**REPUBLIC OF SOUTH AFRICA**

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

**Case Number: 2023-095869**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

**8 April 2025**
DATE

[redacted]
SIGNATURE

In the matter between:

| | |
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| **INDEPENDENT INSTITUTE OF EDUCATION (PTY) LTD** | First Applicant |
| **ADVTECH LTD** | Second Applicant |
| and | |
| **CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | First Respondent |
| **MUNICIPAL MANAGER OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | Second Respondent |
| **MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** | Third Respondent |
| **MINISTER OF FINANCE** | Fourth Respondent |
| **MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG PROVINCE** | Fifth Respondent |

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| **MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG PROVINCE** | Sixth Respondent |

**AND**

**Case No: 13361/2023**

In the matter between:

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| **INDEPENDENT SCHOOLS ASSOCIATION OF SOUTHERN AFRICA NPC** | First Applicant |
| **THE TRUSTEES FOR THE TIME BEING OF THE SPARROW SCHOOLS EDUCATIONAL TRUST** | Second Applicant |
| **BELLAVISTA SCHOOL NPC** | Third Applicant |
| **CITYKIDZ PRE AND PRIMARY SCHOOL NPC** | Fourth Applicant |

and

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| **CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | First Respondent |
| **MUNICIPAL MANAGER OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | Second Respondent |
| **SOCIAL DEVELOPMENT DEPARTMENT OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | Third Respondent |
| **MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** | Fourth Respondent |
| **MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG PROVINCE** | Fifth Respondent |
| **MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG PROVINCE** | Sixth Respondent |
| **MINISTER OF FINANCE** | Seventh Respondent |

**AND**

**Case No: 120464/2023**

In the matter between:

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| **CURRO HOLDINGS LTD** | Applicant |

and

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|---|---|
| **CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | First Respondent |
| **MUNICIPAL MANAGER OF THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | Second Respondent |
| **MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** | Third Respondent |
| **MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS: GAUTENG PROVINCIAL GOVERNMENT** | Fourth Respondent |
| **MINISTER OF FINANCE** | Fifth Respondent |
| **MINISTER FOR GAUTENG PROVINCE TREASURY: GAUTENG PROVINCIAL GOVERNMENT** | Sixth Respondent |
| **MEC FOR EDUCATION: GAUTENG PROVINCIAL GOVERNMENT** | Seventh Respondent |

**AND**

**Case No: 128616/2023**

In the matter between:

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| **AFRIFORUM** | Applicant |

and

**CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** First Respondent

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

**MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS** Third Respondent

**MINISTER OF BASIC EDUCATION** Fourth Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR EDUCATION, GAUTENG PROVINCE** Fifth Respondent

**MINISTER FOR HIGHER EDUCATION & TRAINING** Sixth Respondent

Judgment handed down electronically by circulation to the parties' legal representatives via email, and release to SAFLII and by uploading it on CaseLines. The date and time for hand down is deemed to be 10:00 on 8 April 2025.

Local authority — Finance — Budgets — Approval — Where public participation in adoption of budget inadequate — Legality — Constitutional and statutory framework dealing with budget approval examined — Nature and extent of obligations on municipalities to ensure public participation in process considered — Applicable principles in assessing compliance with such obligations set out — Court concluding municipality falling short of requirements —— Court ordering compliance with public-participation obligations in preparation and tabling of future budgets insofar as privately owned properties used for educational purposes were in terms of the Municipality's Rates Policy and By- Law were categorised as business and commercial.

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**JUDGMENT**

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**MUDAU, J**:

[1] These matters have been specially allocated for hearing. The matters concern four separate review applications which have been consolidated for the purpose of a joint hearing in terms of an order by this Court per Unterhalter J (as he then was) dated 26 April 2024. All four applications challenge the City of Johannesburg Metropolitan Municipality's ("the City") 2023/2024 Rates Policy and By-Law, which came into effect on 1 July 2023, based on the principle of

legality and various constitutional grounds insofar as privately-owned properties used for educational purposes may in terms of the City's Rates Policy and By-Law only be allocated under "business and commercial" (the impugned decisions). The applicants also seek certain ancillary and alternative relief. The applications are only opposed by the first respondent, the City. The City is a Municipality as contemplated in section 2 of the Local Government: Municipal Systems Act[1] (the "Municipal Systems Act").

[2] The matters are:

a. The Independent Institute of Education (Pty) Ltd and Another v City of Johannesburg Metropolitan Municipality and Others (Case number: 2023/095869) (the "IIE Application"). The first applicant in the IIE Application is The Independent Institute of Education (Pty) Ltd, a private company duly incorporated under the laws of the Republic of South Africa. The second applicant, Advtech Ltd, is a public company duly incorporated under the laws of the Republic of South Africa. IIE is a wholly owned subsidiary of AdvTech. IIE and AdvTech bring this application acting in its own interest, and in the interest of the children enrolled at its schools and in the public interest.

b. AfriForum NPC v City of Johannesburg Metropolitan Municipality and Others (Case Number: 2023/128616) (the "AfriForum Application"). AfriForum NPC is a non-profit company registered under registration number 2005/042861/08 in terms of the company laws of the Republic of South Africa and is also registered as a non-governmental organisation (NGO). AfriForum brings the application in terms of section 38(a) of the Constitution[2] in its own interest, the interests of its members by in terms of section 38(e) and the public interest, as contemplated in section 38(d) of the Constitution.

c. Curro Holdings Ltd v the Council of The City of Johannesburg Metropolitan Municipality and 5 Others (Case no: 23/120464) (the "Curro Application").

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[1] 32 of 2000.
[2] Constitution of the Republic of South Africa, 1996 ("*the Constitution*").

Curro Holdings is a public company with limited liability duly registered and incorporated in terms of the company laws of the Republic of South Africa.

d. Independent Schools Association Southern Africa NPC and Others v City of Johannesburg Metropolitan Municipality and Others (Case number: 2023/133361) (the "ISASA Application"). ISASA is a non-profit, voluntary association of independent schools in the Southern African region. It prides itself as the oldest and largest association of independent schools in Southern Africa, with 847 of these member schools located in South Africa. ISASA brings this application in its own interest, as contemplated in section 38(b) of the Constitution, but also in the public interest as contemplated in section 38(d) of the Constitution.

[3] The second applicant in the ISASA application are The Trustees for The Time Being of Sparrow Schools Educational Trust ("Sparrow School"). Sparrows School is a non-profit independent school in Auckland Park, Johannesburg. Sparrow School serves learners with special educational needs from economically disadvantaged communities. Sparrow School is recognised as a Public Benefit Organisation ("PBO") as defined in Section 30(1) of the Income Tax Act.[3]

[4] The third applicant in the ISASA application is Bellavista School NPC ("Bellavista School"), a registered Non-Profit Organisation ("NPO") with PBO status in terms of the Income Tax Act. Bellavista School is an independent remedial school that serves 270 learners with special educational needs, including children with, inter alia, autism spectrum disorder as well as developmental delays.

[5] The fourth applicant in the ISASA application is Citykidz Pre and Primary School NPC ("CityKidz School"), a non-profit pre-primary and primary independent state-subsidised school that serves learners from lower income families in the Johannesburg CBD.

[6] Three of the applicants, except Curro, contend that the City was entitled to create the category of "education" in which their properties must be allocated, and the

[3] 58 of 1962 as amended.

City's failure to do so tainted the whole process with irrationality. Distinct from the other applications, Curro contends that meaningful engagement with stakeholders is needed to address the question of the categorisation of independent schools and the rates to be levied thereon, which in this instance did not materialise. Curro seeks a review of the impugned decisions on account of being irrational, arbitrary and unreasonable. Curro seeks to have the impugned decisions declared invalid on the basis that they violate section 229(2)(a) of the Constitution and section 19(1)(c) of the Local Government: Municipal Property Rates Act ("MPRA").[4] Curro seeks an order directing the City to consult and undertake the necessary public participation process before categorising independent schools.

[7] Curro also seeks an order declaring the differentiation between public and independent schools for the purpose of levying property rates, an impermissible differentiation under section 19(1)(c) of the MPRA. The rate, so debated and formerly approved by the municipal council, lies at the heart of the public consultative process that is debated at the necessary public hearings, and is thereafter considered by a municipal council.

[8] The City opposes these applications. It contends that the impugned decisions are not justiciable in this Court. In this regard, the municipality relies on the decision of, inter alia, the Supreme Court of Appeal in *Nokeng Tsa Taemane,*[5] where it was held that the power to levy rates on property for services provided by a municipality concerns "political and inter-governmental issues, evidently specialist areas involving policy issues" outside the expertise of courts.

*Preliminary issue: Mootness*

[9] The City contends that the applicants' review of the City's 2023/24 Rates Policy has been rendered moot by its Rates Policy, which came into effect on 1 July 2024. The City raises this argument for the first time in its heads of argument. The factual basis for the City's contention is that the rates policy is part of the

[4] 6 of 2004.
[5] *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association* [2010] ZASCA 128; [2011] 2 All SA 46 (SCA) at para 8.

City's budget which lasts for one financial year. As the City's financial year end, *in tandem*, the budget for that year, which is challenged in these proceedings ended on 30 June 2024, the application has become moot. This issue need not detain this Court longer than necessary.

[10] It is trite that a matter is moot if it no longer raises an "existing or live controversy" between the parties, such that this Court's order will have no practical effect or result.[6] The applicants in the various matters seek to set aside, inter alia, the City' 2023/2024 rates policy in terms of section 172(1) of the Constitution. As of necessity, this calls for the exercise of a judicial discretion. In the matter of *Islamic Unity Convention v Independent Broadcasting Authority and others*[7] ("Islamic Unity Convention") the Constitutional Court stated:

> "[10] A Court's power under s 172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or conduct that is inconsistent with the Constitution invalid. It provides that when a Court decides a constitutional matter it *must* declare invalid any law or conduct inconsistent with the Constitution. It does not, however, expressly regulate the circumstances in which a Court should decide a constitutional matter. As Didcott J stated in *J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*:
>
> > 'Section 98(5) admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration.' [Footnote omitted].
>
> [11] In determining when a Court should decide a constitutional matter, the jurisprudence developed under s 19 (1)(a)(iii) will have relevance as Didcott J pointed out in the *J T Publishing* case. It is however also clear from that judgment that the constitutional setting may well introduce considerations different from those that are relevant to the exercise of a Judge's discretion in terms of s 19 (1) (a) (iii)."

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[6] Section 16 (2) (a)(i) of the Superior Courts Act, 10 of 2013; see also *National Coalition for Gay and Lesbians Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 CC; 2000 (1) BCLR 39 at para 21 and *AB and another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) at para 50.
[7] [2002] ZACC 3; 2002 (5) BCLR 433; 2002 (4) SA 294 (CC).

[11] The City is wrong. It is not correct that there is no longer a live controversy between the parties, nor is it correct that the constitutionality of the City's 2023/2024 rates policy has been rendered academic or hypothetical and of no direct, practical effect on the parties. As the applicants point out, the City has charged and collected rates from its ratepayers, based on what they allege is its unconstitutional and unlawful rates policy. In the event of a declaration in the applicants' favour, this is an ongoing wrong which continues to exist even after the lapse of the City's financial year. It is trite that under s 172(1)(b) of the Constitution, a court deciding a constitutional matter has wide remedial powers. It is empowered to make "any order that is just and equitable".[8] Significantly, the City's 2023/2024 rates policy clearly provides that the property rates on properties zoned and used for educational purpose but privately owned under the category of "Business and Commercial" will be phased in over a period of four years, specifically the 2023/2024, 2024/2025, 2025/2026 and 2026/2027 financial years.

[12] Our jurisprudence is solid and well established in this regard. In *The Thaba Chweu Rural Forum and others v The Thaba Chweu Local Municipality and others*[9] some years after the application was first launched, the Supreme Court of Appeal upheld an appeal and declared the rates policies unlawful and invalid. In determining a just and equitable remedy in terms of section 172(1)(b) of the Constitution, the Supreme Court of Appeal set aside the Thaba Chweu municipality's rates policies for the 2009-2018 years albeit to a limited extent and ordered the municipality to credit the appellants' members accounts which were levied and paid municipal rates in excess of the legally permissible rate limit of the rates chargeable. Recently, the Constitutional Court in *Ekapa Minerals (Pty) Ltd and another v Sol Plaatje Local Municipality and Others*[10] made a substitution order in place of that of the High Court inter alia, in the following terms:

> "3(a) The decisions taken by the council of the first respondent to set a property rates ratio of 1:22 in respect of the category of 'mining' for the financial years 2015/2016;

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[8] *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC).
[9] 2023] ZASCA 25.
[10] [2025] ZACC 1.

2016/2017; 2017/2018; 2018/2019 and 2019/2020 are declared unlawful and set aside.

(b) In terms of section 172(1)(b)(i) of the Constitution, the order in paragraph 3(a) will operate retrospectively with effect from 1 July 2015 onwards".

[13] In all these matters, there is no suggestion that the applicants delayed in launching these applications or that such delay, if any, was unreasonable. Importantly, as stated in *Thaba Chweu*, the City could not arrange its affairs with the confident expectation that the ratepayers would not challenge the 2023/2024 rates policy. I am accordingly of the view that the constitutional imperatives exist for the Court to hear these applications. The start of the City's new financial year is of no moment. Neither is it an impediment for this Court to hear these applications.

*Legal Framework*

[14] Section 229(1) of the Constitution provides that a municipality may impose rates on property. Section 2(1) of the MPRA similarly provides that a metropolitan or local municipality may levy a rate on property in its area. The Municipal Systems Act , the Municipal Finance Management Act (the "MFMA"),[11] as well as the Constitution, read jointly, prescribe the minimum requirements that form the framework of the content for public consultation. These legislations outline what is required of municipalities in dealing with public participation and submissions received from ratepayers in the administration of their municipality.

[15] Notwithstanding the separate affidavits filed by the four applicants, the City's answering affidavits share substantial common features. They are centred on three broad grounds of review, which are: procedural irrationality, substantive irrationality and infringement of rights in sections 28 and 29 of the Constitution. In essence, the City's conduct as indicated is challenged on the principle of legality in terms of section 1(c) of the Constitution for offending the rule of law, for offending various other rights in the Bill of Rights, and for offending the empowering provisions of the Constitution and the MPRA. In the AfriForum

[11] 56 of 2003.

application, the challenge also includes rating and categorising of public educational institutions over and above private educational institutions.

*Background facts*

[16] The relevant facts are largely common cause between the parties. Prior to the 2022/23 and 2023/24 Rates Policies, properties falling under the category "education" enjoyed the benefit of favourable rating ratios of 1:0.25 (i.e. 25% of the rating for residential properties, rated at a ratio of 1:1). As indicated, the applications concern a consideration and interpretation of the City's 2023/2024 Rates Policy and By-Law in light of the provisions of the MPRA and the Constitution. The significant change that occurred in the impugned Rates Policy was the removal of the category of "Education". As a direct consequence of the classification of these "properties zoned and used for educational purpose but privately owned" under the "Business and Commercial" category in the 2023/2024 Rates Policy, the applicable tariff in 2023/2024 to the properties, in relation to the 2021/2022 financial year, effectively resulted in substantial increases in the amount payable on the affected properties. This is against the following background and uncontentious facts.

[17] On 6 April 2021, The City addressed a letter to the Minister of Co-Operative Governance and Traditional Affairs ("COGTA"), inter alia, informing the Minister that the City intended to retain "Education" as an independent category in terms of section 8(3) of the MPRA. On 10 December 2021, the COGTA Minister addressed a letter to the City informing it, inter alia, that certain of the City's intended categories, including "Education", do not meet the requirements of being determined as additional categories. On 27 May 2022, the City Council approved the Medium-Term Revenue and Expenditure Budget, including the 2022 Rates Policy and the 2022 Rates By-Law.

[18] The impugned provision of the City's Rates By-Law, which is the subject of these application reads as follows:

"(b) Business and Commercial Property in this category includes:

(...)

(v) Properties zoned and used for educational purpose but privately owned will be categorised as Business and Commercial. The property rates will be phased in over a period of 4 years. The rates payable will be:

Year 1 —25% of the tariff for this category (2023/2024)

Year 2 —50% of the tariff for this category 2024/2025)

Year 3— 75% of the tariff for this category (2025/2026)

Year 4— 100% of the tariff for this category (2026/2027)."

[19] On the other hand, the impugned provision of the City's Rates Policy and By-Law pertaining to public educational institutions in item (l)(i)(b) read with (ii) of the Rates Policy provides that: the property rates of properties used and owned by organs of state such as schools, pre-schools, early childhood development centres and further education and training colleges will be phased in over a period of 4 years and that the rates payable will be:

Year 1 — 25% of the tariff for this category (2023/2024);

Year 2 — 50% of the tariff for this category (2024/2025);

Year 3 — 75% of the tariff for this category (2025/2026); and

Year 4 —100 % of the tariff for this category (2026/2027).

The ratio for the category of Public Service Purposes is 1:1.5 and the rates tariff for 2023/2024 is 0.013186

[20] It is common cause that in the 2021/2022 financial year of the City, the applicable Rates Policy reflected under the "Education" category for "properties zoned and used for educational purpose but privately owned" attracted a ratio of 1:0.25 and rates tariff of 0.002155. In the 2022/2023 financial year, the applicable Rates Policy reflected under the "Education" category for "properties zoned and used for educational purpose but privately owned", were categorised as "Business and Commercial", a ratio of 1:2.5 and rates tariff of 0.021547 became applicable

resulting in litigation by three of the applicants (IIE, Curro and Afriforum) against the City in respect of the 2022/2023 Rates Policy.[12]

[21] In *casu*, purporting to act in terms of section 11(3)(i) and section 75A(1) and (2) of the Municipal Systems Act read with section 24(2)(c)(ii) of the MFMA and section 14(1) and (2) of the MPRA, the City Council approved the proposed property rates and tariffs for 2023/24 financial year, with effect from 1 July 2023.

[22] The applicants in the IIE Application run various independent educational institutions, including primary and secondary schools, universities and colleges, within the City's area of jurisdiction. The first applicant owns immovable properties on which the applicants' schools used for education purposes are operated. The applicants' contention is that the categorisation of the IIE's properties used for that purpose under the category of "business and commercial" based on the words "but privately owned" is unlawful and unconstitutional on a few grounds. Whereas the City may levy different rates on different categories of property in terms of section 8 of the MPRA, the categories of properties must be determined based only on the use or permitted use of the property.

[23] IIE contends that the nature or identity of the owner of the property is not a lawful criterion that may be used by the City to categorise properties or to differentiate between categories of properties. By adding the criteria of "but privately owned", the City has unlawfully levied rates against the person or identity of the applicants as profit companies, rather than against their property and the use to which such property is put. The applicants contend that the differentiation of privately owned and publicly owned properties used for the same purpose, i.e. education, is contrary to section 19(1)(c) of the MPRA.

[24] IIE points out that the inclusion of privately owned schools under the category of "business and commercial" constitutes an unlawful sub-categorisation for which the City failed to obtain the Minister's consent in terms of section 8(4) of the MPRA. In addition, that the City undermined a meaningful public participation

[12] See in this regard the judgment by Kuny J in *Afriforum NPC v The Council of the City of Johannesburg Metropolitan Municipality and Others* [2023] ZAGPJHC 241.

process as contemplated Chapter 4 of the Municipal Systems Act. The rest of the applicants adopt a similar stance.

[25] In terms of section 8(1) of the MPRA, a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable properties. The way such rates are calculated is based on the market value of the property.[13] All rates ratios in respect of the various categories of properties are calculated in relation to the "residential property" rate which is used by the municipality as a benchmark. Each year the municipal council determines the rates ratio that is applicable and the rates tariffs are then promulgated according to those ratios.

[26] Curro, as indicated, seeks to have the impugned decisions declared invalid on the basis that they violated section 229(2)(a) of the Constitution[14] and section 19(1)(c) of the MPRA.[15]

*The City's Public Participation Process*

[27] It is convenient and crucial to firstly deal with the public participation process. The applicants contend that the City conducted a sham and unsatisfactory public participation process. The public participation process relevant to this application concerns the City's budgetary process. This is, inter alia, is provided for in section 4 of the MPRA, Chapter 4 of the Municipal Systems Act, read with section 22 of the MFMA.

[28] Section 16 of the Municipal Systems Act deals with the development of culture of community participation. It provides that:

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[13] See section 11(1)(a) of the MPRA.

[14] Section 229(2) states:
The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties —
(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour.

[15] Section 19(1)(c) provides that
(1) A municipality may not levy —
(c) rates which unreasonably discriminate between categories of non-residential properties.

"(1) A municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance, and must for this purpose-

(a) encourage, and create conditions for, the local community to participate in the affairs of the municipality, including in-

(i) the preparation, implementation and review of its integrated development plan in terms of Chapter 5;

(ii) the establishment, implementation and review of its performance management system in terms of Chapter 6;

(iii) the monitoring and review of its performance, including the outcomes and impact of such performance;

(iv) the preparation of its budget; and

(v) strategic decisions relating to the provision of municipal services in terms of Chapter 8;

(b) contribute to building the capacity of-

(i) the local community to enable it to participate in the affairs of the municipality; and

(ii) councillors and staff to foster community participation; and

(c) use its resources, and annually allocate funds in its budget, as may be appropriate for the purpose of implementing paragraphs (a) and (b).

(2) Subsection (1) must not be interpreted as permitting interference with a municipal council's right to govern and to exercise the executive and legislative authority of the municipality".

[29] Section 17 of the Municipal Systems Act deals with mechanisms, processes and procedures for community participation. It provides as follows:

"17 (1) Participation by the local community in the affairs of the municipality must take place through-

(a) political structures for participation in terms of the Municipal Structures Act;

(b) the mechanisms, processes and procedures for participation in municipal governance established in terms of this Act;

(c) other appropriate mechanisms, processes and procedures established by the municipality;

(d) councillors; and

(e) generally applying the provisions for participation as provided for in this Act.

(2) A municipality must establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality, and must for this purpose provide for-

(a) the receipt, processing and consideration of petitions and complaints lodged by members of the local community;

(b) notification and public comment procedures, when appropriate;

(c) public meetings and hearings by the municipal council and other political structures and political office bearers of the municipality, when appropriate;

(d) consultative sessions with locally recognised community organisations and, where appropriate, traditional authorities; and

(e) report-back to the local community.

(3) When establishing mechanisms, processes and procedures in terms of subsection (2) the municipality must take into account the special needs of-

(a) people who cannot read or write;

(b) people with disabilities;

(c) women; and

(d) other disadvantaged groups.

(4) A municipal council may establish one or more advisory committees consisting of persons who are not councillors to advise the council on any matter within the council's competence. When appointing the members of such a committee, gender representivity must be taken into account. (emphasis added)

[30] In an attempt to fulfil its obligation in the abovementioned regard, on 1 April 2023, the City embarked on what it calls the public participation process by publishing the draft 2023/2024 Rates Policy. However, the draft Rates Policy as indicated above contained the same categorisation of "Properties zoned and used for educational purpose but privately owned" as in the 2022/2023 Rates Policy. Following this publication, on 17 April 2023, the applicants' representative, Mr Travis Baikie, together with other stakeholders, attended a virtual meeting with the City's officials. The applicants raised their concerns relating to the Kuny J Order and Judgment and that the City had not determined the category of "Education", but rather that properties used for education but privately owned were determined as a sub-category of "business and commercial"". However, the City's officials provided no feedback to the parties present in respect of the submissions made and called for a further meeting to deal with such issues.

[31] On 21 April 2023, IIE received a notice, as did Curro, one business day prior to the proposed further meeting scheduled to be held on 24 April 2023. Mr Travis Baikie, attended the further meeting with the City on behalf of IIE. He again requested clarity pertaining to the matters previously raised including the establishment of an independent category of education in the draft Rates Policy. The City, again, did not engage with the attendees that included Curro or provide any answers or explanations in respect of the public's representations regarding this issue. Instead, the attendees were asked to provide their submissions to the City in writing, which IIE did as per annexure FA9 dated 5 May 2023.

[32] The applicants requested the City to consider in support of an independent category of "education", inter alia, that for the purposes of determining categories of rateable properties, the City must consider the use of the property, the permitted use thereof or a combination of the use and permitted use, in terms of section 8(1) of the MPRA, which is subject to section 19 of the same Act. That, any subjective enquiry into the ownership of such property or the imposition of an additional criteria other than use or permitted use, was irrelevant for purposes of section 8(1) of the MPRA. Further, that the City may determine such other categories as it may require in terms of section 8(3) of the MPRA, provided such categories do not circumvent those determined in section 8(2) of the same Act. In addition to the above, that that the City was, inter alia, required to obtain the prior written consent of the Minister to determine a sub-category of property used for educational purposes but privately owned under the "business and commercial" category as contemplated in section 8(4) of the MPRA.

[33] IIE contends that the categorisation of properties used for educational purposes but privately owned as ""business and commercial"" would unreasonably discriminate between categories of non-residential properties which is impermissible in terms of section 19 of the MPRA.

[34] The applicants are adamant, as evidenced from the City's response, that the public participation process was a sham and that the City's exclusion of "education" as an additional category was a pre-determined outcome. The applicants aver that the City's officials who led the public participation process failed to bring an objective mind to bear on the submissions presented to them,

failed to interact at all with the members of the public represented at these meetings and did no more than pay lip-service to the legal requirement of public participation. According to AfriForum, this rendered the community participation process meaningless. This was not only against the spirit and purpose of the community participation process as stipulated in the MPRA but was also procedurally irrational and unconstitutional.

[35] It is common cause that the outcome of the City's public participation process is noted in the Mayoral Committee's recommendations to council, which recommendations were to be considered at the council meeting scheduled for 13 and 14 June 2023 together with the Integrated Development Plan 2023/2024, the 2023/2024 Institutional Service Delivery Budget and Implementation Plan of the Municipality2023/2024 to 2025/26 Medium-Term Budget and related documentation, which included the draft Rates Policy and Rates By-Law. In Item 3D titled "Draft Rates Policy and Rates By-law", annexure "FA15", the City submitted at page 3D.3 that: "*The majority of the inputs received by the City during the public participation process for the draft Rates Policy 2023 were from academia and the business sector").*

[36] The City's purported response to the public submissions in respect of education, which was attached as C1 to the draft Rates Policy 2023/2024 and is marked annexure "FA16" consisting of twelve pages of unnumbered paragraphs in the IIE application. In material parts of C1, it reads thus:

> "*The proviso to the Order granted by the Court in the Afriforum Judgment is that the City may not rely on the "closed list" in sub-section (2) of section 8 as a basis for not determining a separate category of 'education'. Strict compliance with this portion of the Order, unless otherwise set aside, therefore requires that the City must locate its justification for not determining a category of 'education on other grounds than the contention that such would "circumvent the categories of rateable property that must be determined in terms of subsection (2)".*
>
> ...
>
> *The failure to determine a separate category of 'education' in the 2023/2024 Rate requires the City to ensure compliance with both the Afriforum Judgment and the Act. In immediate response to these concerns is that the Afriforum judgment does not*

*create a legal obligation on the City to determine a separate category of "education" in the manner suggested in the comments received. The observation of the Court opens the door to the City not to determine the category of education, subject to it acting lawfully in other respects.*

*...*

*The Afriforum Judgment is no authority for:*

*The invalidity of the alleged excessive or massive increase in the rate which the City may impose in relation to the properties which previous fell under the category of education;*

*The substantive invalidity of the classification of privately owned properties which are used for educational purpose sunder either the 'business and commercial' category or the Public Benefit Organisation (PBO) category;*

*...*

*The infringement of the rights in sections 28 and 29 of the Constitution with regards to the alleged negative impact of the rates increase on the best interests of the child and the right to education..."*

[37] The applicants allege that the City's response did not consider the submissions from the public or other stakeholders but was nothing more than a critique of the Judgment and an *ex post facto* justification of the pre-determined course. Afriforum makes the same allegation. According to the applicants, none of the views expressed in the City's response in C1 were ever raised during any of the public participation meetings for discussion and debate. ISASA pointed out in addition and significantly that, the Draft Rates Policy did not communicate the City's reasons for abandoning the "education" category and the 30% rebate for private schools. The other applicants make the same submission.

[38] AfriForum also bemoans the fact that there is no reference in any report to the council that the City had consulted with other organs of state that have a direct interest in Rates Policy and the financial effect on educational institutions. Such organs of state are in this case, the Minister of Basic Education, the MEC for Education: Gauteng Province and the Minister of Higher Education. This even though the judgment Kuny J specifically found, in relevant parts, that it was vital that at least the Gauteng Education Department be consulted. Curro seeks relief which includes consultation with the Gauteng Department of Education.

[39] In the answering affidavit the City acknowledges that sections 152(1) (a) and (e), 152(2) and 153(a) of the Constitution read with Chapter 4 of the Municipal Systems Act (sections 16 to 22) and other relevant statutory provisions make it obligatory for municipalities to encourage the participation of local communities and community organisations in local government matters. The City states that it conducted a public participation exercise whilst conscious of the nature and extent of its constitutional obligation to encourage the involvement of local communities in matters of local government, having regard to the provisions of the Municipal Systems Act and the MFMA.

[40] The City claims for the first round of engagements, the wards were grouped into 40 clusters. Each ward was then consulted individually which took place between September - November 2022. This meant that each of the 135 CoJ Wards were given the space and time to exercise their voice and come up with their individual priorities. This was followed by the second round of engagements consisting of Regional Summits, 7 in total and 8 targeted stakeholder sessions, which detailed "what projects and/or programs the City has fashioned in responding to the community issues raised" during April 2023. The City further claims that a total of 3057 persons participated in the first round of public participation, with a total of 491 written comments received and that "all the planned sessions were successfully held". The City also claims that a total of 4153 persons participated in the second round of public participation, with a total of 3727 comments received with all the planned 17 sessions held successfully.

[41] The City contends that the applicants failed to take advantage of the opportunity offered to them by the City's extensive public consultation processes. It also contends that it gave attention to all those comments received in respect of private educational institutions, but pointed out that "*it is not practical to provide detailed reasons in response to each submissions (sic) which the City received*".

[42] The City contends that it is the applicants and not the City, that has a negative duty not to impair and diminish the right to a basic education. Further, that the applicants mischaracterise the rights in sections 28 and 29 of the Constitution and no infringement of the rights in section 28 and 29 of the Constitution has been established.

[43] The City submitted that the inclusion of schools which are publicly owned under a separate category in section 8(2)(i) of the MPRA is a rational differentiation in relation to schools which are privately owned. Section 8(2)(f) of the MPRA provides the statutory basis for the differentiation in the Rates Policy.

[44] In all these matters, I have no difficulty in concluding that the primary issue of public participation is dispositive of the dispute between the applicants and the City. On public participation, the Constitutional Court in *Tshwane City v Afriforum and another*[16] stated that -

> "[p]ublic participation should not be elevated to co-governance or equal sharing of executive and budgetary responsibilities. Council bears the constitutional and statutory power to run the affairs of the City. For this reason, it cannot serve as the basis for a court to intrude into Council's sole operational space that a segment of those it serves, is displeased with the public participation process Council had otherwise facilitated."[17]

[45] However, as a constitutional democracy, our Constitution envisages the extension and expansive involvement of communities as a basic guiding principle which envisions a dynamic and evolving involvement of communities in the affairs of local authorities. In *Doctors for Life International v Speaker of the National Assembly and Others*[18] the Constitutional Court refers to "a continuum that ranges from providing information and building awareness, to partnering in decision-making".

[46] It is correct that pursuant to section 17 of the Municipal Systems Act, participation of the local community occurs through the political structures, i.e. through engagement with the City council and its executive committees but also through the structures and mechanisms established by the Act, particularly ward committees as the City pointed out. However, the obligation on the City in promoting constitutional values by encouraging public participation at local-government level goes beyond a mere formalism in which public meetings are convened and information is shared.

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[16] [2016] ZACC 19; 2016 BCLR 1133 (CC); 2016 (6) SA 279 (CC).
[17] *Id* at para 67.
[18] [2006] ZACC 11; 2006 (6) SA 416 (CC) (2006 (12) BCLR 1399) at para 129.

[47] The Court in *Borbet South Africa (Pty) Ltd and Others v Nelson Mandela Bay Municipality*[19] noted that the concept of "participatory democracy" as envisaged by the Constitution requires that the interplay between the elected representative structures and the participating community is addressed by means of appropriate mechanisms. It is this relationship to which the Constitutional Court speaks when it states that there must not only be meaningful opportunities for participation, but also that steps must be taken to ensure that people have the ability and capacity to take advantage of those opportunities. *Borbet* reminds us aptly at para 19 that "the obligation to encourage public participation and to provide appropriate mechanisms is not confined to these structures".

[48] In *Matatiele Municipality and Others v President of the RSA and Others (No 2)*[20] the Constitutional Court made the following authoritative remarks:

> "The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."[21]

[49] The dispute of fact regarding the process of adoption of the 2023/2024 municipal budget in this instance must be resolved on the basis of the well-known test set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[22] This Court accordingly accept that the City, during this phase of the budget-preparation process, did take steps to facilitate public meetings at which the integrated development plan ("IDP") review and budget were considered. With that said, it is however a matter of great concern that the City hardly set out any relevant facts relating to its conduct on such an important matter with constitutional ramifications such as the best interests of children. As in *Borbet*, hardly anything is said of the role, if any, played by ward committees in the budget preparation process insofar as privately owned properties used for educational purposes may in terms of the City's Rates Policy and By-law only be allocated into the category of "business and commercial".

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[19] 2014 (5) SA 256 ECP.
[20] [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC).
[21] Id at para 68.
[22] [1984] ZASCA 51; 1984 (3) SA 623 (A).

[50] It was incumbent upon the City, as ISASA points out, to consider what would be in the best interests of learners at independent schools and to ensure that the parents and learners were particularly heard before the City re-categorised private educational properties as "business and commercial". In the context of local government more is required than public meetings and the publication of information. A local council is required to put in place mechanisms that create conditions for public participation, that builds the capacity of communities to participate. It is required to allocate resources to the task and to ensure that the political and other structures established by the legislation are employed to meet the objectives of effective public participation.

[51] The applicants who attended the meetings were effectively ignored as their question were deferred. Further, the opportunity for adequate public participation in this instance was unreasonable consideration being had to objective facts referred to above, given the intensity of the impact on the public by the changes, particularly from poor communities in the inner city. This against the background that the state has not opened a new public school in the Johannesburg CBD in the last thirty years or so, despite the substantial increase in the inner-city population, which according to ISASA includes the development of over 50,000 new affordable housing units.

[52] Importantly, the underlying consideration is section 28(2) of the Constitution, which provides that "a child's best interests are of paramount importance in every matter concerning the child". ISASA points out in RA2 (ISASA's letter to the City) that independent schools make a necessary and indispensable contribution to expanding and improving access to basic education for thousands of children in the City. More so that the Gauteng Education Department confirms that public schools in Gauteng are in crisis,[23] a notorious fact, which this Court can take judicial notice, and that they do not have capacity to accommodate the growing number of learners in the province.

[53] The unaffordability of fees on account of the increased rates following the new categorisation of private educational properties is bound to have a negative

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[23]. Learner in-migration in the province was 7.5% from 2022 to 2023 and the backlog of new schools that need to be built to meet that demand is 152 new schools (85 primary and 67 secondary).

impact for access to basic education given the notoriously constrained capacity of public schools across the City. In all these matters the City failed to consider the best interests of the children that attend independent schools when it decided to re-categorise private educational properties and consequently breached section 28(2) of the Constitution, read with section 29(1)(a) of the Constitution which guarantees everyone the right to a basic education. It further obliges the state, including the City, to take reasonable measures to make further education progressively available and accessible.

[54] I am accordingly of the view that the steps taken by the City, objectively considered and viewed in their entirety, did not meet the requirements for effective public participation in the budget process. The public participation process was undoubtedly a sham process. The focus, as apparent from C1 in the ISASA application, which is clearly a legal opinion albeit unsigned, was to circumvent the Kuny J judgment. To this end, the City is guilty of dereliction of their duty towards the public and have been poor stewards of the trust reposed in them.

[55] Turning to the appropriate remedy in the light of the finding regarding public participation in the budget process: Section 172(1)(a) of the Constitution requires a court, when deciding a constitutional matter, to declare any law or conduct that is inconsistent with the Constitution to be invalid to the extent of the inconsistency. I have, for the reasons set out above, found that the City's conduct was indeed inconsistent with the constitutional obligation to ensure public participation in its processes. This is insofar as privately owned properties used for educational purposes may in terms of the City's Rates Policy and By-law only be allocated under ""business and commercial".

[56] As indicated above under section 172(1)(b) of the Constitution, a court deciding a constitutional matter is empowered to make "any order that is just and equitable". Generally, a court will not substitute its own decision for that of the administrator, in this instance, the City. It will remit the matter to the City together with an instruction to decide the matter again or other appropriate directions. This accords with the primary remedy associated with judicial review at common law, usually coupled with remittal as opposed to the exceptional circumstances under

which an impugned decision is "corrected" or "substituted". Heher JA indicated in *Gauteng Gambling Board v Silverstar,*[24] "remittal is almost always the prudent and proper course"[25] not only for trite constitutional reasons to defer to bodies vested with decision-making power, but are also institutional since in this instance the decision to determine rates and categorisation and therefor the constitutional competence, lies with the City, in the absence of a finding or the Court being persuaded that the case "exceptional". There is no such suggestion in any of these matters. In the circumstances, I make an order in respect of all these matters in the following terms:

*Order*

**(Case Number: 2023-095869; Case Number: 2023-095869; Case No: 120464/2023 and Case No: 2023 -13361)**

1. The first respondent's Municipal Property Rates By-Law and Property Rates Policy 2023/2024 as adopted by the council of the first respondent on 14 June 2023 and published in the Provincial Gazette No. 261 on 26 July 2023 are declared unconstitutional and unlawful in respect of the rating and categorisation of all educational institutions whether public or private in nature and including all schools, pre-schools, early childhood development centres, further education and training colleges and universities (hereinafter collectively referred to as "educational institutions").

2. The first respondent's Municipal Property Rates By-Law and Property Rates Policy 2023/2024 as adopted by the council of the first respondent on 14 June 2023 and published in the Provincial Gazette No. 261 on 26 July 2023 are set aside in respect of the rating and categorisation of all educational institutions and the phasing in of the property rates over a period of 4 years from 2023/2024 to 2026/2027.

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[24] *Gauteng Gambling Board v Silverstar Development Ltd* [2005] ZASCA 19; 2005 (4) SA 67 (SCA).
[25] Id at para 29.

3. The first respondent is to comply with the provisions of the Local Government: Municipal Systems Act 32 of 2000, the Local Government: Municipal Finance Management Act 56 of 2003 and the Local Government: Municipal Property Rates Act 6 of 2004, with specific regard to community participation, before tabling, adopting and promulgating a new or amended Rates Policy and Property Rates By-Law addressing the future categorisation of public and independent schools.

4. The first respondent is to request input and/or comments from the applicants, the respondents in all these cases and all affected independent schools providing basic education in the first respondent's local community before adopting and promulgating the amended Rates Policy and Property Rates By-Law concerning the future categorisation of public and independent schools.

5. The City of Johannesburg Metropolitan Municipality is directed to levy the tariff ratio and rate tariff applicable to properties included in the "education" category of rateable property prescribed in Section B(e) of the 2021/22 Municipal Rates Policy and By-Law to the properties described in Section B(b)(v) of the 2023/2024 Rates Policy and By-Law, adjusted according to the annual inflationary increases applied in the 2022/23 financial year (4.85%) and in the 2023/24 financial year (2%).

6. The costs of these applications, including all reserved costs, are to be paid by the City of Johannesburg Metropolitan Municipality on Scale C, including the costs of two counsel, where so employed.

**MUDAU J**

**JUDGE OF THE HIGH COURT**

**JOHANNESBURG**

**APPEARANCES:**

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|---|---|
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Judgment on: 8 April 2025

Heard on: 3-7 March 2025