished in the usual course. I can see no reason why the section restricts its application in that way, even on its plain language, but assuming it does, there is no reason why it should not apply to the accounts in issue in this case: In substance, what is being asked is an explanation as to how the amounts now levied are calculated. Given that the usual accounts had to be adjusted and rectified in accordance with a court order, the manner in which the account was calculated must necessarily be specified with sufficient clarity to demonstrate how compliance has been effected. The fact that the explanation might take a different format to the usual accounts is of no moment.

60. Secondly, the appellants submitted that the Court was entitled to grant an order directing a debatement as a just and equitable order as contemplated by section 172(1)(b) of the Constitution.[39] The appellants correctly emphasised the breadth of a Court’s power to grant effective relief and do practical justice, and in doing so, if need be, to devise new remedies.[40] Moreover, the appellants expressly disavowed reliance on the common law entitlement to a debatement which is premised on a fiduciary

duty, a statutory duty or a contractual duty.[41] The disavowal of reliance on the common law remedy in turn answers the central submission of the respondents who contend that no case is made for a common law debatement and the case is thus bad in law.[42] The legal basis for the relief, rather, must be a failure to adhere to or take such steps as are necessary to give effect to the court order.

61. The question thus arises whether, absent a finding of non-compliance with the review orders in respect of the 2012 SVR period, such an order would be competent. In my view, it is competent in circumstances where the evidence shows that there is a bona fide dispute between the parties as to whether there has been compliance with a court order of this sort (one which requires account rectification), the appellants have cast serious doubt on whether the City has complied and are unable, meaningfully, to engage the City on whether there has been compliance. In these circumstances, the appellants are unable, meaningfully, to secure compliance with the court order granted in their favour. And that is what the dispute between the parties in respect of the 2012 SVR period is ultimately about. Put differently, in circumstances where there is a bona fide dispute about compliance with a court order pursuant to which a state party is obliged to rectify a rate-payers’ account, the state party must engage meaningfully with the rate-payer so as to ensure compliance as part of its duty to adhere to and take steps necessary to comply with that order.

62. Had the respondents wished to refute any of the allegations made in reply in response to the City's defence, it was open to them to do so and that may have put the matter to rest. The appellants made it clear that they would not oppose such a request. The interests of justice would have demanded that such a response be admitted, precisely because one is dealing with proceedings to ensure compliance with a court order and in circumstances where the City only adjusted the accounts after the proceedings were instituted. The City did not do so.
63. In these circumstances, the appellants have at the very least cast serious doubt on whether the City has complied with the review orders and there is, at best for the City, a bona fide dispute on this issue. Moreover, although the City tendered a meeting, it has simultaneously refused to explain, with sufficiently clarity, how it has recalculated the amounts, thereby rendering any proposed meeting, or 'debate', unhelpful. Indeed, the City's approach, rather, evidences an unwillingness to seriously engage the appellants' concerns, which are reasonably directed at securing compliance with a court order granted in their favour. Accordingly, I am of the view that the appellants have established that the City is yet to adhere to and take all steps necessary to give effect to the review orders, which in turn opens the door to relief under section 172(1)(b) of the Constitution. The specific remedy that is sought is a statement and debatement of their accounts.
64. A key thrust of the submissions advanced by Mr Strydom was that the appeal can only succeed if this Court wholly disregards the trite principles that apply to motion proceedings[43] and, indeed, appeals.[44] In my view, these submissions did not take sufficient cognisance of the nature and nuances of the case that the appellants were in fact advancing or the reasoning underlying the decision of the Court a quo. I have explained above on what basis I consider the Court a quo to have erred in rejecting the evidence in reply and on what basis I consider the appellants to have been entitled to relief notwithstanding the dispute of fact in respect of the 2012 SVR period. I do not repeat what I say now, suffice to reiterate that in my view, the appellants' case pays proper heed to the applicable and established principles.

The fourth issue: appropriate remedy

65. What is left to determine is the appropriate remedy. The Court is enjoined in terms of section 172(1)(b) of the Constitution to grant just and equitable relief. The relief must be appropriate and effective relief that ensures compliance with the review

orders.

66. On the respondents' submission, the appellants should be required to turn to the various statutory remedies that an aggrieved

rate-payer has when seeking to dispute their accounts. In my view, that would defeat the purpose of the review proceedings and undermine the effectiveness of court orders. Moreover, it would render finality illusory. The need for finality in administrative decision making is a theme that runs through administrative law^[45] and has resonance in circumstances such as the present where the appellants had already spent years seeking to regularise the payment

of their rates when the matter came before the Court a quo.

67. In respect of the 2012 SVR period, the relief the appellants ultimately sought compels an explanation of the adjustments to the accounts with sufficient particularity and authorises their debatement by way of familiar processes. In my view, this constitutes just and equitable relief which can effectively secure compliance with the review orders. It is appropriate relief because it enables the appellants, meaningfully, to secure compliance with the review orders and does so in an accountable manner that comports with the Rates Act. Accountability lies at the heart of the constitutional order.
68. As regards the 2013 GVR period, the respondents submitted that this Court should decline to grant relief in circumstances where the EVR has been made and stands until set aside. In this regard, the parties informed the appeal Court that there is a pending review application before this Court, instituted by the appellants, in parallel proceedings in which they seek to review and set aside the EVR. This is a material consideration. However, as Mr Ferreira persuasively submitted, the issue in this case is, in nature, a different one, concerning, as it does, whether there has been compliance with the review orders or not. The Court a quo, and now this appeal Court, was and is not called upon to determine whether the EVR is lawful under the requirements of administrative law.
69. There is another consideration, which is that a party seeking to enforce a court order cannot be prevented from doing so in circumstances where an organ of state has precluded itself from complying, by taking further administrative action which the party contends is unlawful. It is of course well-established – for rule of law reasons – that where an administrator is *functus officio*, an administrative decision stands until set aside.^[46] But that does not mean that a party aggrieved by non-compliance is left without remedy.
70. Indeed, a similar issue arose recently in *Mpofana* - albeit in a different context - where I held as follows, in my capacity as a Judge of the Land Claims Court:

“... it is in my view, not open to an administrator, unnecessarily and deliberately, to take an administrative decision that precludes the same administrator from complying with an existing court order, and then to stand back and tell the aggrieved party that they must approach a Court to have that decision set aside if they have grounds to do so. In my view, even if in good faith, such conduct would subvert the rule of law, interfere with judicial authority and would be unlawful: put differently, such a decision is susceptible to review for these reasons alone. In other words, quite independently of whether the decision is otherwise procedurally compliant or passes muster under the applicable standard of review.”^[47]

71. In this case, the appellants have instituted review proceedings impugning the EVR, which are pending. From the outset the appellants

sought, and are now only persisting with, declaratory relief in respect of the 2013 GVR period, which is what is affected by the

review. The declaratory order sought, if granted, thus would not generate legal uncertainty in the face of the review application and, on the contrary, clarifies the duties imposed by the review orders and can thereby further the resolution of the dispute between the parties while vindicating the authority of the Court.[48]

72. In my view, the remedy the appellants ultimately sought is a just and equitable order and appropriate relief,[49] which will serve effectively to ensure that the review orders are complied with and the authority of the Court is vindicated.

Order

73. I would grant the following order:

73.1. The appeal is upheld.

73.2. The order granted by Tsatsi AJ is set aside and replaced with an order in the terms set out in paragraph 73.2.1 to 73.2.4.

73.2.1. In relation to the first respondent's adoption of the 2013 Extraordinary Valuation Roll, it is declared that the first respondent is in breach of their constitutional obligations to adhere to and take all necessary steps to give effect to the court order handed down by Tuchten J on 31 May 2016 under case number 40019/2013, confirmed by the Supreme Court of Appeal on 31 May 2018 under case number 724/2017.

73.2.2. In relation to the first respondent's passing of credits on the applicant's accounts for the period of the 2012 Special Valuation Roll:

73.2.2.1. The first respondent is ordered to furnish each of the applicants with a written account in terms of section 27(1) of the Local Government: Municipal Property Rates Act 6 of 2004, which written account must specify the amount due for rates payable; the date on or before which the amount is payable; how the amount was calculated; the market value of the property; and any other relevant information required to understand the basis upon which the amount payable was calculated.

73.2.2.2. The accounts must be provided to each of the applicants within 30 days of this order.

73.2.2.3. The first respondent is directed to debate the adequacy of the accounts with the applicants within one month from the date on which it is rendered.

73.2.2.4. The debatement of account referred to above may take place before a judge of the Gauteng Division of the High Court alternatively an arbitrator appointed by agreement between the applicants and the respondents.

73.2.3. The applicants are authorised to re-enrol the matter for further relief on supplemented papers.

73.2.4. The costs of the application are to be paid by the first respondent.

73.3. The costs of the appeal are to be paid by the first respondent.

SJ Cowen

Judge of the High Court, Pretoria

I agree, and it is so ordered.

L M Molopa - Sethosa

I agree.

R Mkhabela

Acting Judge of the High Court, Pretoria

Date heard: 6 September 2023

Date of decision: 12 January 2024

Appearances:

Plaintiff: N Ferreira, D Linde & M Makhubele instructed by Adams and Adams Attorneys

Defendant: T Strydom SC & L Kotze instructed by Mothle Jooma Sabdia Inc

[1] The SCA granted leave on 7 March 2022.

[2] Under case number 40019/2013.

[3] Under case number 724/2017.

[4] This notwithstanding that provision had been made in the policy of the Kungwini Municipality for a rateable category of ‘vacant

land’, a category that had never been applied.

[5] This example appears from Tuchten J’s judgment at para 3.

[6] The order, in substantive part, reads: 1. ... 2. The respondent’s 2012 supplementary valuation roll is declared invalid and set aside to the extent that it re-categorizes as ‘Vacant’ properties situated in the municipal area of the former Kungwini local municipality formerly categorized as ‘residential’ (the affected properties). 3. The respondent’s 2013 general valuation roll and all subsequent valuation rolls of the respondent are declared invalid and set aside to the extent that they categorised the affected properties as ‘Vacant’ unless and until the affected properties are lawfully recategorised as such. 4. The imposition by the respondent of the assessment rate applicable to vacant land on those of the affected properties which belonged to the applicants on 28 June 2013, the date upon which this

review application was instituted, is declared invalid and set aside. 5. Item 5.1.5(d) of the respondent's rates policy with effective date 1 July 2011, (as amended (pp 784-799 of the record) is declared invalid and set aside. 6. The respondent is prohibited from further implementing any of the decisions mentioned above in this order to the extent that they have been set aside. 7. Pursuant to the applicants' tender made through counsel, the applicants are directed to pay rates to the respondent in respect of the affected properties immediately preceding the coming into operation of the respondent's 2012 supplementary valuation roll until the rate applicable to such properties changed according to law. 8. The decision to implement the 2013 general valuation roll is remitted to the respondent to consider afresh the appropriate categorization of the affected properties and the rate which should be levied upon the affected properties, with due regard to the provisions of the Municipal Property Rates Act 6 of 2004, to other applicable legislation and to this judgment. 9. Except as expressly stated in this order, decisions taken and acts performed under and pursuant to any of the valuation rolls mentioned in this order are not invalid merely because of the invalidity of such valuation rolls themselves.

[6] The order, in substantive part, reads:

1. ...
2. The respondent's 2012 supplementary valuation roll is declared invalid and set aside to the extent that it re-categorizes as 'Vacant' properties situated in the municipal area of the former Kungwini local municipality formerly categorized as 'residential' (the affected properties).
3. The respondent's 2013 general valuation roll and all subsequent valuation rolls of the respondent are declared invalid and set aside to the extent that they categorised the affected properties as 'Vacant' unless and until the affected properties are lawfully recategorised as such.
4. The imposition by the respondent of the assessment rate applicable to vacant land on those of the affected properties which belonged to the applicants on 28 June 2013, the date upon which this review application was instituted, is declared invalid and set aside.
5. Item 5.1.5(d) of the respondent's rates policy with effective date 1 July 2011, (as amended (pp 784-799 of the record) is declared invalid and set aside.
6. The respondent is prohibited from further implementing any of the decisions mentioned above in this order to the extent that they have been set aside.
7. Pursuant to the applicants' tender made through counsel, the applicants are directed to pay rates to the respondent in respect of the affected properties immediately preceding the coming into operation of the respondent's 2012 supplementary valuation roll until the rate applicable to such properties changed according to law.

8. The decision to implement the 2013 general valuation roll is remitted to the respondent to consider afresh the appropriate categorization of the affected properties and the rate which should be levied upon the affected properties, with due regard to the provisions of the Municipal Property Rates Act 6 of 2004, to other applicable legislation and to this judgment.
9. Except as expressly stated in this order, decisions taken and acts performed under and pursuant to any of the valuation rolls mentioned in this order are not invalid merely because of the invalidity of such valuation rolls themselves.
- [7] See paras 37 to 46 of the judgment where the issue is dealt with, with reference specifically to section 49 of the Rates Act and Regulation 4 of the Municipal Property Rates Regulations 2006 published in GN R1036 in GG29304 on 18 October 2006.
- [8] See para 56 of the judgment, with reference to *Seale v Van Rooyen NO and others; Provincial Government, North West Province v Van Rooyen NO and others* 2008
- (4) SA 43 (SCA) at para 13.
- [9] See para 58.
- [10] *City of Tshwane Metropolitan Municipality v Lombardy Development (Pty) Ltd & others* [2018] ZASCA 77. The SCA's judgment was written by Ponnann JA, with Majiedt, Seriti JJA, Pillay and Makgoka AJJA concurring. It should be noted that paras 5 and 6 of the judgment of Tuchten J were set aside on appeal. The respondents in the appeal (the appellants in this case) conceded that they be set aside. See para 29.
- [11] See para 20.
- [12] See para 23.
- [13] The latter point is difficult to understand as it was disclosed in the founding affidavit that in fact the lists were given albeit on a without prejudice basis.
- [14] *Finishing Touch 163 (Pty) Ltd v BHP Billiton* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (*Finishing Touch*) at para 26.
- [15] *Relying on Mostert and others v Firststrand Bank t/a RMB Private Bank* [2018] ZASCA 54; 2018 (4) SA 443 (SCA) (*Mostert*).
- [16] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984
- (3) 623 (A) (*Plascon Evans*) at 634H-635C.
- [17] *Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) at para 37.

- [18] AB and another v Pridwin Preparatory School and others [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020(5) SA 327 (CC) (Pridwin) at para 50 with reference to Ruta v Minister of Home Affairs [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019
- (2) SA 329 (CC) at para 7. In Pridwin the Constitutional Court held (footnotes omitted):
“Typically, this court will not adjudicate an appeal if it no longer presents an existing or live controversy, and will refrain from giving advisory opinions on legal questions which are merely abstract, academic or hypothetical and have no immediate practical effect or result. This principle was recently reiterated in President of the Republic of South Africa.”
- [19] While not strictly necessary to reach the issue, it may be noted that where relief sought is moot, it is not open to a court to set it aside: there is nothing to set aside.
- [20] Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) at para 10: “[T]here is today a tendency to permit greater flexibility than may previously have been the case to admit further evidence in reply. Consequently, as stated in Nkengana, ‘if the new matter in the replying affidavit is in answer to a defence raised by the respondent and is not such that it should have been included in the founding affidavit in order to set out a case of action, the court will refuse an application to strike out.’” Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and another 2011
- (4) SA 642 (GSJ).
- [21] Supra n 14 at para 26 (footnotes omitted). The reference is to Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976
- (2) SA 701 (D).
- [22] Cf Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en andere 1984
- (2) SA 261 (WPA) at 269 B-H; Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd 1984
- (4) SA 87 (T) at 91F-92F; Kwinana and Others v Ngonyama and Others [2022] ZASCA 48 at para 12, being authorities relied upon by the respondents.
- [23] Section 165(5) of the Constitution: “An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”
- [24] Section 1 of the Constitution.
- [25] Section 165(1) of the Constitution provides: “The judicial authority of the Republic is vested in the courts.” Section 165(4) provides: “Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.”
- [26] Department of Transport and Others v Tasima (Pty) Ltd [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (Tasima) at para 183.

- [27] Section 1 of the Constitution and see *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and another intervening)* [2001] ZACC 18; 2001
- (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 68.
- [28] *SOS Support Public Broadcasting and others v South African Broadcasting Corporation (SOC) Limited and Others* [2018] ZACC 37; 2018 (12) BCLR 1553 (CC); 2019 (1) SA 370 (CC) at para 52.
- [29] *Supra* n 14 at para 13. See too *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977
- (4) SA 298 (A) 304D-H.
- [30] Approved by the Constitutional Court in *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016
- (3) SA 37 (CC) at para 29. See too *SOS Support Public Broadcasting and others*, *supra* n 28 at para 52.
- [31] See n 6 above for the terms of the orders.
- [32] See para 29.6 above.
- [33] An administrative decision declared invalid is to be retrospectively regarded as if it had never been made. See *City of Johannesburg and another v Ad Outpost (Pty) Ltd* [2012] ZASCA 40; 2012
- (4) SA 325 (SCA) at para 20, referred to by Ponnar JA, in para 21 of the SCA's judgment.
- [34] See paras 54, 57 and 58 of the judgment of Tuchten J and paras 29 and 30 of the SCA judgment.
- [35] See specifically para 54. Section 78(4) provides: "Rates on a property based on the valuation of that property in a supplementary valuation become payable with effect from the date on which the change of category referred to in subsection (1)(g) occurred."
- [36] *Administrator of Transvaal and others v Theletsane and another* [1990] ZASCA 156; 1991 (2) SA 192 (AD); [1991] 4 All SA 132 (AD).
- [37] Prayer 2 declared the 2012 SVR invalid and set it aside to the extent that it recategorised as 'Vacant' properties situated in the municipal area of the former Kungwini local municipality formerly categorized as 'residential' and prayer (the affected properties). Prayer 7 reads: Pursuant to the applicants' tender made through counsel, the applicants are directed to pay rates to the respondent in respect of the affected properties immediately preceding the coming into operation of the respondent's 2012 supplementary valuation roll until the rate applicable to such properties changed according to law.

- [38] Wightman t/a JW Construction v Headfour (Pty) Ltd and another [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); [2008] ZASCA 6; 2008
- (3) SA 371 (SCA) at para 13.
- [39] Section 172(1) provides: “When deciding a constitutional matter within its power, a court –
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable”
- [40] Mwelase and others v Director-General for the Department of Rural Development and Land Reform and another [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC) (Mwelase) at para 65; Electoral Commission v Mhlope and others [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) at para 83. Also relevant is Fose v Minister of Safety and Security [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (CC) at para 96.
- [41] Absa Bank BPK v Janse van Rensburg [2002] ZASCA 7; 2002
- (3) SA 701 (SCA). However, they also highlighted the fact that the SCA has held that there is an important element of trust in the relationship between a municipality and a rate-payer Relying inter alia on Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others [1998] ZASCA 14; 1998 (2) SA 1115 (SCA); [1998] 2 All SA 325 (A); 1998 (6) BCLR 671 (SCA) at 1122G-H.
- [42] In turn, it reveals how this case is distinguishable from Moila v City of Tshwane Municipality [2017] ZASCA 15, in which the SCA held that a plaintiff who claimed that the City incorrectly charged him for services due by a previous owner had not pleaded facts necessary to establish entitlement to the common law remedy of debatement.
- [43] Citing inter alia NDPP v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361 (SCA); 2009 (4) BCLR 393 (SCA); [2009] 2 All SA 243 (SCA) at para 26, Plascon Evans supra n 16, Mostert, supra n 15 at para 13 and the authorities referred to in n 22 above.
- [44] Specifically, the principle that an appeal court can only interfere with the exercise of a discretion in the strict or true sense on narrow grounds as set out in cases such as Media Workers Association of SA and others v Press Corporation of SA Ltd [1992] ZASCA 149; 1992 (4) SA 791 (AD) ; [1992] 2 All SA 453 (A) at 800C-G and Shepstone and Wylie and others v Geyser NO [1998] ZASCA 48 ; 1998 3) SA 1036 (SCA); [1998] 3 All SA 349 (A) at 1044J-1045F. In the latter case, the circumstances an appeal court can interfere in the exercise of such discretion were stated to be where a court “has exercised its discretion capriciously or upon a wrong principle, or has not brought it unbiased judgment to bear on the question, or has not acted for substantial reasons.” See too Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd and another [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1119 (CC) at paras 83 to 89. In Trencon, the Constitutional Court referred to the test as articulated in National Coalition for Gay and Lesbian Equality and others v Minister

of Home Affairs and others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 at para 11, that a court will not ordinarily interfere in the exercise of a true discretion unless satisfied that the discretion was not exercised 'judicially, or that it had been influenced by wrong principles or a misdirection on the fact or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.

[45] See for example *Gwetha v Transkei Development Corporations Ltd and Others*

[2005] ZASCA 51; [2006] 3 All SA 245 (SCA); 2006 (2) SA 603 (SCA) at paras 22 to 24.

[46] *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA); [2004] 3 All SA 1, MEC for Health, Eastern Cape and another v *Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at para 106.

[47] *Mpofana Community Land Claimants and another Regional Land Claims Commissioner KwaZulu-Natal Province and others* [2023] ZALCC 35 at para 39.

[48] *Cf Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005(4) BCLR 301 (CC) at paras 106 to 108.

[49] *Mwelase supra* n 40.

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