FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRCIA

Case No: 744/2013

In the matter between:

REON ESIAS BADENHORST N.O. 1st Applicant
(In his capacity as trustee of the Renhof Badenhorst Family Trust, IT1765/2000)

FLORINA NICOLENE BADEHORST N.O.
(In her capacity as trustee of the Renhof Badenhorst Family Trust, IT1765/2000)

EBEN PIETERSE N.O.
(In his capacity as trustee of the Renhof Badenhorst Family Trust, IT1765/2000)

SELLBORNE HOTEL (PTY) LTD 2nd Applicant

ZAFIRHA ENVESTMENTS CC 3rd Applicant

and

MOQHAKA MUNICIPALITY Respondent

CORAM: MURRAY, AJ

HEARD ON: 11 JUNE 2013

JUDGMENT BY: MURRAY, AJ

DELIVERED ON: 13 SEPTEMBER 2013

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[1] The Applicants approached the Court to declare all siding taxes, levies and/or tariffs as well as all taxes, levies and/or tariffs other than the normal taxes and tariffs imposed on the Applicants' property in Kroonstad ("the property") *ultra vires*and to order the Moqhaka Municipality ("theMunicipality") to repay all siding tariff payments made by the Applicants with interest; to reverse with interest all amounts debited against the Applicants' accounts as siding tariffs and to credit the Applicants' accounts accordingly.

[2] In issue between the parties are, firstly, whether the Municipality after 28 November 2000 was entitled to rely on a council decision to levy the siding tariffs which it has levied from the Applicants since then, and,secondly, whether the Applicants would be entitled to be so refunded or credited or repaid in the circumstances of this case.

[3] The Applicants are the owners of five immovable industrial properties, some vacant, others with improvements, in the district of Kroonstad, Free State Province. The payment of their municipal accounts for normal rates and taxes has always been up to date. However, the Municipality has also served on them tax invoices for tariffs coded, for instance, *"SU", "Siding erf", "Users levy"* and "*Rental"* ("the siding tariffs"). Since the Municipality has been unable to provide them with any legal grounds entitling it to levy such tariffs, on their attorneys' advice they ignored the siding tariff invoices.

[4] However, in March 2012 when the First Applicant attempted to sell two of its three properties, erven 1545 and 1546,it was confronted

with section 118 of the Local Government: Municipal Systems Act, Act 32 of 2000 (“the Systems Act”), which prevents the transfer of immovable properties without a clearance certificate which certifies that there are no outstanding municipal taxes, rates, and/or tariffs regarding that property for the 2 yearsprior to the clearance certificate. The original clearance certificates issued by the Municipalityfor the two propertiesin question indicated outstanding amounts of R24 925.40 and R20 773.47, respectively. These were subsequently replaced, however, with new clearance certificates indicating outstanding amounts of R10 883.16 and R10 712.37, respectively.

[5] First Applicant avers that it has never had any use of, access to or benefit from the sidings for which he was taxed since they were removed before he became the owner of the relevant properties. Its attorney therefore attempted to “determine the basis on which he could be held liable for such tariffs”. The Municipality originally provided him with and relied on a recommendation by the Executive Committee (annexure “RB10(2)” to the founding affidavit) for its cause of action, insisting that it constituted the Council decision to institute siding tariffs which authorised the Municipality to levy the siding tariffs.

[6] The Municipalityfailed to provide the Applicants’ attorney with any decisions or its policy regarding the siding tariffs for 2010, 2011 and 2012, any decisions in terms of section 75A of the Systems Act, any by-laws promulgated with reference to siding tariffs or any proof of publication of the tariffs in a newspaper in terms of section 75A(3)(b) of the Systems Act. Its officialspersisted in relying on

annexure “RB10(2)”for the Municipality’s right to levy siding tariffs even when the Applicants pointed out that the said annexure contained only proposals and made no reference to any decisions taken by the Municipality.

[7] When the Applicants approached the Court on annexure “RB10(2)”,however,the Municipality in its opposing papers sought to rely on, *inter alia,* a contractual arrangement, a possible enrichment claim, the Municipality’s original power to make decisions regarding municipal affairs and a Council resolution (annexure “O6”to the opposing affidavit).Its reliance on annexure “O6” instead of on annexure “RB10(2)” as well as the abovementioned defencesled to the filing of a rejoinder, a supplementary rejoinder and a surrejoinder, with numerous new averments in and further annexures to the rejoinder and supplementary rejoinder.

[8] The Respondent also raised two *points-in-limine*, namely an averment that Applicants’ founding affidavit was not properly sworn to and an averment that the resolution that authorised First Applicant to depose to the affidavit was undated and therefore invalid. Both were dismissed after theCourt had listened to the arguments and considered the further affidavits filed in that regard and was satisfied that there had been substantial compliance with the requirements for validity in both instances.

The alleged contract *cum* servitude and the Enrichment Claim:

[9] In argument Counsel for the Municipality explicitly abandoned the contractual defence. He did not take the enrichment claim any further, either. Therefore neither of these will be addressed in the judgment.

The Municipality's original power:

[10] The Applicants aver that the Municipality did not have a legal right to levy siding tariffs from the Applicants and therefore acted *ultra vires* when it did so. They claim that the Municipality never took a valid decision to levy siding tariffs and, if it were to be found that it did, that it failed to comply with the statutory requirements for such a decision to be lawfully implemented. They allege, furthermore, that if a lawful decision was indeed taken on 28 November2000 as averred, it could only have been valid until 30June 2003.

[11] The Respondent, on the other hand, maintained that the Municipality's power to impose taxes, rates and fees is now an original constitutional power bestowed on it by section 229(1)(a) of the Constitution, that all that was needed for a lawful decision to impose taxes was a majority decision and that, consequently, the Applicants' reliance on the *ultra vires* doctrine was fatally flawed.

[12] The Respondentclaims, furthermore, that in terms of the original and constitutionally entrenched powers to charge fees, the Municipal Council on 28 November 2000 in terms of section 10G(7)(a)(ii) of the Local Government Transition Act, Act 209 of 1993 (the Transition Act), lawfully decided by way of a resolution to charge the tariffs for railway sidings as set out in annexure "06".

[13] The Municipality maintains that the 28 November 2000resolution recorded in annexure “O6” is the only decision regarding the implementation of siding tariffs that it ever took until the financial year of 2012/2013. It avers that it only then made a further decision regarding siding tariffs under section 11.1 of *“Public service infrastructure (e.g. Servitudes)”* in the 2012/2013 budget and that it was the first time it had acted in terms of the Systems Actwhich came into effect on 1 March 2001. The Municipality insistsstthat the November 2000 decision was never amended or reconsidered until then. It admitsthat its Councilresolved to phase in fees up to 31 [*sic*] June 2003 and maintains that, as from 1 July 2003, the same 30 June 2003 fee has been budgeted for and taken into considerationwithout increase in the projected income and expenditure for all subsequent financial years up to the 2012/2013 financial year.

[14] The Municipality maintains, furthermore, that the November 2000 resolution entitled it to collect a “*users levy”* of R2 941.84 p/a and a *“rental”* of R13 839.31 p/a (or a *total* of R16 781.15) until a new decision regarding the 2012/2013 financial year changed the amounts to R3 000.00 and R16 700.00, respectively. It avers, also, that the inclusion of the unchanged 2003 fees in the budget was done in accordance with section 74 and section75 of the Systems Act, that the said tariffs were applicable to the Applicants’ properties and that the Applicants were all charged the said tariffs in accordance with the 28 November 2000 decision until 2012/2013.

[15] In order to determine whether the resolution in annexure "O6" indeed constituted a valid decision to impose railway siding tariffs, the Court needs, first of all, to examine in chronological order the events leading up to the Council meeting of 28 November 2000 as depicted in the relevant annexures.

[16] The Municipality reportedly in 1997 started to consider an adjustment to the railway siding tariffs allegedly levied from owners of industrial properties close to railway sidings since 1951. At an Executive Committee meeting on 20 May 1997 it was reported that industrialists in the Kroonstad Industrial areas had been paying an annual fee ranging from R100 to R300 for railway sidings, though "*it is not clear how the amounts were determined…".* An averment that the amounts "*were determined and registered to the Deeds of Sale when the erven were sold",*was disproved by an audit report which stated that "*the full maintenance costs of the municipal railway sidings are reclaimable from the industrialists."*

[17] The Executive Committee at the 20 May 1997 meeting resolved to request an official to obtain the tariff structures of railway sidings from other towns and to convene meetings with the owners of the relevant industrial properties to discuss the possible adjustment of tariffs.

[18] The first such meetingon 3 July 1997 was reportedly attended by only four owners who did not use the sidings and who agreed to pay R100 per month towards maintenance of the sidings. The Applicants aver that they know nothing about any meetings.The First Applicant in any event only acquired his properties in 2005.

Although the Municipality annexed copies of the notices regarding the meetings, it did not disclose how such notices were brought to the attention of the industrialists.

[19] On 30 September 1997the Executive Committee report was submitted to the Council who resolved that all the owners of industrial sites with railway sidings available to them were to be invited to a follow-up meeting and to be informed beforehand that the Council would consider the imposition of one of two formulas for determining siding tariffs, namely:

> "Either the formula set out in the agenda or a formula according to which the 56 owners whose erven can physically be linked to the railway sidings shall be liable, on an equal basis, for the annual interest and redemption in respect of the provision of siding facilities; and
>
> The 17 owners who presently make use of the railway sidings shall be liable, on an equal basis, for the annual maintenance cost of the sidings,
>
> (c) that the persons referred to in (b) above, also be informed that they are entitled to submittheir comments.
>
> **Formula 5**
>
> A fifth option is to take the yearly interest and redemption and to divide that between all the users of the siding facilities and the balance, viz the maintenance cost, between the users who actually make use of the facilities.
>
> Example:
>
> Interest and redemption for the 1997/98 financial year = R164743 ÷56 = R2941.84 per year.
>
> Maintenance cost for the 1997/98 financial year = R185 257 ÷17 = R10 897.46 per year."

[21] The next Council resolution annexed to the Municipality's papers is the one of 26 May 1998 taken during a meeting at which it was reported that at the 10 November 1997 meeting with the industrialists it was decided to approach Spoornet for assistance and that the industrialists had indicated that the Municipality should wait for Spoornet's policy before determining a tariff. The agenda for the Council meeting and the minutes of the Council resolution is annexed to the rejoinderas annexure "S22".

[22] Significantly, the agenda for the 26 May 1998 Council meeting stated that the purpose of the meeting was "*to take a resolution regarding the* ***short term***(myemphasis*) increase of tariffs payable by users and non-users of sidings".*

[23] On 26 May 1998 the Council resolved:

> "(a) thatbased on the previous year's budget, formula 5 … be implemented, subject thereto that the implementation thereof be phased in as follows:
>
> (i) 1998/1999 – financial year – 50%;
>
> (ii) 1999/2000 – financial year – 25%; and
>
> (iii) 2001/2002 – financial year – 25%; and
>
> (b) that all the stakeholders be informed accordingly."

[24] Significantly, no amounts were determined, specified or approved. The amounts appearing in Formula 5 are clearly labelled *"Example"*, i.e. merely an illustration of the result of the application of Formula 5 to, for example, the budget of 1997/1998. Only the percentages as set out above were approved, with no explanation as to their meaning. It is therefore impossible to determine whether they referred to a percentage of the tariff otherwise applicable in

terms of each particular year's budget (as meant, for instance, in section 21 of the Local Government: Municipal Property Rates Act, Act 6 of 2004 (the Rates Act) regarding the phasing in of certain property rates) or to various percentages of only the "maximum tariff"pertaining to the 1997/1998 budget (as in the Formula 5 example).

[25] The wording of Formula 5, namely *"to take the* ***yearly***(my emphasis) *interest and to divide that between … and the balance, viz. the maintenance cost, between …"*in my view makes it clear thatFormula 5 was intended to be applied, after the end of the phasing in period, to each successive year's budget in order to calculate and determine the appropriate siding tariffs for that year. The *"short term increases"*can in that context be taken to refer to the three incremental percentage increases in the tariffs proposed for the 1998/1999, 1999/2000 and 2000/2001 financial years, whereafter the full tariffs in accordance with each year's budget resulting from the application of Formula 5 were to start to apply.

> [26] This interpretation is supported, in my view, by the NOTE after the second table in annexure "RB10(2)" in which it is pertinently stated that:
>
> *"the increased tariffs can be phased in over the next two financial years, whereafter the charges will be based on the interest and redemption plus maintenance costs"*

[27] Inannexure "RB10(2)", dated 28 November 2000, the Executive Committee reportedthat for all owners the maximum amount had

erroneously been debited for the full period *"instead of in three phases* ***at the approved charges in respect of each of the three years****"*(my emphasis).But as stated above, the Municipality did not provide any document in which such charges had indeed been approved *"in respect of each of the three years"*.And on the Respondent's own version there was no such resolution before November 2000.

[28] Annexure "RB10(2)" is the document which the Municipality initially called the Council decision which makes the levying of siding tariffs legal. From its contents it is clear, however, that it is not a Council decision. It is merely the agenda for the Council meeting on 28 November 2000at which the Executive Committee reported the non-compliance with the previous 'decision' to phase in the tariff increases over a three-year period from the 1998 to the 2001 financial years as set out in annexure "S22", and proposed that the charges applicable to the financial year 1998/1999 rather be debited annually for the full period of those three years,and the increased charges be phased in in 2002 and 2003 instead.

[29] The agenda in "RB10(2)"contains two tables which detail the *"user levy"*amounts which according to the Respondent's papers were intended to be imposed as a *"service fee"* on industrial properties which could potentially obtain access to railway sidingsand the much higher *"rentals"* to be imposed, together with *"user levies",* on properties into which a railway siding actually runs. In terms of Formula 5, the calculation of the user levies would be based on the annual interest and redemption charges and the calculation of the rentals on the annual maintenance costs. No explanation is

provided regarding the ‘redemption charges’ or the ‘interest’, what they pertain to or how they are calculated.

[30] Presumably the user levies and rentals set out in the first table in “RB10(2)”are the *“approved charges”(*referred to in the “NOTE” after the second table)with which the different owners were supposed to have been debited on 1 July 1998, 1 July 1999 and 1 July 2000, respectively, but regarding which no resolution is annexed. The said first table reads as follows:

> “An investigation revealed that the owners concerned were all debited with the maximum amount for the full period, instead of at the following levies and rental in respect of each of the three financial years:-

“**DATE**	**USERS LEVY**		**RENTAL**	**TOTAL**
1/7/1998	R 1 470.92 pa	+R	6 919.66 pa	R 8 390.58 pa + VAT
1/7/1999	R 2 206.38 pa	+R	10 379.48 pa	R 12 585.86 pa + VAT
1/7/2000	R 2 941.84 pa	+R	13 839.31 pa	R 16 781.15 pa + VAT

> In 50 cases owners are responsible for payment of the users levy only and in their cases their accounts will be credited by an amount of R 32 561.13 each.”

[31] Annexure “RB10(2)” also contains a second table with the EC’s recommendation for the implementation of the increased tariffs:

> “Recommendation:
>
> The Executive Committee recommends:
>
> (a) that an investigation be done regarding the impact on the budget, should the followingproposal be acceptedthat the new tariffs for railway sidings be phased in as follows:

DATE	**USERS LEVY**	**RENTAL**	**TOTAL**
1/7/1998-30/6/2001	R 1 470.92 pa+	R6 919.66pa	R8 390.58pa+VAT
1/7/2001-30/6/2002	R 2 206.38 pa+	R10 379.48pa	R12 585.86pa+ VAT
1/7/2002-31/6/2003	R 2 941.84 pa+	R 13 839.31pa	R16 781.15 pa + VAT

1/7/2003 – the tariffs as per Council's policy

(b) That the report in (a) above be submitted at the meeting of the Council.

NOTE: An amount of R 2 140 634.55 was erroneously debited in respect of railway siding facilities as the maximum levy was charged in all cases for the period 1 July 1998 to 30 June 2001 instead of in three phases at the **approved charges***(my emphasis)* in respect of each of the three years.

Should the charges applicable to the financial year 1998/1999 be debited for the full period of three years, the total debit will amount to R550 515.80 in which case the increased tariffs can be phased in over the next two financial years, **whereafter the charges will be based on the interest and redemption plus maintenance costs.***(my emphasis)*

An amount of R 227 300.00 has been provided in the budget for the 2000/2001 financial year."

[32] The minutes of the resolution of 28 November 2000in terms of which the Council accepted the Executive Committee recommendation regarding the phasing in of the recommended tariffs are annexed to the opposing affidavit as annexure "O6"which reads as follows:

"459(TLC-Minutes:28.11.2000)

ACCOUNTS IN RESPECT OF RAILWAY SIDING FACILITIES

(Director Finance) (7/2/3/1/9)

RESOLVED that the new tariffs for railway sidings be phased in as follows:

DATE	**USERS LEVYRENTAL**	**TOTAL**
1/7/1998-30/6/2001	R1 470.92 pa+R6 919.66pa	R8 390.58pa + VAT
1/7/2001-30/6/2002	R2 206.38pa+R10 379.48pa	R12 585.86 pa + VAT
1/7/2002-31/6/2003	R2 941.84 pa+ R13 839.31pa	R16 781.15 pa + VAT

1/7/2003 – the tariffs as per Council's policy"(my emphasis)

[33] Annexure "O6" therefore documents the Council's acceptance,by way of resolution on 28 November 2000, of the Executive Committee's recommendation in "RB10(2)"to phase in over a period of five years (instead of three), from the 1998/1999 to the 2002/2003 financial years, the tariffs originally proposed to be approvedon 26 May 1998 as "short term increases" to be implemented on 1 July 1998, 1 July 1999 and 1 July 2000, respectively.It is clear from the last row in the table that the Council resolved that the listed tariffs beimposed only up to 30 June 2003, whereafter they were to be determined and imposed in accordance with the "*Council's policy*".No such policy has, however, been provided.

[34] Significantly the Council only passed the resolution on 28 November 2000, whilst the majority of the tariffs they so decided were applicable to previous financial years, namely 1998/1999, 1999/2000 and 2000/2001.I have to agree with the Applicants that the practical effect of that resolution would be that siding tariffs were to be levied with retrospective effect. And in par [36] of **Kungwini Local Municipality v Silver Lakes Home Owners Association**2008(6) SA 187 (SCA), Streicher JA held that retrospective levying indubitably was not authorised by the legislation. I respectfully agree. Section 10G(7)(b)(ii) of the

Transition Act indeed does not provide for the retrospective levying of siding tariffs. The resolution of 28 November 2000 is therefore *ultra vires.*

[35] The Respondent'sargument that municipalities are no longer creatures of statute and that therefore their power to levy fees is now accepted as a constitutionally entrenched original power, the exercise of which needs no enabling legislation, whether national or provincial and that all that was required for a valid Council decision was a resolution supported by the majority of the members of the Council, is, of course, not as simple as that. It does not take into consideration the fact that such original power is not unfettered.

[36] The principle of legality requires that a Council's decision to impose tariffs or levies has to be taken in accordance with the law, failing which it is invalid to the extent that it is inconsistent with the law. In **Afordable Medicines Trust and Others v Minister of Health and Others**2006(3) 247 (CC) the Constitutional Court summarised the legal position as follows:

> *"Our constitutional democracy is founded on … the supremacy of the Constitution and the rule of law. . . the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid … this means that the exercise of all public power is subject to constitutional control. The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the*

executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."(Seealso: **Gerber and Others v Member of the Executive Council for Development Planning and Local Government, Gauteng, and Another**2003(2) SA 244 (SCA) at para [35].)

[37] Section 229 of the Constitution provides *"that a municipality may impose … if authorised by national legislation … other taxes, levies and duties appropriate to local government… and … the power of the municipality to impose rates…, fees… or other taxes, levies or duties … may be regulated by national legislation."*The Local Government: Municipal Systems Act, Act 32 of 2000 (the Systems Act) and the Local Government: Municipal Finance Management Act, Act 56 of 2003 (the Finance Act) is the applicable national legislation for purposes of this case.

[38] In **Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Other**1999(1) SA 374 (CC) in paras [56] and [58] the principle of legality was held to imply that a body exercising public power, *"such as a municipality making original legislation in the form of budgetary resolutions",* had to act within the powers lawfully conferred on it. In **Kungwini** in par [14] at 194F – 195A the Supreme Court of Appeal held that a municipality exercising its power to impose a rate on property was exercising a legislative power, not executing an administrative act. The same principle applies to the other taxes, levies or duties, as part of the budgetary process. (See also: **South African Property Owners Association v Johannesburg Metropolitan**

Municipality and Others 2013(1) SA 420 (SCA) paras [6] and [8]).

[39] It was held in **Kungwini**, furthermore, that the principle of legality dictated that in levying, recovering or increasing property rates, a municipality is obliged to follow the procedure prescribed by the applicable national or provincial legislation. In **SA Property Owners** par [8] at 426 the Supreme Court of Appeal determined, moreover, that the national legislation authorising municipalities to impose other taxes, levies and duties appropriate to local government in accordance with section 229 of the Constitution, the Systems Act, the Finance Act,and the Rates Act*"... must be read together as they form part of the suite of legislation that gives effect to the new system of local government"*. (See also: **Liebenberg NO v Berg River Municipality** 2012 JDR 1834 (SCA) par [8].) The Rates Act is of course only relevant where property rates are concerned.

[40] It is common cause that section 10G(7) of the Local Government Transition Act 209 of 1993 (the Transition Act) applied to the November 2000 resolution and that the procedures prescribed in s 10G(7) for the publication and notification of the community therefore had to be followed regarding the November 2000 resolution.

[41] The Supreme Court of Appeal in paras [8] and [9] of **SA Property Owners**made it clear *"that a fundamental aspect of the new local-government system is the active engagement of communities in the affairs of municipalities"* and that *"members of the local community have the right 'through mechanisms and in accordance with processes and procedures*

*provided for in terms of the Systems Act or other applicable legislation' to contribute to the decision-making processes of the municipality … It is significant that the Act pertinently makes provision for the local community to participate in the preparation of the budget … and the levying of rates".*Chapter 4 of the Systems Act provides in detail for such community participation and emphasises the necessity for the community to be apprised effectively of all matters requiring its participation. Chapter 4 of the Finance Act also provides for the specific procedure to be followed in a budgetary process in order to inform and involve the community.

[42] In **Liebenberg NO v Bergrivier Municipality** 2012 JDR 1834 (SCA) in par [20] Lewis JA determined that the power to levy rates was to be found in section 10G(7) until 2011, but that the procedure or *"manner of doing so"* was regulated by Chapter 4 of the Finance Act once the latter came into operation on 1 July 2004.After 1 July 2004, in other words, the procedures to be followed in the municipal budgetary process were determined by the Finance Act.

[43] The Supreme Court of Appeal in **Kungwini** in par [30] at 199F/G – 200A held that section 10G(7)(c)(iv) of the Transition Act required that a notice of a council resolution whereby rates or service charges were determined or amended was to provide for a period of 14 days within which any objections to such determination or amendment had to be lodged. Section 10G(7)(c) provided that:

> *"after a resolution as contemplated in paragraph (a) has been passed, the chief executive officer of the municipality* ***shall*** *(my emphasis) forthwith cause to be conspicuously displayed at a place installed for*

> *this purpose at the offices of the municipality as well as such other places within the 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."*

[44] As is clear, section 10G(7)(c)(ii) required the notice to, *inter alia,* stipulate the date on which the determination or amendment would come into operation. The purpose of such requirement, according to Van Heerden JA in **Kungwini,** was to afford the public the opportunity to raise objections which the Municipality then had to consider and make fresh or amended determinations and a new implementation date if such objections had merit. Section 10G(7)(e), furthermore, provided that:

> *"The chief executive officer* ***shall***(my emphasis) *forthwith send a copy of the notice referred to in paragraph (c) to the MEC and cause a copy thereof to be published in the manner determined by the Council."*

[45] The Respondent did not annex any document that could have served as such a section 10G(7)(c) notice or as a section 10G(7)(e) copy thereof regarding the November 2000 decision or any earlier decision on the amounts listed in the tables in annexures "RB10(2)" or "O6", whether in relation to an original determination of tariffs or to an amendment to existing tariffs. The

language regarding the notice in both section 10G(7)(c) and section 10G(7)(e) is peremptory. In the absence of such a notice, which absence the Municipality in argument admitted, the implementation of the resolution would have been unlawful and the Applicants would simply have been confronted with a *fait accompli* once the new or amended tariffs were imposed.

[46] In **Gerber**in par [36] at 357 D/E and E/F the Supreme Court of Appeal held that the rates in that case had not been imposed in the manner required by law, but in conflict with the statutory prescripts for publication and community participation and therefore had to be set aside. In that case the municipality did publish a notice, but failed to follow the prescribed format and contents. In the present case, the Municipality did not offer any explanation or provide any evidence of having published any notices at all, despite having had the opportunity to do so in its extended papers. It merely made a bare averment that all the statutory requirements of section 10G(7) of the Transition Act had been complied with.

[47] In **Kungwini**, *supra*, in par [31] at 200 B – F the Supreme Court of Appeal held that the object of the provisions requiring clear and timeous notice of new or amended tariffs was to ensure that residents in the municipal area concerned were 'properly and optimally informed' of what their financial obligations would be, should the published amendments take effect, and precisely when such obligations would become enforceable. The Court held that for that reason a procedure whereby residents were, in effect, presented with a *fait accompli* in that the rate increases were

implemented and enforced prior to the expiry of the period allowed for the lodging of objections to such increases, failed to *'encourage the involvement of communities and community organisations in matters of local government'* as required by section 152(1)(e) of the Constitution and failed to constitute *'democratic and accountable government for local communities'*, which is one of the objects of local government in terms of section 152(1)(a).

[48] The Municipality argued that there had at least been substantial compliance with the said section. But, contrary to the **Kungwini**and **Nokeng**cases, in this instance the notice was not deficient. There was simply no notice at all from 2000 to 2012 when the Council adopted a resolution to impose specific tariffs and for the first time published a list of tariffs which included those for railway sidings, as well as a notice in the newspaper in terms of S75A of the Systems Act.

[49] In **Berg River**in par [28] it was held that material non-compliance with the provisions of the subsection regarding publication renders the rate imposed legally ineffective. I agree with the Applicants' argument that there is no evidence of either material or even substantial compliance with the publication requirement in the present case. Chapter 4 in both the Systems Act and the Finance Act has the same purpose: namely to afford the relevant owners the opportunity to raise objections to tariffs so that the Municipality can consider the objections and determine other tariffs if the objections were valid. On the papers before me the Municipality *in casu* did not offer the Applicants such an opportunity.

[50] In my view the meetings that the Municipality held with some of the owners in 1997 regarding the various potential formulas with which to determine siding tariffs did not relieve it of its statutory duty to inform the owners of any decisions actually taken in that regard, especially since it is clear from the relevant documents that the Municipality did not follow the owners' proposals, e.g. to wait for Spoornet's input before determining the tariffs.

[51] The Systems Act commenced on 1 March 2001. Thereafter the Municipality was supposed to apply its provisions. In terms of section 74 and section 75 of the Systems Act the Municipality was supposed to adopt and implement by way of resolution a siding tariff policy. There is no evidence that it did so. It also had to levy and collect tariffs in accordance with its tariff and credit control policy. There is no evidence that it did that, either. And if the phrase*"Council's policy"* was meant to refer to the application of Formula 5, there is no evidence that that was applied after the November 2000 resolution either.

[52] The Respondent's argument that the tariffs were lawfully imposed because they have been part of the budget since 2000 is not persuasive. Being part of the budget does not make them lawful *per se,* unless the prescribed budgetary process was followed and the necessary resolutions promulgated. The Municipality did not provide any evidence, however, of the promulgation of any such resolution, a policy in terms of which siding tariffs could have been imposed, a list of such tariffs, any applicable by-law or evidence of the tariffs having been made known to the public in the prescribed manner.

[53] In par [15] of **SA Property Owners**it was stressed that the levying of rates is an integral part of a municipality's annual budget process and that the levying of rates has to be considered together with the budget. There is no reason why the same would not apply to the levying of tariffs. A Council levies rates by passing a resolution imposing the rates, which resolution must be promulgated and made known to the public in the prescribed manner.

[54] In **Lienbenberg** Lewis JA in par [27] found with reference to **Gerber**and to **Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association** [2011] 2 All SA 46 (SCA)that it would be sufficient for a notice in terms of section10G(7) to state that the details of a rates resolution could be scrutinised elsewhere e.g. that the resolution was available for inspection at the town council offices during normal office hours, in order to meet the requirement of section 10G(7)(c) that the general purport of the resolution be displayed. There is no evidence that that indeed happened *in casu.*

[55] In order to lawfully impose siding tariffs in terms of the budget as from 1 July 2005 the Municipality would have had to determine appropriate siding tariffs to meet the Municipality's obligations regarding the maintenance of the sidings in terms of the procedures prescribed in the Finance Act. In compliance with section 17 of the said Act it would have had to have made the draft budget and siding tariff resolutions available for inspection and would have had to call for objections.

[56] Section 17(3)(a) of the Finance Act determines that when an annual budget is tabled, it has to be accompanied by draft resolutions (i) approving the budget and (ii) … setting any municipal tariffs as may be required for the budget year. Section 22(a)(i) determines that the Municipality must, in accordance with Chapter 4 of the Systems Act, immediately after the tabling of the annual budget, make public the annual budget and the draft resolutions referred to in section 17(3) and (ii) invite the community to submit representations in connection with the budget.

[57] Although the Municipality argued that it was done, no evidence to that effect was provided with reference to the siding tariffs. Part of the purpose of a budget is to regularly determine that the tariffs imposed for certain services are still relevant and appropriate and if they are not, to debate and determine new tariffs. From the documents provided by Respondent itself it is clear that the 2003 tariffs were never intended to be imposed unchanged *ad infinitum.* Yet on its own version it did not determine new tariffs until 2012/2013.

[58] In **Berg River Municipality v Liebenberg and Others** (26078/2010) [2011] ZAWCHC 371 (25 August 2011) in par [23] Binns-Ward J made it clear that in order for a levy to qualify as one imposed in terms of section 10G(7)(a)(ii) of the Transition Act, as averred by the Applicants regarding the siding tariffs, its imposition would have to be connected with an identified function or service of the Municipality; it would need to be recognisable by its express provisions as a charge for the execution of such function or the

provision of such service, with the criterion of a liability to pay it being established by being a benefactor or user of the function or service.

[59] In **Pretoria City Council v Walker**1998(2) SA 363 (CC) the Constitutional Court in para [85] at 397H – 398B stated, in respect of a local authority's power to levy a tariff for services rendered based on a uniform structure for its area:

> *"In my view, this requirement compels local governments to have a clear set of tariffs applicable to users within their areas. The tariffs may vary from user to user, depending on the type of user and the quality of service provided. As long as there is a clear structure established, and differentiation within that structure is rationally related to the quality of the service and type or circumstances of the user…"*

[60] It was stated in **SA Property Owners**, furthermore, that *"logic dictated that the approval of the budget had to go hand in hand with the determination of rates, as the revenue from rates was essential to fund the budgeted expenditures". In casu,* however, in my view it is clear that no annual determination of the tariffs took place with the approval of the budget. The two tenders annexed to the Municipality's papers clearly show an annual escalation of the siding maintenance costs over a period of six years from 2000 to 2006. On its own version the industrial owners were to be held liable for the full maintenance costs. Clearly, then, if a policy or even Formula 5 had indeed been applied to determine tariffs in accordance with the annual budget, it is not possible for the annual siding tariffs to have remained static until 2012/2013 as, on the Municipality's own papers they did.

[61] Furthermore, from the relevant portions of the budgets annexed to the rejoinder, there appears to be no rational connection between the continued levying of the unchanged 2003 amounts and the amounts budgeted for siding maintenance and interest and redemption. The budgeted amounts for interest and redemption between 2004/2005 and 2007/2008, for instance, decreasedfrom R151 500.00 to R105 000.00 to R 65 000.00. Yet there was no corresponding decrease in the 'user levies' claimed from the Applicants. It can therefore not be found that the Council even applied its mind to the imposition of siding tariffs until 2012.

[62] In my view it is a municipality's obligation as part of its budgetary process to ensure that the tariffs it imposes for various services are relevant and appropriate. It cannot simply sit back and say that just because tariffs were historically levied for certain services, they may be so levied *ad infinitum.* The tariffs must at least demonstrate that the Municipality has applied its mind to the determination thereof. That is not the case in the instant matter.

[63] While the Municipality averred, for instance, that it has outsourced the siding maintenance and therefore had certain expenditures regarding the sidings, it only annexed two tenders dated 2001 and 2004, each one for a period of 3 years. There is no evidence, therefore, that the sidings are still maintained, either by an outside company or by the Municipality itself. On the contrary, the Applicants maintain that they have never had any use or benefit of the sidings and that it would for all practical purposes be impossible or extremely expensive to gain such access. When

First Applicant bought the property in 2005, the relevant siding had been removed already. The Applicants maintain, furthermore, that the Municipality is not maintaining the sidings and that they have had to report the lack of maintenance because of a fire hazard. Yet the Municipality argues that the Applicants are liable for the "user levies' which on its own version have not been determined or adjusted since 2003, until the 2012/2013 financial year.

[64] In view of the decreasing amounts budgeted for interest and redemption, as appears from the extracts from the budgetsannexed for 2005 to 2007, for instance, the non-user owners would certainly have had an interest in objecting to the continued levying of the same user levies, which opportunity they would only have had if the tariffs had been published as required.

[65] Lewis, JA, in **Liebenberg**with reference to section 27(4) of the Finance Act did hold that mere non-compliance with a provision of Chapter 4 of that Act relating to the budget process did not make the annual budget invalid.But the Municipality's failure to comply with especially the community involvement requirements in the present case was not simply an administrative omission of the kind that she found in par [40] "*should not undermine the entire rates basis on which the budget rests"* because *"that could not have been the intention of the legislature".* On the papers, there was no substantial compliance at all with the provisions of the applicable legislation.

[66] On its own version the Municipality took only two resolutions to determine and impose siding tariffs: the 28 November 2000 one which, if valid, could not have yielded valid tariffs after 2003 in the

absence of a tariff policy or a new resolution for budgetary purposes, and the 2012/2013 resolution validly taken and implemented in accordance with the provisions of the Systems Act and the Finance Act.

[67] If one were to find, then, that the 2000 resolution and the tariffs imposed in consequence thereof, were not validly imposed, the unavoidable result would be that the tariffs allegedly included unaltered in the budget from 2005 until 2012 when a specific resolution to determine the tariffs was passed, were also unlawful and invalid.But even if I am wrong about the unlawfulness of the November 2000 resolution, it is clear that the amounts therein were decided to apply only until 2003 and thereafter needed to be imposed by way of a policy. The Respondent provided none and relies on that resolution as the only one until 2012/2013. On their own papers then the tariffs imposed after 2003 until 2012 are invalid.

[68] The Respondent relied on **Rademan v Maqhaka Municipalityand Others**[2012] JOL 28591 (SCA) case where in par [9] it was held that for a municipality to be able to properly and efficiently execute its constitutional and statutory obligations to deliver municipal services to its residents, it requires sufficient resources and revenue and that, in order to put the municipality in a position to render the required municipal services, the ratepayers must make regular payments of taxes and levies and consumption charges. It was held that it was part of the ratepayers' civic and contractual responsibilities to make corresponding payment for municipal

services in accordance with subsections 5(1)(g) and 5(2)(b) of the Systems Act.

[69] The circumstances *in casu*differ vastly from those in **Rademan**where in par [19] the Supreme Court of Appeal found that the ratepayers' refusal to pay *"for services which they enjoy"* could not be condoned. Regarding the Applicants *in casu* there is no evidence that they*"enjoy"* any of the services they are being charged for.

[70] The Respondent's averment that allowing the Applicants' siding tariffs to be reversed and their payments repaid would deprive other residents of essential services such as water and electricity if their charges for siding tariffs were to be reversed, is not persuasive. On the Municipality's own papers they were to be fully responsible for the siding maintenance. On the Respondent's own version the industrial owners pay higher property rates than owners of private property anyway and in that respect the Applicants' accounts were fully paid up. In my view the effect of the relief prayed for would be limited, especially if the retrospective effect thereof were to be appropriately restricted.

[71] In **Rademan** in paras [10] and [11] Bosielo JA stated that municipalities are obliged to levy and collect rates and taxes from their residents as authorised by s 229 of the Constitution and for this purpose is required by law to have a credit control and debt collection policy in accordance with s 96 of the Systems Act and which is consistent with its rates and tariffs policies.

[73] Municipalities, therefore, have three statutory obligations regarding taxes and tariffs: to determine, to levy and to collect. In the present case there is no evidence that the Municipality did anything to actually collect the siding tariffs other than to send invoices either. There is no evidence that it ever demanded payment from the Applicants when they stopped paying, until March 2012 when First Applicant wanted to alienate its property and was confronted with the section 118 certificate. (See in this regard **Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Hoausing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as *amici curiae)***2005(1) SA 530 (CC) in which Yacoob J in par [49] agreed with the Applicants that a municipality cannot sit by and allow charges to escalate regardless and in the knowledge that recovery will be possible whenever the property falls to be transferred. He found that the municipality must comply with its duties and take reasonable steps to collect amounts that are due, andheld in paras [62] and [67] at 557B, C – D that the provisions of section 118(1) did not relieve the municipality of its duty to do everything reasonable to ensure appropriate debt collection.)

[74] The Municipality relied on **Rademan**to argue that the Applicants would deprive other residents of the provision of basic services if their payments for the siding tariffs were to be credited to their accounts. Furthermore, that, because the siding tariffs have been part of the budget, crediting the Applicants' accounts would have a

'domino-effect' or "knock-on effect" such as described in par [71] in the **SA Ratepayers**case.

[75] But, the important difference between the present case and the **SA Ratepayers**case is that in the latter case the property rates sought to be impugned formed the principal component of the budget the appellants sought to have set aside. *In casu* the siding tariffs are a very small, restricted and relatively insignificant subset of the budget, contributed by and applicable to a very small subset of owners. On the Municipality's own version the tariffs payable by the industrial owners remained unaltered since 2003. They did not allege that there are more industrial owners now than when the November 2000 resolution was passed – namely around 50 'user levy' payers and 17 'rental payers'. Unquestionably that is a very small proportion of the total municipal ratepayers and in my view it would not have a prohibitively negative effect on the budget if the railway siding tariffs unlawfully levied were to be credited to their accounts, especially if restricted to appropriate period.

[76] The Municipality *in casu* has provided no details of the effect on the Municipality if it were indeed to be ordered to reverse the tariffs charged and to credit the Applicants' accounts or to repay the tariffs unlawfully claimed, other than to make a general averment that "the matter deals with a possible loss of approximately R8 million". No explanation is provided for the calculation of the said amount. It is not averred that it would not be possible to credit the accounts or even to pay back what has been paid, either.

[77] I agree with the Applicants that it is clear on the papers that the Municipality did not implement the siding tariffs in accordance with the law. The tariffs so imposed are therefore unlawful and should be set aside.In my view, therefore, the Municipality was not entitled to claim the siding tariffs and the Applicants are entitled to have the charges reversed. The Municipality's averment, with reference to **SA Ratepayers,** that it should not be done because the Supreme Court of Appeal refused to 'unscramble the egg' is in my view not applicable in the instant case. The refusal to 'unscramble the egg' in that case pertained to a situation where the Court was asked to set aside or declare null and void Johannesburg city's whole budget for 2009/2010. Obviously the ramifications of such an order is vastly different from setting aside the tariffs unlawfully claimed in a very small subset of a budget as in the present case.

[78] I respectfully agree with Navsa JA in par [37] in **Gerber**that it is regrettable that revenue will be lost because of the Council's failure to exercise its powers and functions within the law, but that one should not lose sight of the principles underlying our democracy and that "*All, especially institutions of State, must respect the principles of legality".*

[79] On the papers before me the process followed by the Council was fundamentally flawed and it acted outside its powers and functions. It was not merely an administrative error such as to publish a defective notice. It was a fundamental failure to adopt the prescribed policies to determine tariffs and collect the tariffs it levied.

[80] The Applicants *in casu* did not ask for the entire budget to be set aside as in the **SA Property Owners** case. Neither is the levying of siding tariffs the principal component of the budget in this case. Other than a bare averment that it might involve R8 million, the parties did not engage, on affidavit, on affordability or terms of repayment or the possible future impact on all ratepayers.

[81] I am of the view, therefore, that if I restrict the order for writing back and crediting the Applicants' accounts accordingly, and for the repayment of amounts paid, to the three years preceding this order, the effect on the budget and the other residents in the Municipal jurisdiction would indeed be minimal and therefore equitable.

[81] The Applicants have been substantially successful in their application and I see no reason for the cost order not to follow success.

ORDER

[82] WHEREFORE the following order is made:

1. The siding tariffs/fees and/or charges imposed on the Applicants by the Respondent with regard to Erf 1545, Kroonstad (extension 110, Erf 1546 Kroonstad (extenion) 11), Portion of Erf 6922, Kroonstad, Erf 1508 Kroonstad and Erf 1087 Kroonstad have been unlawfully imposed and are set aside.

2. The Respondent is to reverse the siding tariffs/fees and/or charges debited to the Applicants' accounts in the financial years 2009/2010, 2010/2011 and 2011/2012 and to credit their accounts accordingly.

3. The Respondent is to repay with interest the siding tariffs, fees and/or charges paid by the Applicants in the financial years 2009/2010, 2010/2011 and 2011/2012.

4. The Respondent is to pay the costs of the application, which costs are to include those occasioned by the removal from the roll on 30 May 2013.

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H. MURRAY, AJ

On behalf of the Applicants:	Adv. B. Knoetze S.C. Instructed by: Symington & de Kok Attorneys BLOEMFONTEIN
On behalf of the Respondents:	Adv. J. Y. Claasen S.C. Instructed by: Rampai Attorneys BLOEMFONTEIN