IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: D5773/2023

In the matter between:

WESTVILLE RATEPAYERS ASSOCIATION Applicant

and

ETHEKWINI MUNICIPALITY First Respondent

MEMBER OF THE EXECUTIVE COUNCIL: KWAZULU-NATAL DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Second Respondent

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ORDER

The application is dismissed with each party to bear its own costs.

JUDGMENT

Kuzwayo AJ

Introduction

[1] The applicant, Westville Ratepayers Association, is seeking a declaratory order against the first respondent that the municipal property rates and taxes that it imposed for the financial years 2004/2005; 2005/2006; 2006/2007; 2007/2008 and 2008/2009, were levied unlawfully in that it failed to comply with the provisions of the Local Government: Municipal Property Rates Act,[1] ("the MPRA") and that all rates and taxes so levied were not due and payable to the first respondent.

[2] In terms of the notice of motion, the applicant also sought an order declaring that in future, the first respondent complies with the provisions of the Local Government: Municipal Systems Act,[2] ("the Systems Act"); Local Government Municipal Finance Management Act,[3] ("the MFMA") and the MPRA, when levying municipal property rates. However, this order was abandoned by the applicant at the commencement of the hearing.

[3] The second respondent was cited as an interested party. Hence, he did not participate in the proceedings. For the sake of convenience, I shall refer to the first respondent as "the Municipality".

Background

[4] The applicant is an independent ratepayers association for Westville and surrounding areas, including Lamontville, Chesterville, Bonella and Sherwood, watching over the interests of ratepayers within its areas.

[5] The applicant's contention is that the Municipality has, over the past years (between 2005 and 2009), failed to promulgate the levying of rates as required by legislation. The applicant took the view that the Municipality was failing to maintain the municipal area and to conduct itself in a fair, reasonable and transparent manner

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[1] Local Government: Municipal Property Rates Act 6 of 2004.
[2] Local Government: Municipal Systems Act 32 of 2000.
[3] Local Government Municipal Finance Management Act 56 of 2003.

regarding service delivery. As a result, it caused an investigation to be undertaken by Johan and Marianne Visser of JM Corporate Services who, after their investigation, filed a report dated 21 December 2022 ("the investigation report").

[6] The findings of the investigation report were that the Municipality resolutions for levying rates during the financial years of 2005/2006; 2006/2007; 2007/2008 and 2008/2009, were not published in the KwaZulu-Natal Provincial Gazette in accordance with s 14(2)*(a)* of the MPRA. Based on the findings, the applicant engaged in negotiations with the Municipality (the details of which were not fully particularised), which did not materialise.

[7] Prompted by the findings of the investigation, the applicant lodged this application for an order declaring the levies that were imposed during the abovementioned periods were unlawful and not due and payable to the Municipality on the basis that the Council resolutions for the said periods were not promulgated in the Provincial Gazette as required by the MPRA. The applicant also placed reliance on the engagements it has had (through its attorneys of record) with the Municipality since 14 April 2023.[4] In these engagements, the applicant sought the Municipality to correct its failures based on the conclusions of the investigation report.

[8] The Municipality opposed the application. It pleaded that it was only required to comply with the provisions of the MFMA or the Local Government Transition Act[5] ("the Transition Act") and it was not obliged to comply with s 14 of the MPRA. It maintained that the procedures that it adopted had constituted compliance.

[9] In its answering affidavit, the Municipality conceded that for the financial years 2005/2006 to 2008/2009, it did not publish the Council resolutions in the Provincial

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[4] Founding affidavit, para 25.
[5] Local Government Transition Act 209 of 1993.

Gazette because, in terms of the applicable statutory framework, it was not obliged to publish same.[6] The Municipality responded to the allegation as follows:

'19. As was correctly held by the Supreme Court of Appeal in *Liebenberg NO and Others v Bergrivier Municipality All SA 626 SCA* and upheld by the Constitutional Court in *Liebenberg NO and Others v Bergrivier Municipality 2013 (5) SA 246 (CC),* given the transitional arrangements of the MPRA, being sections 88 and 89, read with s 179 of the Local Government: Municipal Finance Management Act, 56 of 2003 ("the MFMA"):

19.1 Section 10(G)(7) of the Local Government Transition Act 903 of 1994 ("the Transition Act");

19.2 Chapter 4 of the MFMA; and

19.3 The Old Ordinances,

regulated the levying of rates from the commencement of the Acts in question and after the commencement of the MPRA.'

[10] It appears that the applicant was overwhelmed by the Municipality's defence and resultantly accepted, in its replying affidavit and argument, that the Municipality was not obliged to perform in terms of s 14 of the MPRA in the promulgation of rates during the relevant five-year period. The applicant further accepted that:

(a) the Municipality was bound by s 10G(7) of the Transition Act (which it regarded as the core of the argument) and the Old Ordinances; and

(b) the MFMA regulated and continues to regulate the budget allocation process to which the Municipality and the public are bound.

[11] However, the applicant contended that the processes provided for in the aforementioned legislation regulated rates valuations and not the issue of rates promulgations which is the subject of the dispute. The applicant reiterated that in terms of s 10G(7) of the Transition Act, the Municipality is obliged to publish rates and calculations and submitted that none of the provisions of this section were complied with and the Municipality did not address the issue of the publication of the resolutions.

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[6] Answering affidavit, para 19.

Issues

[12] The core issues for determination are the following:

(a) whether the applicant is entitled to the order it is seeking in terms of the draft order which is different from the order that was sought in the notice of motion;

(b) whether the Municipality was required to and did comply with all relevant legislation in promulgating rates for the years 2005 to 2009; and

(c) whether the rates so levied were unlawful and not due to the Municipality.

[13] The applicant also raised the following issues for determination:

(a) whether the Municipality enjoyed a right of election in choosing the empowering legislation to use in publishing its rates determinations as well as the source of that right;

(b) whether the election was exercised, by whom and through what means in each of the financial years;

(c) whether the Municipality discharged the onus in establishing the requisite compliance;

(d) the striking out of paragraphs 12, 13, 60 and 61 of the answering affidavit; and

(e) if the conclusion on the matter is not in favour of the Municipality, what remedy should be granted.

Submissions made by the parties

[14] It is the applicant's contention that for the financial years from 2005 to 2009, the Municipality had failed to promulgate the Council resolutions in the Provincial Gazette as required by legislation. The initial averments by the applicant were based on the MPRA, as reflected in the investigation report. Ms *Mahabeer SC*, for the applicant, argued that the process for promulgating rates involved the valuation of rates for each year and a budget allocation process which would lead to the determination of rates. The promulgations of rates, so she argued, was regulated by the Transition Act and the Ordinance, not by the MFMA or the Systems Act.

[15] The Municipality did not dispute that it was obliged to comply with legislation in implementing municipal rates but contended that it was not obliged to publish the annual municipal rates determinations in terms of the MPRA. Ms *Nicholson*, for the Municipality, submitted that the MFMA and the Transition Act were the applicable legislation. As a result, municipalities were not required to comply with both of them. Accordingly, the Municipality had opted to utilise and comply with the MFMA.

[16] In paragraphs 36 to 38 of the answering affidavit, the Municipality stated that its Council resolutions were lawfully promulgated for the years 2005 to 2009 and it had complied with the relevant provisions of the MFMA. In support of its averment, the Municipality attached to the answering affidavit its Council minutes dated 26 May 2004. According to the minutes, the Second Report of the Executive Committee was laid on the table. The report indicates that it was resolved *"that the recommendations of the Executive Committee, relative to the Draft Estimates for the year ended 2005-06-30, contained in the Second Report of the Executive Committee dated 2004-05-25, be APPROVED."*

[17] Ms *Mahabeer* argued that despite the Municipality having pleaded that it had complied with the applicable legislation when promulgating rates, it had failed to disclose information and documents to substantiate its averment and show that it published notices and advertisements of the promulgations, as required by law. She contended that the Municipality conflated the community participation in rates valuations and the annual budgets allocation (which are regulated under the MFMA) with the process of implementing the rates determinations in terms of the Transition Act and the Ordinances.

[18] In response, Ms *Nicholson* submitted that the failure of the Municipality to disclose the information required by the applicant was due to the dispute dating back more than a decade. As a result, documents containing such information were no longer available. She also submitted that the applicant had the onus of proving its case and the Municipality only had a duty to reply to the facts laid out in the founding affidavit.

The applicable legal principles

[19] Section 229 of the Constitution empowers municipalities to impose rates on property.[7] This section also provides that the powers of municipalities to levy rates may be regulated by national legislation.[8]

[20] In *Uniqon Wonings v City of Tshwane*,[9] the Supreme Court of Appeal ("the SCA") articulated the power of municipalities to levy rates on properties as follows:

'[10] The power of municipalities to impose property rates is derived from s 229 of the Constitution and from legislation. In terms of this section, municipalities have direct original legislative capacity. Section 229(1)*(a)* of the Constitution provides that a municipality may impose "(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality". In terms of subsection *(b)*, it may if authorised by national legislation, impose "other taxes, levies, and duties appropriate to local government". Section 229(2)*(b)* provides that the power of municipalities to impose rates may be regulated by national legislation.' (Footnote omitted.)

[21] Section 10G(7)*(a)*(i) of the Transition Act gave the Municipality's Council power to 'levy and recover property rates in respect of immovable property' within its area of jurisdiction in terms of a common rating system. A municipality is empowered, by resolution, to impose levies, fees, taxes and tariffs in respect of any function or service of the municipality.[10] Section 10G(7)*(c)* imposes a duty on the chief executive officer to display a notice after a resolution is passed. Such notice is to be displayed at the offices of the municipality as well as other places within the area of jurisdiction of the municipality as may be determined by the chief executive officer stating:

'(i) the general purport of the resolution;

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[7] Section 229(1) of the Constitution provides: 'Subject to subsections (2), (3) and (4), a municipality may impose-

(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

...'

[8] Section 229(2) of the Constitution provides: 'The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties -

(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and

(b) may be regulated by national legislation.'

[9] *Uniqon Wonings v City of Tshwane* [2014] ZASCA 182.

[10] Section 10G(7)*(a)*(ii) of the Transition Act.

(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.'

[22] It is worth mentioning that the Transition Act was repealed by s 36 of the Local Government Laws Amendment Act 19 of 2008.[11] However, s 179(2) of the provides that: 'Despite the repeal of section 10G of the Local Government Transition Act, 1993 (Act 209 of 1993), by subsection (1) of this section, the provisions contained in subsections (6), (6A) and (7) of section 10G remain in force until the legislation envisaged in section 229 (2) *(b)* of the Constitution is enacted.'

Analysis

[23] The core issues to be determined in this matter are identical to the primary issues that had to be determined by the SCA in *Uniqon Wonings* which was whether a municipality was obliged, to determine property rates annually and whether such rates automatically lapsed at the end of the financial year during which it was levied.[12] The similarity in the issues raised in this case and in *Uniqon Woni*ngs is that:

(a) the applicant took issue with the Municipality's failure to promulgate levies raised for the same four financial years (2005/2006 to 2008/2009); and

(b) the applicant is requesting a declaration that the Municipality failed to comply with all relevant legislation in respect of those years.

Considering the exclusion of the 2004/2005 financial year, I presume that the Municipality had complied with the legislation in that period.

[24] The questions are therefore whether the Municipality was required to promulgate levies in each financial year after the 2004/2005 financial year and whether it was required to comply with 'all' relevant legislation. Should these questions be answered in the affirmative, I will proceed with all the other issues and in the event that they are in the

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[11] Local Government Laws Amendment Act 19 of 2008.

[12] *Uniqon Wonings* above fn 9.

negative, it would be the end of the matter. However, the remaining issues will be analysed for the sake of finality. Before dealing with these two questions, it is necessary to first address the issue of the amended order that is sought by the applicant and the investigation report which forms the basis of this application.

Should the court consider the applicant's amended relief sought (which is different from the notice of motion)?

[25] The Municipality raised issue with the draft order that was attached to the applicant's heads of argument. Ms *Nicholson* submitted that the only issue that was raised by the applicant in the notice of motion and founding affidavit was that the promulgation of rates by the Municipality for the period from 2005 to 2009 was not published in the Provincial Gazette in accordance with s 14 of the MPRA. She argued that the applicant was bound by its founding papers and could not introduce new issues in reply and referred this court to the case of *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa and Others*[13] where the court stated that the affidavits in motion proceedings do not only serve to place evidence before the court, but also to define issues.

[26] Ms *Nicholson* further argued that for the amended draft order that was attached to the applicant's heads of argument to be accepted, the applicant should have applied for an amendment in terms of Uniform rule 28.

[27] I do not see the need to deal with the applicant's submissions in this regard as it is common cause that the applicant submitted an amended order whereby paragraph 1 of the notice of motion in terms which it had requested the court to declare that the municipal property rates and taxes imposed by the Municipality for the financial years 2005/2006; 2006/2007; 2007/2008 and 2008/2009 were levied unlawfully in that the Municipality *"failed to comply with the provisions the Local Government: Municipal*

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[13] *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F-J and 324A.

Property Rates Act, 2004" was amended to read that the Municipality *"failed to comply with the provisions of all relevant legislation".*

[28] I fully agree with the submissions made by the Municipality's counsel in this regard. However, in my view, the issue of which legislation the Municipality was bound to comply with was fully canvassed by the parties in the answering and replying affidavits as well as their arguments. It is apparent that as soon as the Municipality raised that it was not obliged to promulgate rates in terms of the MPRA, the applicant made a concession and shifted its reliance from the MPRA.

[29] In *Minister of Police v Gqamane,*[14] the SCA stated as follows:

'[13] It is trite that a party is bound by his or her pleadings and, ordinarily, he or she will not be allowed to raise a different or fresh case without a due amendment. A court is equally bound by those pleadings and should not pronounce upon any claim or defence not made in the pleadings by the parties. A court may relax this rule where the issue involves a question of law which emerges fully from the evidence or is apparent from the papers. This court, in *Minister of Safety and Security v Slabbert,* held that:

> "There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial."' (Footnotes omitted.)

[30] Due to the kind of dispute raised in this matter, despite the applicant having changed the legislation it was relying on in its founding papers, I take the view that the issue deserves to be considered and interrogated on the basis of the arguments presented and canvassed by both parties. This court cannot shy away from the fact that the Municipality was obliged to comply with the legislation that was applicable at the time. In my view, the minutes dated 26 May 2004 does not save the Municipality as the main issue is the publishing of the notices in the Provincial Gazette directly. The minutes only

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[14] *Minister of Police v Gqamane* 2023 (2) SACR 427 (SCA).

dealt with the tabling of the Second Report of the Executive Committee and the approval of its recommendations.

The investigation report

[31] It is also common cause that the applicant based its application on the findings of the investigation report. The heading of the report reads:

'REPORT ON MUNICIPAL PROPERTY RATES ACT NO 6 OF 2004 AND AMENDED ACT OF 2014: COMPLIANCE AND NON-COMPLIANCE BY ETHEKWINI METRO MUNICIPALITY INCLUDED THE FINANCIAL YEARS, FROM 1 JULY 2005 UNTIL 20 JUNE 2022.'

[32] The following deficiencies can be identified from the investigation report: the investigation focused on the two pieces of legislation mentioned above. It is not clear from the report as to what was done by JM Corporate Services in conducting its investigation and how this was done. No sources of information were disclosed in this regard, especially since the investigation was conducted more than ten years after the Municipality's alleged non-compliance. It is therefore highly improbable that at the time of the investigation all the relevant documents were still available for inspection and interrogation and this was never mentioned in the investigation report. In my view, the investigation report (on which the application is founded) bears no merit.

Was the Municipality required to and did it comply with all relevant legislation in promulgating rates and did the Municipality enjoy a right of election in choosing the empowering legislation to use in publishing its rates determinations as well as the source of that right

[33] It is common cause that the financial year 2004/2005 was incorporated into the notice of motion in error and should be disregarded. It is also worth mentioning that the applicant is not claiming any financial recourse. All that it is seeking is a declaratory order that the rates that were imposed by the Municipality during the impugned periods were unlawful due to its failure to promulgate rates.

[34] At the commencement of the proceedings, the applicant's case was that the Municipality had failed, in terms of s 14(2) of the MPRA, to promulgate resolutions levying rates by publishing the resolutions in the Provincial Gazette. It contended that the Municipality's failure to promulgate the resolutions for the rates imposed in the years 2005/2006 to 2008/2009 was therefore fatal to those rates and rendered them unlawful and invalid. Consequently, those levies were not due and payable to the Municipality.

[35] After the filing of the answering affidavit, the applicant had correctly conceded, in its replying affidavit and heads of argument, that the Municipality was not obliged to comply with the MPRA as alleged in the founding papers. In *Liebenberg NO and Others v Bergrivier Municipality*,[15] Mhlantla AJ concluded that s10G(7) of the Transition Act survived the commencement of the MPRA and thus rejected the argument that the Municipality was obliged to comply with s 14(2) of the MPRA .

[36] As indicated earlier, the Municipality stated that it had adopted the publication procedures which were set out in the MFMA, read with Chapter 4 of the Systems Act, after it came into operation and contended that in each of the relevant financial years, it complied with the relevant provisions of the MFMA and the Local Authorities Ordinance. It further contended that its annual budget, which included the determination of rates, was prepared in accordance with ss 21 and 17 of the MFMA and throughout the years in question it had followed the same process of approving the determination of rates as part of the budget until its first General Valuation Roll was implemented on 1 July 2008. In support of these averments, the Municipality attached the Council minutes for the meeting that was held on 26 May 2004, which recorded the approved budget and determination of rates for the 2004/2005 financial year.

[37] The applicant challenged the Municipality's contentions on the basis that no documents were provided to prove that a notice was published as required in terms of s 10G(7)*(c)* of the Transition Act and the Municipality did not indicate when and how many

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[15] *Liebenberg NO and Others v Bergrivier Municipality* [2013] ZACC 16; 2013 (5) SA 246 (CC).

searches were conducted to recover the documents. Ms *Mahabeer* submitted that the applicant had issued a notice in terms of rule 35(12) requesting the Municipality to provide those documents. She contended that the averments contained in the Municipality's response were not addressed in the answering affidavit and also submitted that the Municipality had failed to disclose the process it undertook to give effect to the requirements and to provide evidence of how the process took place.

[38] Counsel for the Municipality contended that the draft budget was published and the Mayor presented the budget to the Municipal Council. She reiterated that the Municipality regarded the MFMA as the appropriate legislation and opted to comply with it in its rates promulgations.

[39] It is indisputable that, in terms of s 10G(7) of the Transition Act, once rates are determined, such determination must be communicated to the public by publishing it in the Provincial Gazette and displaying a notice on the place allocated for that purpose at the offices of the municipality. In this case, there is no evidence by the applicant to prove the Municipality's non-compliance with this provision. Neither is there evidence by the Municipality to prove its compliance.

[40] The answers to all questions posed above are fully provided in *Liebenberg*, where the applicants had argued that both the MFMA and the Transition Act should be followed. The Constitutional Court found the argument to be fallacious and held that the Municipality was not required to comply with both statutes at the same time. The court stated that Chapter 4 of the MFMA regulated the manner of levying rates from the date of commencement and the MFMA imposed requirements that were inconsistent with the Transition Act. It stated that when such inconsistency appeared, the provisions of the MFMA prevailed.[16]

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[16] Ibid para 73.

[41] In *Uniqon Wonings*[17], the SCA stated that although municipalities were entitled, in terms of s 10G(7) of the Transition Act, to fix property rates separately for each financial year, the section did not oblige municipalities to do so and did not provide that any property rates which had been levied during a specific financial year automatically lapsed at the end of such financial year. The court concluded that a municipality, acting in terms of s 10G(7), was not obliged to impose property rates annually and the levied rate did not lapse at the end of a financial year but continued to apply until changed. In the circumstances, if the Municipality was not required to comply with all the relevant legislation and had it complied with the relevant legislation in imposing property rates for the 2004/2005 financial year, such rates continued to apply until they were changed. The changing of rates that were applicable during 2004/2005 was never raised or argued. I accordingly find that the rates remained unchanged and hence, cannot be said to have been unlawful. This court therefore concludes that the Municipality was obliged to comply with all the relevant legislation.

Whether the election was exercised, by whom and through what means in each of the financial years

[42] As stated by the SCA in *Liebenberg*, the MFMA regulated the manner of levying rates. The Municipality contended that it had opted to comply with the provisions of the MFMA. This was within its right and no provisions are provided for in the legislation regarding the process that the Municipality was obliged to follow when it chose to comply with the MFMA.

Whether the Municipality discharged the onus in establishing the requisite compliance

[43] As correctly argued by Ms *Nicholson*, the Municipality had no onus to establish its compliance. Its failure to provide documentary proof can be attributed on the number of years that the applicant had left the issue of the alleged non-compliance with the promulgation of rates unchallenged.

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[17] *Uniqon Wonings v City of Tshwane* [2014] ZASCA 182 para 29.

Application for striking out of paragraphs 12, 13, 60 and 61 of the answering affidavit

[44] While it is true that the events referred to in the investigation report took place over a decade ago, as pleaded by the Municipality, I agree with the applicant's counsel that the responses that were provided by the Municipality, did not deal directly with the applicant's averments but pointed to a particular individual, Mr Asad Gaffar. It was never pleaded by the applicant that JM Corporate Services was appointed by Gaffar to interrogate the Municipality's rates processes as asserted by the Municipality. The said paragraphs are accordingly struck off. Nevertheless, this does not save the applicant's case in any event.

Conclusion

[45] As indicated above, the applicant did not seek financial redress, except for the court to declare that the rates charged during those years were unlawful and not due to the Municipality. In as much as the Municipality failed to attach a copy of the Provincial Gazette to prove its compliance, it contended that it had complied with the MFMA and published the promulgations in the Gazette. This could not be disputed by the applicant. In fact, both parties failed to place all the necessary documents before court. Leaving aside that the application was based on a meritless investigation report, I disagree with the applicant that the Municipality was obliged to comply with all relevant legislation in promulgating rates. Based on my analysis above, I cannot declare that the Municipality failed to comply with the provisions of all relevant legislation because it was not bound to comply with 'all' legislation, as held in *Liebenberg*.

Costs

[46] The applicant requested this court to apply the *Biowatch* principle in respect of costs. This was disputed by the Municipality, who argued that this principle was not applicable in this matter. In my view, this is not a matter which deserves the application of the *Biowatch* principle because both parties have failed (in their own way) in proving their cases. The applicant failed to prove its case on a balance of probabilities that the Municipality was obliged and failed to comply with all relevant legislation. This court has

concluded that the Municipality was not obliged to comply with all relevant legislation. On the other hand, in as much as the Municipality did not have a case to prove, in its defence it was bound to show that it had complied with MFMA, as pleaded and argued by it. As a result, I conclude that neither of the parties is entitled to costs.

Order

[47] In the circumstances, the application is dismissed with each party to bear its own costs.

Kuzwayo AJ

For the applicant	: Adv. S Mahabeer SC (with Adv M Z F Suleman)
Instructed by	: Norton Rose Fulbright South Africa Inc.
For the respondent	: Adv. J F Nicholson
Instructed by	: Legator McKenna Incorporated
Date of hearing	: 10 March 2025
Date of judgment	: 13 May 2025