CASES / VONNISSE

THE FISCAL AUTONOMY OF SOUTH AFRICAN MUNICIPALITIES TO LEVY RATES: AN APPRAISAL OF

City of Johannesburg Metropolitan Municipality v Zibi [2021] ZASCA 97

1 Introduction

One of the fundamental institutional changes brought about by the Constitution of the Republic of South Africa, 1996 (the Constitution) is the protection of local government's autonomy (see *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) par 58; *The Body Corporate of the Overbeek Building, Cape Town v Independent Outdoor Media (Pty) Ltd* (unreported) 2022-01-21 Case no 4838/2021 par 14–21; Fuo "The Courts and Local Governments in South Africa" in Fessha and Kossler (eds) *Federalism and the Courts in Africa: Design and Impact in Comparative Perspectives* (2020) 103–108). As part of this autonomy, local government, constituted by 257 municipalities, is recognised as a distinct sphere of government with legislative and executive powers that are vested in democratically elected municipal councils (see ss 40(1), 151(1) and (2), and 157 of the Constitution). Municipalities are constitutionally empowered to govern, on their own initiative, the affairs of local communities, subject to national and provincial legislation that is constitutionally compliant (s 151(1) and (2) of the Constitution). National and provincial government are barred from impeding or compromising the ability or right of a municipality to exercise its powers or perform its functions (s 151(4) of the Constitution). The autonomy of local government is also evident from a reading of certain constitutional provisions that protect the original powers and functions of municipalities (this is supported by a joint reading of ss 151, 153(*a*), 156 and 229 of the Constitution; see Fuo in Fessha and Kossler (eds) *Federalism and the Courts in Africa* 105; *City of Cape Town v Robertson supra* par 58–61; *Body Corporate of the Overbeek Building v Independent Outdoor Media supra* par 14–21). For example, section 229 of the Constitution confers original fiscal powers and functions on every municipality (*City of Tshwane v Blom* [2013] ZASCA 88 par 19; Steytler and De Visser *Local Government Law of South Africa* (2019) 13-6). In terms of this section, municipalities have powers to impose and recover rates on property.

Section 229 on municipal fiscal powers and functions provides:

> "(1) Subject to subsections (2), (3) and (4), a municipality may impose – (*a*) rates on property and surcharges on fees for services provided by or on behalf of the municipality; (*b*) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls …
>
> (2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties – (*a*) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the mobility of goods, services, capital or labour; and (*b*) may be regulated by national legislation."

Furthermore, section 156 of the Constitution, read together with Schedules 4B and 5B of the Constitution, gives municipalities original powers over functional matters such as municipal planning, for example. Generally, the legislative, executive and administrative powers of municipalities to govern local communities are referred to as original powers because they are expressly protected in the Constitution (Steytler and De Visser *Local Government Law* 12-19; Fuo in Fessha and Kossler (eds) *Federalism and the Courts in Africa* 105–106). These powers and functions strengthen the autonomy of local government because they cannot be altered or removed without an amendment of the Constitution (Steytler and De Visser *Local Government Law* 12-19; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) par 37). Municipalities can take executive, legislative and administrative action in relation to their original powers and functions (Fuo in Fessha and Kossler (eds) *Federalism and the Courts in Africa* 105–106).

Despite their autonomy, the exercise of the original powers and functions of municipalities is subject to supervision and regulation by national and provincial government (see Steytler and De Visser *Local Government Law* 15-5 to 15-57; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC) par 56*; Body Corporate of the Overbeek Building v Independent Outdoor Media supra* par 27–30). For example, section 229(2)(*b*) of the Constitution clearly provides that the power of municipalities to impose rates on property may be regulated by national legislation. In this regard, national government enacted the Local Government: Municipal Property Rates Act (6 of 2004) (MPRA) to regulate the power of municipalities to levy property rates (*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal supra* par 43–47). Regulation in this context entails "creating norms and guidelines for the exercise of a power or the performance of a function" (*Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 (5) BCLR 591 (CC) par 22). It is essentially a managerial and compliance-driven role that is intended to ensure that municipalities perform their fiscal function effectively. National or provincial government cannot arrogate to itself an original municipal power and function through legislation that purports to regulate such a power or function.

The incidental powers of municipalities protected in section 156(5) of the Constitution further strengthen the autonomous powers of local government. According to this provision, each municipality "has the right to exercise any power concerning any matter reasonably necessary for, or incidental to, the effective performance of its powers and functions". In *City of Cape Town v Robertson* (*supra*), the Constitutional Court took into consideration the original and incidental powers of municipalities when it asserted that in the current constitutional dispensation "the conduct of a municipality is not always invalid only for the reason that no legislation authorises it" (*City of Cape Town v Robertson supra* par 60). The court explained that the power of a municipality may derive from the Constitution or from legislation of a competent authority or from its own laws (*City of Cape Town v Robertson supra* par 60). This reasoning of the court suggests that in order to impose and collect rates on property, for example, a municipality can use its initiative and go beyond what is expressly stipulated in section 229 of the Constitution or the MPRA, provided they do not violate any law that is constitutionally compliant.

In *City of Johannesburg Metropolitan Municipality v Zibi* ([2021] ZASCA 97), the Supreme Court of Appeal (SCA) had to decide on whether the City of Johannesburg was entitled to levy a rate in the form of a penalty on residential property for illegal or unauthorized use, without first changing the category of the property on its valuation roll or supplementary roll from "residential" to "illegal or unauthorized" use and publishing this in the provincial gazette. Based on an interpretation of relevant legal provisions and the application of established legal principles, the majority judgment (written by Mbha JA, with Saldulker JA and Poyo-Dlwati AJA concurring) held that the City's powers to levy a penalty in respect of the use of the property within its jurisdiction was legal, especially since it had levied the penalty as part of a validly adopted property rates policy. In contrast, the minority judgment (written by Schippers JA, with Carelse AJA concurring) concluded that the City was not empowered under section 8 of the MPRA to determine "illegal use" as a category of rateable property, nor to include such category in its rates policies. The minority judgment reasoned that although the respondents' use of their property for an illegal or unauthorised purpose was beyond question, "the sanction for the respondents' illegal use of their property must be sought elsewhere and not in the Rates Act" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 38–39). The minority judgment argued that the appeal should have been dismissed.

This case note appraises the judgments of the SCA in *City of Johannesburg Metropolitan Municipality v Zibi* (*supra*). It argues that although the reasoning of the majority judgment was correct, it overlooked the transitional arrangements in section 93B of the MPRA that were introduced by section 35 of the Local Government: Municipal Property Rates Amendment Act (29 of 2014) (Property Rates Amendment Act). In relation to the minority judgment, it argues that the position adopted by Justice Schippers was incorrect in that it reflects the closed list of rateable properties that municipalities were required to comply with only after 1 July 2022. In order to achieve the above objective, the remainder of this contribution is structured into four parts. It begins by providing a contextual

background on property rating in South Africa, highlighting the need for legal reform following the transition to constitutional democracy. (Planning law as well as property taxes across the globe are generally linked to political ideology. See Van Wyk *Planning Law* 2ed (2012) 1–2; Franzsen and Olima "Property Taxation in Southern and East Africa: Lessons from South Africa and Kenya" 2003 15 *SA Merc LJ* 309 309.) This is followed by a brief discussion of the MPRA, with attention given to those sections that have been argued in SCA judgments. After this, the author provides an overview of *City of Johannesburg Metropolitan Municipality v Zibi*, focusing on the facts, issue in dispute, and the findings of the majority and minority judgments, as well as their reasoning. The last part of the contribution is an appraisal of the judgments of the SCA.

2 Municipal property rates in historical context

Property rating (taxation) is an important tool used by local authorities to improve revenue generation and efficiently manage urban land (Franzsen and Olima 2003 *SA Merc LJ* 309; Ramakhula *Implications of the Municipal Property Rates Act (No 6 of 2004) on Municipal Valuations* (masters research report, University of the Witwatersrand) 2010 22–23). Often, property rating has failed to meet the desired objectives in African countries because of the retention of inappropriate colonial laws that do not speak to the current reality of many local authorities (Franzsen and Olima 2003 *SA Merc LJ* 309). Although South Africa has a long history of property rates, dating back to 1836, property tax only existed in towns and urbanised White areas in the old order. At the national level, property tax was regulated by several pieces of legislation that promoted racial separation (Ramakhula *Implications of the MPRA* 1). The Natives Land Act, promulgated in 1913, restricted ownership or leasing of land reserves that were established for Blacks, Coloureds and Indians. The series of racially-based national statutes that were adopted before and during apartheid rule meant that White and Black local authorities could not be amalgamated for purposes of uniform property taxation (Ramakhula *Implications of the MPRA* 2). As a result of racial separation, White areas had good infrastructure, better properties and better living environments than Black areas. While Whites willingly paid property rates, Blacks did not see the need to pay, given the poor services that were delivered in their areas (Ramakhula *Implications of the MPRA* 2). In order to better manage those townships that could not be incorporated into homelands and to contain growing uprisings, the State granted such townships full municipal status through the Black Local Authorities Act (102 of 1982). Structures established to manage Black townships lacked political credibility and were often rejected through violent community protests (see De Visser *Developmental Local Government: A Case Study* (2005) 59–60; Craythorne *Municipal Administration* (1997) 3; Ismail, Bayat and Meyer *Local Government Management* (1997) 50–51). Elections to Black local authorities in 1983 ignited a serious wave of urban protests against the policy of apartheid (Wittenberg "Decentralisation in South Africa" (2006) 14–15; Bekink *Principles of South African Local Government* (2006) 24). Attempts by Black local authorities to impose rates and charges for services were met with fierce opposition. By the late 1980s, there was a

general realisation of the need to establish a new, uniform, all-inclusive system of local government, capable of responding to the needs of all South Africans (Ismail *et al Local Government Management* 58–61; Bekink *Principles of South African Local Government Law* 25).

From 1910 until the demise of the apartheid system, municipalities were subject to tight provincial control. The power of municipalities to impose property rates was regulated at the provincial level through various ordinances adopted by the country's four provinces (for a list of these ordinances, see Ramakhula *Implications of the MPRA* 2). Each province had legislation to guide municipal valuations and the implementation of the preferred rating system. The different rating systems used included: flat rating, site rating, composite rating or differential rating (for details on these rating methods, see Ramakhula *Implications of the MPRA* 7–10). Despite the different forms of rating used, municipalities were obliged to collect a prescribed amount of income each financial year (Ramakhula *Implications of the MPRA* 2). The use of different rating systems by provinces led to inconsistencies in the collection of rates across South Africa (Ramakhula *Implications of the MPRA* 7).

During the transition to democracy, government had two main property rating challenges: first, to reform and extend the property rating system that functioned effectively in the hands of former White urban local authorities before 1994 to all properties within a transformed system of non-racial wall-to-wall municipalities; and, secondly, to achieve uniformity in the system of property rating across the entire country (Franzsen and Olima 2003 *SA Merc LJ* 309–310). Against this historical backdrop and a number of transitional legislative arrangements, a series of negotiations between the new democratic government and interested parties led to the finalisation and enactment of the MPRA in 2004 (Steytler and De Visser *Local Government Law* 13-9 to 13-10; Franzsen and Olima 2003 *SA Merc LJ* 317–318. For details on transitional legal arrangements, see Steytler and De Visser *Local Government Law* 13-9 to 13-10). The objectives of the MPRA and provisions relevant to this contribution are set out under heading 3 below.

It is important to note that the transformation of the system of property rates in South Africa is intertwined with the transformation of the system of land planning in the country (for a discussion on the history of land planning in South Africa, and the law and policy reforms that have been implemented since 1993, see Van Wyk *Planning Law* 1–4). Just as the system of rating was not uniform, land-use planning in South Africa was also fragmented. This was mainly because land itself was fragmented for racial purposes. In the current dispensation, local government has been accorded greater powers in relation to land planning and land-use management through the Constitution (Schedule 4B of the Constitution read together with s 156(1) and (2) of the Constitution) and the Spatial Planning and Land Use Management Act (6 of 2013) (SPLUMA) (see s 20(2) of SPLUMA, for example). In terms of the Constitution, municipalities have original competence over "municipal planning". This means that they have legislative, executive and administrative authority in respect of "municipal planning" (ss 156(1)(*a*)–(*b*) and 156(2) of the Constitution). The

exact ambit of the powers of local government over "municipal planning" was the subject of contestation in a number of cases (*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal supra*; *Maccsand (Pty) Ltd v City of Cape Town* 2012 (7) BCLR 690 (CC); *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town* 2014 (5) BCLR 591 (CC)). The question was finally settled by the Constitutional Court in *Minister of Local Government v Habitat Council* (*supra* par 19). In the *Habitat Council* case, the court concluded that all "municipal planning decisions that encompass zoning and subdivision, no matter how big, lie within the competence of municipalities" (*Minister of Local Government v Habitat Council supra* par 19). The court reasoned that it made perfect sense for municipalities (and not provinces) to be responsible for zoning and subdivision decisions because municipalities are best suited to making those decisions (*Minister of Local Government v Habitat Council supra* par 14). The court pointed out that because municipalities are at the forefront of service delivery, they face persistent demands from citizens for delivery of government services. Based on these considerations, the court reasoned that it is appropriate that municipalities should be responsible for zoning and subdivision decisions because this entails localised decisions, and should be based on information that is readily accessible to municipalities (*Minister of Local Government v Habitat Council supra* par 14). The decision-maker must consider whether services that are primarily provided by municipalities will be available for proposed developments and take into consideration matters like building density and wall heights – matters that are best left for municipal determination (*Minister of Local Government v Habitat Council supra* par 14).

Van Wyk points out that, if one takes into account the historical context of South Africa, it becomes evident that the proper planning and management of land use is pivotal to the creation and maintenance of a satisfactory quality of life for all of South Africa's people (Van Wyk *Planning Law* 1). The current zoning powers of local government ensures that municipalities are able to plan the development of municipal areas. As a commentator puts it: "This is to ensure that nobody operates a chicken farm in the middle of a residential area" and that "no heavy industries open up shops in a commercial area" (Visser "Take Note If You Are Conducting a Business From Your Private Residence" (29 March 2022) https://www.moneyweb.co.za/news/south-africa/take-note-if-you-are-conducting-a-business-from-your-private-residence/ (accessed 2022-03-30)). These are some of the issues a municipal council must consider for proper town planning. Property rating is a tool that municipalities use to generate revenue and manage the use of land within their jurisdictions.

3 Discussion of the MPRA

The Preamble of the MPRA asserts that, among other purposes, it was adopted to regulate the power of a municipality to impose rates on

property; make provision for fair and equitable valuation methods of properties; and make provision for an objections and appeal process. The MPRA affirms the need for municipalities to exercise their power to impose rates on property within a statutory framework that increases certainty, uniformity and simplicity across the country (see Preamble of the MPRA). In terms of section 2 of the Act, a metropolitan or local municipality may levy a rate on property in its area (although there are three categories of municipality in South Africa, district municipalities do not have powers to levy a rate on property). This power must be exercised subject to section 229 and other provisions of the Constitution, the provisions of the MPRA, and a municipal rates policy adopted in terms of section 3 of the MPRA (see s 2 of the MPRA).

Section 3 of the MPRA deals with the adoption and contents of a rates policy. It obliges the council of a municipality to adopt a policy consistent with the MPRA on the levying of rates on rateable property in the jurisdiction of the municipality (s 3(1) of the MPRA). A rates policy adopted in terms of section 3(1) of the MPRA takes effect on the effective date of the first valuation roll prepared by the municipality in terms of the Act and must accompany the municipality's budget for the financial year concerned when the budget is tabled in the municipal council in terms of the Local Government: Municipal Finance Management Act (56 of 2003) (MFMA) (s 3(2) of the MPRA). A municipal rates policy must: treat persons liable for rates equitably; determine the criteria to be applied by the municipality if it levies different rates for different categories of property determined in terms of section 8 of the MPRA, and if it increases or decreases rates; determine, or provide criteria for the determination of, categories of property for the purpose of levying different rates; identify and provide reasons for exemptions, rebates, and reductions; and take into account the effect of rates on public service infrastructure (see generally s 3(1)–(5) of the MPRA).

Section 4 of the MPRA prescribes the public participation process that must be followed by every municipality before it adopts its rates policy. The process is generally aligned with Chapter 4 of the Local Government: Municipal Systems Act (32 of 2000) (the Systems Act), which is exclusively dedicated to facilitating public participation in local government generally. Section 4 of the MPRA outlines the role of the municipal manager and the council in this regard.

Section 5 deals with the annual review of rates policies and prescribes that each municipal council must annually review, and if necessary, amend its rates policy. Any amendments to a rates policy must accompany the municipality's annual budget when it is tabled in the council in terms of the MFMA (see s 5(1) of the MPRA). Any amendments that relate to any of the following matters listed in sections 3(3) to (6) of the MPRA require community participation: equitable treatment of persons liable for rates; determination of the criteria to be applied by the municipality if it contemplates levying different rates for different categories of property, and when it increases or decreases in rates; determination of the criteria for the levying of different rates for different categories of property; and providing exemptions, rebates, and reductions for rates (see s 5(2) of the MPRA).

Every municipality is obliged to adopt and publish by-laws to give effect to its rates policy (s 6(1) of the MPRA). Such a by-law may differentiate between different categories of property; and different categories of owner of properties liable for the payment of rates (s 6(2)(*a*)–(*b*) of the MPRA).

Section 8 of the MPRA deals with differential rates. This section was overhauled following the adoption of the Property Rates Amendment Act, which went into operation on 1 July 2015. In terms of the Amendment Act, the new categorisation framework created in section 8 of the MPRA was supposed to be implemented by all municipalities fully by 1 July 2022.

In this regard, s 93B of the MPRA reads as follows:

> "Transitional arrangement: Differential rates – The provision of section 8 must be applied by a municipality within seven years of the date of commencement of this Act".

S 93B was inserted by s 35 of the Property Rates Amendment Act. See also Steytler and De Visser *Local Government Law* 13-39.) Steytler and De Visser argue that the inappropriate framing of the old section 8(1) and (2) of the MPRA left municipalities with a lot of discretionary powers in relation to differentiation and categories of rateable property (Steytler and De Visser *Local Government Law* 13-36 to 13-40).

Before the 2014 amendment, s 8(1) and (2) of the MPRA read as follows:

> "8. (1) Subject to section 19, a municipality may in terms of the criteria set out in its rates policy levy different rates for different categories of rateable property, which may include categories determined according to the- *(a)* use of the property; *(b)* permitted use of the property; or *(c)* geographical area in which the property is situated.
>
> (2) Categories of rateable property that may be determined in terms of subsection (1) include the following: *(a)* Residential properties; *(b)* industrial properties; *(c)* business and commercial properties; *(d)* farm properties used for– (i) agricultural purposes; (ii) other business and commercial purposes; (iii) residential purposes; (iv) purposes other than those specified in subparagraphs (i) to (iii); (*e*) farm properties not used for any purpose; (*f*) smallholdings used for- (i) agricultural purposes; purposes; (ii) residential; (iii) industrial purposes; (iv) business and commercial purposes; or (v) purposes other than those specified in subparagraphs (i) to (iv); (*g*) state-owned properties; *(h)* municipal properties *(i)* public service infrastructure; *(j)* privately owned towns serviced by the owner; *(k)* formal and informal settlements; *(l)* communal land as defined in section 1 of the Communal Land Rights Act, *(m)* state trust land; *(n)* properties – (i) acquired through the Provision of Land and Assistance Act, 1993 (Act No. 126 of 1993), or the Restitution of Land Rights Act, 1994 (Act No. or 1994); 22 of 25 (ii) which is subject to the Communal Property Associations Act, 1996 (Act No. 28 of 1996); *(o)* protected areas; *(p)* properties on which national monuments are proclaimed; *(q)* properties owned by public benefit organisations and used for any specific public benefit activities listed in Part 1 of the Ninth Schedule to the Income Tax Act; or *(r)* properties used for multiple purposes, subject to section 9."

Owing to this framing, "it was thus competent for a municipality to include in its rates policy the category of 'non-permitted use' of property" (Steytler and De Visser *Local Government Law* 13-36). In contextualising the

amendment of the old section 8 of the MPRA, Steytler and De Visser argue that:

> "The radical amendment of section 8 should be understood again[st] the inherent contradictions it contains as well as the open-ended discretion it afforded municipalities. First, the discretion of municipalities to categorise properties is unregulated. Hence, there is no obligation on a municipality to determine differential rates on property. Moreover, the methods used for categorisation are not exhaustive. The categories listed in section 8(2) are also optional; a municipality does not need to adopt them at all. Secondly, the methods of determining categories of properties are awkwardly expressed because they are set in the alternative. As the three methods are linked by the proposition "or", it indicates that a municipality may use only one of the grounds. This would defeat the object of determining, for example, vacant property as a category, as vacant property would include, by definition, land which is not used for its permitted use. Again, the method of 'geographical areas' could be used in conjunction with the other two methods. However, because section 8(1) permits municipalities to use any other method, a municipality is not prevented from using the listed methods in combination." (Steytler and De Visser *Local Government Law* 13-39)

The amendment of section 8 of the MPRA sought to remedy the problems identified in the above extract (Steytler and De Visser *Local Government Law* 13-40).

In order to manage the discretion municipalities enjoyed under the old section 8, the new section 8 of the MPRA now prescribes a closed list of categories of property and the method by which a property is categorised as falling into one or other of the categories.

The amended s 8 of the MPRA reads as follows:

> "8. Differential rates
>
> (1) Subject to section 19, a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property, determined in subsection (2) and (3), which must be determined according to the (*a*) use of the property; (*b*) permitted use of the property; or (*c*) a combination of (*a*) and (*b*).
>
> (2) A municipality must determine the following categories of rateable property in terms of subsection (1): Provided such property category exists within the municipal jurisdiction: (*a*) Residential properties; (*b*) industrial properties; (*c*) business and commercial properties; (*d*) agricultural properties; (*e*) mining properties; (*f*) properties owned by an organ of state and used for public service purposes; (*g*) public service infrastructure properties; (*h*) properties owned by public benefit organisations and used for specified public benefit activities; (*i*) properties used for multiple purposes, subject to section 9; or (*j*) any other category of property as may be determined by the Minister, with the concurrence of the Minister of Finance, by notice in the *Gazette*.
>
> (3) In addition to the categories of rateable property determined in terms of subsection (2), a municipality may determine additional categories of rateable property, including vacant land: Provided that, with the exception of vacant land, the determination of such property categories does not circumvent the categories of rateable property that must be determined in terms of subsection (2).
>
> (4)(*a*) Where a municipality can, on good cause, show that there is a need to subcategorise the property categories listed in subsection (2), a municipality must apply to the Minister in writing for authorisation to create one or more of such subcategories. (*b*) Such application must

> (i) be accompanied by a motivation for such subcategorisation; (ii) demonstrate that such subcategorization is not in contravention of section 19; and (iii) reach the Minister at least 15 months before the start of the municipal financial year in which the municipality envisages levying a rate on such subcategorised property."

The new provision limits the method of categorisation to that of either actual or permitted use or a combination of both. By using this method, all properties have to be generally classified as one or other category from the closed list in the revamped section 8(2) of the MPRA (Steytler and De Visser *Local Government Law* 13-40). For example, when the method in section 8(1) is applied to the list in section 8(2), the first category of property is "residential property" which is defined in terms of the actual use or permitted use for residential purposes. It has been suggested that, by using permitted and actual use in relation to the same property, a category of "vacant" or "unused" property can be created (Steytler and De Visser *Local Government Law* 13-40). In addition, a property can be used for multiple purposes and categorised as such by a municipality as set out in section 9 of the MPRA. In terms of section 19 of the MPRA, a municipality is not generally allowed to levy different rates on residential property (see s 19(1)(*a*) of the MPRA and the exceptions in ss 11(2), 21 and 89 of the MPRA). Furthermore, a municipality may not levy additional rates on residential property (s 19(1)(*d*) of the MPRA; see s 22 of the MPRA for exceptions to the rule). However, this can be done for an entire circumscribed area in order to improve or upgrade infrastructure (see Steytler and De Visser *Local Government Law* 13-41 to 13-42).

As indicated above, it was envisaged that municipalities must, from 1 July 2022, comply with the closed list of categories of property and the method by which a property is categorised as falling into one or other of the categories (see s 93B of the MPRA). This means that, before this cut-off date, reliance on the old categories of property and the old method by which property was categorised by a municipality was not illegal.

4 Overview of *City of Johannesburg Metropolitan Municipality v Zibi*

4 1 Facts and issue in dispute

Mr and Mrs Zibi bought immovable property that was transferred into their names on 24 June 2013. The property was zoned as "Residential 1" in terms of the Johannesburg Town Planning Scheme of 1979. The property is a free-standing erf with a house that has five bedrooms. Initially, only they resided in the property with their two minor children. However, in January 2015, they rented out two bedrooms to students and young professionals, therefore using the property as a commune. No authorisation was obtained from the City for commercial use (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 2–6).

Based on several site inspections carried out by officials of the City, the couple was first notified of their contravention (through TP19 Notice) on

4 September 2013. The TP19 Notice called on them to terminate their unauthorised use of the property by 4 October 2013 at the latest. On 28 October 2016, the City, through its attorneys, sent a letter to the couple, notifying them of their wrongful and unlawful use of the property, in violation of the town planning scheme and zoning thereof. The letter stated that five site inspections conducted on the property from 3 August 2014 to 9 October 2016 confirmed that the unauthorised use of the property continued unabated (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 7–8).

On 22 September 2015, the City's town planning law enforcement unit directed the property rates policy finance and compliance unit to impose a penalty tariff as contemplated in the City's Property Rates Policy 2015/2016. From October 2015 to the date of the SCA judgment, the City levied rates on the property in the form of a penalty for illegal and unauthorised use. Before October 2015, the municipality had levied a property rate of R898.01 monthly on the property. However, from October 2015 onwards, the rate escalated to R3 592.05. The penalty tariff of R3 592.05 included the amount charged in respect of property rates. After October, the penalty tariff was claimed monthly as per the tariff provided for in the City's rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 4 and 9).

The couple were not happy with the increase in the penalty tariff and approached the City's Ombudsman on 11 December 2017 to investigate what they called an incorrect billing on their property. On 31 January 2018, the Ombudsman informed the couple that the increase in their account was due to the implementation of a penalty tariff for using their property contrary to the zoning. On 10 October 2018, the City obtained an order in the Johannesburg High Court interdicting the couple from using the property in contravention of its residential zoning within 30 days of the date of the order. Instead of challenging the interdict, which remained in force, on 26 November 2018, the couple launched an application challenging the City's penalty tariff. They argued that, in terms of the MPRA, before an illegal or unauthorised tariff can be levied, the City was first obliged to update the category of the property on its valuation roll. The City argued that the property rates policy was correctly applied and there was no requirement that there should first be a re-categorisation before the application of a penalty tariff (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 21).

The High Court reasoned that the City was not entitled to levy a penalty rate without first re-classifying the property as an "unauthorised category" and ruled in favour of the couple (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 11–12). The court held that the failure to follow this procedure contravened section 3 of the MPRA as per the reasoning of the court in *Smit v The City of Johannesburg Metropolitan Municipality* ([2017] ZAGPJHC 386). The High Court concluded that the City was only authorised to levy rates on the property based on how it was categorised – that is, in accordance with its "Residential 1" zoning. The court reasoned that if the City wanted to charge the punitive rate, it was required to amend the valuation roll or issue a supplementary roll and comply with the relevant

legislative requirements that are designed to ensure compliance with the *audi alteram* principle, in order to protect ratepayers like the couple against arbitrary increases. Based on this reasoning, the court held that the City's failure to follow this procedure rendered its conduct invalid (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 12–13).

The City appealed to the SCA. The main issue for determination by the SCA was whether a municipality was entitled to levy a rate in the form of a penalty on residential property for illegal or unauthorised use, without first changing the category of the property on its valuation roll or supplementary roll from "residential" to "illegal or unauthorised" use (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 1).

4 2 Majority judgment and reasoning

Based on an interpretation of relevant legal provisions, the majority judgment of the SCA held that the City's action to levy a penalty in respect of the use of the property within its jurisdiction was not *ultra vires* its powers especially since it had done so as part of a validly adopted property rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 20).

The majority judgment began by examining the legal provisions governing the powers and ability of municipalities to impose rates and tariffs. Justice Mbha explained that the power of municipalities to levy rates on property within their jurisdictions is an original power conferred by section 229(1)(*a*) of the Constitution and regulated by the MPRA as envisaged by section 299(1)(*b*) of the Constitution (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 14). He indicated that the MPRA and other legislation such as the Systems Act and the MFMA constitute part of the suite of statutes that transformed local government in South Africa (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 14). He proceeded to explain how provisions in these statutes further strengthen the powers of municipalities to impose rates. He indicated that in terms of section 2 of the Systems Act, a municipality is an organ of state with a separate legal personality and that section 4(1)(*b*) of the Systems Act gives the council of a municipality the right to govern, on its own initiative, the local government affairs of the local community (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 15). He went further to specify that the object of the MFMA is to secure sound and sustainable fiscal management of municipalities by establishing norms and standards for, *inter alia*, budgeting and financial planning processes (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 15). He explained that the power of a municipality to raise a surcharge over and above a rate it levies in respect of property is grounded in the incidental powers conferred on municipalities by section 156(5) of the Constitution (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 16). He asserted that, because the power of a municipality to levy rates is an original power, it is not dependent on enabling national legislation but on the Constitution. On this front, Justice Mbha concluded that the imposition of a penalty against property owners, as it happened in the case before the court, is necessary and incidental to the effective performance of the City's

functions (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 16).

Justice Mbha noted that, despite the above constitutional provisions, section 75A(1)(*a*) of the Systems Act gives every municipality a general power to "levy and recover fees, charges and tariffs in respect of any function or service of the municipality" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 17). He indicated that, in terms of section 75A(2) of the Systems Act, fees, charges or tariffs are levied by a municipality by way of resolution passed by the municipal council with a supporting vote of the majority of its members. He pointed out that section 74 of the Systems Act obliges every municipality to adopt and implement a tariff policy on the levying of fees for municipal services provided by or on behalf of the municipality through a service delivery agreement that complies with the provisions of the Act and any other applicable legislation (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 18). He emphasised that section 74 of the Systems Act must be read together with section 3(1) and (2) of the MPRA, which obliges a municipality to adopt a rates policy on the levying of rates on rateable property – which takes effect on the effective date of the first valuation roll prepared by the municipality, and which must accompany the municipality's budget for the financial year concerned (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 18). He indicated that in terms of existing case law the adoption of a rates policy and the levying, recovering and increasing of property rates by a municipal council is a legislative rather than an administrative act (even if a validly adopted rates policy is not considered a legislative act, it still has binding force as an executive policy and can be enforced; see Steytler "The Legal Instruments to Raise Property Rates: Policy, By-Laws and Resolutions" 2011 *SAPL* 484–496; Fuo "Constitutional Basis for the Enforcement of 'Executive Policies' That Give Effect to Socio-Economic Rights in Africa" 2013 16(4) *PELJ* 1–44). In this light, Justice Mbha held that a municipality's action in this regard can only be challenged on the basis of the legality principle, which is an incidence of the rule of law (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 19).

Based on the legal provisions and principles traversed above, Justice Mbha held that it was beyond any doubt that a municipality's powers to levy a penalty in respect of the use of any property within its jurisdiction is not *ultra vires* its powers, provided it does so as part of a validly adopted property rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 20). He indicated that it was common cause that, in the case before the court, the respondents did not challenge the validity of the relevant property rates policy of the City of Johannesburg, but rather its application. Justice Mbha indicated that the respondents' attack was only directed at the validity of the impugned tariff and that the High Court also did not attack the validity of the property rates policy in question in any manner whatsoever (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 20).

After the above finding, Justice Mbha proceeded to explain how the City had adopted and implemented a rates policy that complied with the requirements of section 8(1) to (3) of the MPRA (see *City of Johannesburg*

Metropolitan Municipality v Zibi supra par 22–35 for details). He noted that, in applying the policy, the City levied different rates for the relevant period 2015/2016. He singled out clause 5 of the City's rates policy, which was reproduced *mutatis mutandis* in the Municipality's 2016/2017, 2017/2018 and 2018/2019 property rates policies.

Clause 5 of the property rates policy provided:

> "(1) The Council levies different rates for different categories of rateable property in terms of section 8 of the [MPRA] Act. All rateable property will be classified in a category and will be rated based on the category of the property from the valuation roll which is based on the primary permitted use of the property, unless otherwise stated. For purposes of levying differential rates in terms of section 8, the following categories of property are determined, in terms of sections 3(3)*(b)* and 3(3)*(c)* of the Act ..." (see *City of Johannesburg Metropolitan Municipality v Zibi supra* par 23).

Clause 5(2) of the City's rates policy contains a list of the various categories of rateable property in respect of which different rates are levied. Out of these, 23 different categories were listed based on the primary permitted use of the property, unless otherwise stated. The last item on the list under *(w)* was for "illegal use" in the 2015/2016 policy. The City's 2016/2017 property rates policy had the same number of categories, except that under item *(w)*, it listed "unauthorised use" in contrast to the "illegal use" that is found in the 2015/2016 rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 24). Clause 6 of the municipality's property rates policy for 2015/2016 explained the primary permitted use of the rateable property, the reasons for the zoning of the specific property and how each particular category of property would be rated. Clause 6.1 of the City's rates policy defined the illegal-use category as including all properties that are used for a purpose not permitted by the zoning thereof in terms of any applicable town planning scheme or land use scheme; and any properties used in contravention of any of the Council's by-laws and regulations (*City of Johannesburg Metropolitan v Zibi supra* par 24). Clause 6.1(2) stipulated: "The rate applicable to this category will be determined by the City on an annual basis. The City reserves the right to increase this penalty tariff higher than any other tariffs" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 24). Justice Mbha explained that it was significant to note that the "unauthorised use" category is explained in similar terms in the municipality's 2017/2018 and 2018/2019 property rates policies to the "illegal use" category (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 24). Informed by the norm of statutory interpretation that courts should attribute meaning to the words used in legal documents, and taking into consideration the context in which they were used, by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 25), the majority judgment asserted:

> "A simple reading of the penalty tariff in Clause 6, read together with the rest of the municipality's property and rates policy, reveals that it is plainly not applied as a 'category', although it is listed under the heading 'Categories of Property for levying of Differential Rates'. From a mere interpretation of the

> MRPA, read with the policy, it is clear that the penalty charges levied under 'illegal use' or 'unauthorised use' are directed against a landowner's illegal conduct, and not the property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 26). The municipality's property rates policy states unequivocally, that the 'illegal use' or 'unauthorised use' tariff will be imposed in respect of all properties that are used for a purpose (land use) not permitted by the zoning thereof. The 'illegal use' or 'unauthorised use' category is thus clearly defined with reference to the zoning categories, and not the categories as contemplated in the valuation roll." (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 27)

Based on the above, the majority judgment reasoned that the respondents' reliance on the fact that the penalty tariff is referred to under the heading of "Categories" in clause 5 is misconceived (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 28). The court reasoned that the penalty tariff (and how it is applied) forms part of the concept of the tariff and charges against the property as informed by the City's validly adopted property rates policy. The court was of the view that a reading of the City's property rates policy clearly reveals a distinction between the general property rate for lawful use and a charge for the penalty tariff that is founded on illegal conduct (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 28). The court concluded that in addition to enabling legal provisions, it is clear from the property rates policy that the City correctly reserved to itself the right to claim a higher charge and tariff against landowners that deliberately refuse to bind themselves to the municipality's land-use scheme. Justice Mbha reasoned that this was the only sensible conclusion that could be reached if the penalty provisions, tariffs and charges referred to in the policy are interpreted in the context in which they appear, taken together with the purpose to which the policy is directed, and the objectives of the enabling suite of local government legislation traversed in the judgment (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 29).

The majority judgment agreed with the City that the imposition of a higher tariff regarding rates payable on residential property, which is used for a purpose other than its authorised purpose, does not require a re-categorisation in terms of the MPRA and the municipality's property rates policy (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 33). The penalty validly imposed by the City on the respondents' property only sought to address the non-compliance to zoning scheme to the extent and for the duration of the illegal land use in operation. The court indicated that the High Court failed to appreciate the unreasonable administrative burden that would be placed on the City if a supplementary valuation roll had to be published in respect of every unlawful use of property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 33). The court held that because the City's policy was validly adopted and applied, the respondents' complaint of an alleged breach of their right to the *audi alteram* procedure could not be sustained (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 35). The majority of the SCA held that the High Court had misdirected itself. It overturned the decision of the High Court and completely set aside its order.

4 3 Minority judgment and reasoning

The minority judgment came to the conclusion that the City was not empowered under section 8 of the MPRA to determine "illegal use" as a category of rateable property, nor to include such category in its rates policies (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 38). Justice Schippers reasoned that although the respondents' use of their property for an illegal or unauthorised purpose was beyond question, the penalty for their illegal use cannot be supported by the MPRA (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 39). He reasoned that the "starting point therefore, is whether the municipality was authorised to determine 'illegal use' as a category of rateable property in terms of section 8(1) of the Rates Act, as it purported to do" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 50). After this, he proceeded to demonstrate why an analysis of relevant provisions in the Constitution and the MPRA do not support the City's argument.

Justice Schippers reasoned that section 75A of the Systems Act was not applicable in this case because the City did not act under that provision when it determined the illegal use category and imposed the penalty tariff. According to Justice Schippers, the City purported to act in terms of sections 3 and 8 of the MPRA. He affirmed the principle that "a decision deliberately and consciously taken under the wrong statutory provision cannot be validated by the existence of another statutory provision authorising that action" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 49). After an examination of section 8(1) to (3) of the MPRA, he reasoned that the MPRA does not permit "illegal use" as a category of rateable property for diverse reasons (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 51–52):

First, in his view, "illegal use" is not a use as such, and the so-called illegal use category "is not determined according to the *use* of the property" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 52 (Judge's emphasis)). He explained that the "category is determined, and the penalty tariff imposed, on the basis of the *conduct* of property owners who use their properties contrary to town planning or land use schemes, or contravene by-laws and regulations" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 52 (Judge's emphasis)). Secondly, he indicated that the uses of property in section 8(1) of the MPRA plainly constitute lawful uses. He argued that this is supported by the immediate context in that all the categories of rateable property listed in section 8(2) of the MPRA are lawful uses of property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 53). Accordingly, illegal, unauthorised or non-permitted uses of property should not be categorised for the purpose of levying rates in terms of the MPRA. He reasoned that a municipality cannot grant its approval to the illegal use of property by levying a rate on such property and collecting rates levied on the owner of that property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 53). Thirdly, he reasoned that it was impossible to determine a value for illegal use and that this was a jurisdictional prerequisite for the exercise of the power to collect rates by a municipality (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 54). Fourthly, he reasoned that the penalty

tariff is not a "rate" as contemplated in section 229(1)(*a*) of the Constitution and that this provision only empowers rates on property as ordinarily understood (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 55). He opined that the penalty tariff was also not a "rate" as defined in the MPRA and did not conform to the established meaning of the term (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 55–56). He explained that the penalty tariff was not a municipal charge, but a sanction directed solely at the conduct of property owners. He opined that there is nothing in the MPRA that authorises a municipality to levy a rate to deter landowners from contravening a statute, by-law, or land-use scheme; or to impose a penalty tariff because the property does not conform with the town-planning scheme (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 57). The fifth reason Justice Schippers advanced for his dissenting judgment is that the "illegal use" category cannot be applied equitably, and so is contrary to the requirement of section 3(3)(*a*) of the MPRA, which provides that a rates policy "must treat persons liable for rates equitably" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 58). He noted that, in the case before the court, the property was not rated on the same basis as other properties used for the same purpose – that is, "accommodation establishments" (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 58). He reasoned that, if it had been rated on that basis, there could have been no complaint because the respondents would have been treated the same as all other operators of such establishments (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 58). Lastly, he reasoned that, in determining the "illegal use" category and imposing the penalty tariff, the City acted contrary to the prohibition in section 19(1) of the MPRA, to which section 8(1) is expressly rendered subject (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 59–60). Section 19(1) of the MPRA provides that a municipality may not generally levy additional rates on residential property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 60).

Based on the above reasons, Justice Schippers held that the City had acted beyond the powers conferred by the MPRA in determining an "illegal use" category of rateable property and in imposing the penalty tariff. He held that this violated the principle of legality (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 59–60), and that the action of the City was arbitrary because it was not rationally related to the purpose for which the power to levy rates was given in the MPRA (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 63).

5 Appraisal of *City of Johannesburg Metropolitan Municipality v Zibi*

With very little engagement with the fiscal autonomy of municipalities as guaranteed in the Constitution, Justice Schippers argued that the appropriate starting point of the analysis ought to be whether the City of Johannesburg was authorised in terms of section 8 of the MPRA to determine "illegal use" as a category of rateable property. From this perspective, he concluded that the City was not empowered under section 8 of the MPRA to determine "illegal use" as a category of rateable property,

nor to include such category in its rates policies. Accordingly, he declared the actions of the City illegal and contrary to the dictates of the principle of legality.

The principle of legality is one of the core elements of the foundational value of the rule of law and informs how municipalities should exercise their original fiscal and self-governing powers. The principle of legality dictates that every municipal council should function in terms of the Constitution, as well as the restrictions it imposes on local government (see *Fedsure Life Assurance v Johannesburg supra* par 58; Hoexter *Administrative Law in South Africa* 3ed (2021) 122–123). The same degree of compliance is also expected from every municipality in relation to legislation that is legitimately adopted under the Constitution (Steytler and De Visser *Local Government Law* 13-7 to 13-8). Where a municipal council acts in breach of one of the direct and mandatory provisions of the Constitution, or enabling legislation, such an infringement is subject to a constitutional challenge (Steytler and De Visser *Local Government Law* 13-7 to 13-8). Given the justiciability of the Bill of Rights, any legislative act of a municipal council (such as the setting of rates) must be consistent with the fundamental rights guaranteed in the Constitution (Steytler and De Visser *Local Government Law* 13-7 to 13-8).

Despite the importance of the principle of legality, the minority judgment is flawed in two ways. First, it fails to take into account the transitional arrangements in section 93B of the MPRA, which gave municipalities until 1 July 2022 to comply fully with the methods and differentiation in categorisation of rateable property. As already seen in the discussion of the MPRA under heading 3 above, municipalities enjoyed considerable discretionary powers under section 8(1) and (2) of the MPRA in relation to differentiation and categories of rateable property before the 2014 amendment owing to the inappropriate manner in which these were framed (Steytler and De Visser *Local Government Law* 13-36 to 13-40). This freedom was well articulated by the SCA in *City of Tshwane v Blom* in 2013 as follows:

> "Section 8(2) lists a number of categories of rateable property that may attract different rates. These categories are optional. The municipality may adopt all of them, drop some or include new categories depending on the nature of the objectives its rates policy seeks to achieve. The municipality has a choice. Rates policies entail, by definition, policy choices which lie at the core of municipal autonomy, and as long as the rates policy treats ratepayers equitably and is consistent with the provisions of the Constitution and the Rates Act, there can be no basis for questioning the choices it makes with regard to properties that may be differentially rated with respect to different categories of property. The court a quo therefore erred in finding that the creation of 'non-permitted use' category was improper." (*City of Tshwane v Blom supra* par 18)

Owing to the framing of section 8(1) and (2) of the MPRA before the 2014 amendment, "[I]t was thus competent for a municipality to include in its rates policy the category of 'non-permitted use' of property" (Steytler and De Visser *Local Government Law* 13-36), which is akin to "unauthorised use" or "illegal use" as in the context of the City of Johannesburg. The "unauthorised" and "illegal" use categories used by the City only became

invalid from 1 July 2022, when the closed list of differentiation and categories of rateable property brought about by the Property Rates Amendment Act became mandatory. All municipalities are obliged to use the categories listed in section 8(3) of the MPRA as from 1 July 2022. The position taken by Justice Schippers in this regard was more futuristic and inconsistent with the legal position that was applicable before 1 July 2022.

Secondly, Justice Schippers erred in holding that a penalty cannot be imposed on rates (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 57). He opined that "there is nothing in the Rates Act which authorises a municipality to levy a rate to deter landowners from contravening a statute, by-law, or land use scheme; or to impose a penalty tariff" when the property does not conform with a town planning scheme (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 57). This reasoning fails to take into account the fact that the Constitution gives municipalities significant discretion in exercising their original fiscal powers and functions. This discretionary power is evident from several constitutional provisions that support the autonomy of local government, including sections 151(3) and 156(5) of the Constitution. What is missing in his reasoning is the recognition that, since the power of municipalities to levy rates is an original power guaranteed in the Constitution, its exercise is not dependent on enabling legislation (Steytler and De Visser *Local Government Law* 13-7). In the absence of national legislation, or where such legislation is mute on a rates-related matter, a municipality may act solely on the basis of section 229(1)(*a*) of the Constitution (Steytler and De Visser *Local Government Law* 13-7). This is in line with the reasoning of the apex court in *City of Cape Town v Robertson* (*supra*). In that case, the court explained that in terms of the current constitutional setup, apart from legislation, municipalities derive their powers directly from the Constitution or their own by-laws and policies (*City of Cape Town v Robertson supra* par 60). Therefore, municipalities can use their own initiative to act. They can exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of their original fiscal functions, such as property rates. In *Fedsure Life Assurance v Johannesburg* (*supra*), the Constitutional Court explained that the exercise of the original power to levy rates on property amounts to a legislative act, not administrative action that can be subjected to administrative law (see *Fedsure Life Assurance v Johannesburg supra* par 41, 53–59; Steytler and De Visser *Local Government Law* 13-7). As a consequence of this reasoning, since the levying of rates by democratically elected councillors follows a deliberative process, "the setting of rates can no longer be challenged simply on the ground that it is arbitrary" (Steytler and De Visser *Local Government Law* 13-7; see *City of Tshwane v Blom supra* par 19–20).

The author agrees with Justice Schippers's view that a penalty is not a rate on its own. However, the penalty tariff in this case should be seen in the context of the right of every municipality to enforce rates obligations, including through litigation. As part of their self-governing powers, municipalities have discretion in deciding how to enforce the duty of property owners to pay duly levied property rates and also to ensure

compliance with relevant by-laws and policies. As Steytler and De Visser point out, local government laws allow a municipality to:

> "[c]onsolidate any separate accounts of persons liable for payment to the municipality. This empowers a municipality to combine an account for service charges with that for the payment of property rates. Any payment, whether intended for service charges or not, is credited to the combined account. A municipality may also credit a payment against any account of the payer." (Steytler and De Visser *Local Government Law* 13-72)

The above reasoning supports the view that the penalty can be consolidated with the rates charges. From this perspective, it is clear that the action of the City of Johannesburg was not illegal.

A reading of the majority judgment shows that, although Justice Mbha did not mention or take into account the transitional arrangements in section 93B of the MPRA, the majority decision was legally sound. The judgment took into account the fiscal autonomy and incidental powers of local government as guaranteed in the Constitution, as well as the concomitant powers to levy and recover rates. Through a purposive and contextual approach to legal interpretation (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 25), the court held that a simple reading of the penalty tariff in clause 6, read together with the rest of the City's property and rates policy, revealed that it is plainly not applied as a "category", although it is listed under the heading "Categories of Property for Levying of Differential Rates". Justice Mbha reasoned that, from a mere interpretation of the MRPA, read with the City's policy, it was clear that the penalty charges levied under "illegal use" or "unauthorised use" are directed against a landowner's illegal conduct, and not the property (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 26). The court indicated that the City's property rates policy clearly stated that the "illegal use" or "unauthorised use" tariff will be imposed in respect of all properties that are used for a purpose (land use) not permitted by the zoning scheme. The "illegal use" or "unauthorised use" category was thus clearly defined with reference to the zoning categories, and not the categories as contemplated in the valuation roll (*City of Johannesburg Metropolitan Municipality v Zibi supra* par 27). The author argues that even if "unauthorised use" and "illegal use" were listed as a category of property under the rates policy of the City of Johannesburg, this could still have been enforceable given the wide discretion municipalities enjoyed under the old section 8 of the MPRA and under the transitional arrangements in section 93B of the MPRA. This view is supported by the approach adopted by the same court in *City of Tshwane v Blom (supra* par 5–23). In the *Blom* case, the SCA held in a unanimous judgment that it was legally valid for the City of Tshwane to add "non-permitted use" to the list of categories of rateable property in section 8(2) of the MPRA in its rates policy; and to levy a penalty, or higher than normal rate, on such a property (*City of Tshwane v Blom supra* par 16–23). The purposive and contextual approach to interpretation adopted by Justice Mbha also suits the fact that section 93B of the MPRA makes it clear that the categories and differentiations introduced by section 8 only became mandatory from 1 July 2022. This means that until that period, municipalities had time to correct their rates policies to align them with the new requirements. Thus, municipal

discretion under the old section 8 remained in place. The majority judgment could have used section 93B to strengthen its argument.

Section 229(2)(*b*) of the Constitution makes it clear that only national government can regulate the original power of municipalities to levy rates through legislation. Regulation entails a broad managing or controlling function rather than direct authorisation (Fuo "Intrusion Into the Autonomy of South African Local Government: Advancing the Minority Judgment in the Merafong City Case" 2017 50 *De Jure* 324 329–330; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal supra* par 59 and 68). When Parliament exercises its regulatory functions, it can impose limitations on municipalities, provided that such limitations do not transcend framework legislation (Steytler and De Visser *Local Government Law* 13-1). Any conditions imposed by Parliament that compromise or impede the ability of municipalities to discharge their powers or perform their functions is inconsistent with section 156(4) of the Constitution and can therefore be constitutionally challenged (Steytler and De Visser *Local Government Law* 13-1 to 13-12(1)). Even though sections 3 and 8 of the MPRA do not expressly allow municipalities to impose penalties on property rates, the Act "regulates" how municipalities should impose property rates. The key word in this context is "regulation", which has been interpreted to suggest the development of guidelines to support municipalities exercise their powers and functions effectively (Fuo 2017 *De Jure* 329–330; *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal supra* par 59 and 68). Since regulations are guidelines, they should be interpreted in a manner that gives municipalities leeway to discharge their functions effectively to the extent that they comply with the Constitution. This approach can be useful in understanding the lawfulness of the approach of the City to impose a penalty on rates.

The call for a purposive and contextual approach to legal interpretation that is consistent with the original fiscal powers of municipalities is important, as seen in this case. This is the same approach that a unanimous bench of the SCA adopted in 2013 in *City of Tshwane v Blom* (*supra* par 14–17). In the *Blom* case, the court relied on the language of section 8 of the MPRA, read it in context (taking into account the purpose of the provision, and the background to the preparation and enactment of the statute) and held that the list of rateable properties in section 8(2) of the MPRA was not closed and that the City of Tshwane had the leeway to adopt "non-permitted" use as a category in its rates policy for the purpose of determining applicable rates (*City of Tshwane v Blom supra* par 14–17). The approach adopted by the majority judgment in *City of Johannesburg Metropolitan Municipality v Zibi* was purposive, contextual and constitutionally compliant. While the majority judgment argued for and adopted a purposive and contextual approach to legal interpretation, the minority judgment adopted a narrower approach that thrust the principle of legality to the centre of its analysis. In addition, both the majority and minority judgments in the *Zibi* matter failed to consider the usefulness of the transitional arrangements in section 93B of the MPRA *vis-à-vis* the action of the City of Johannesburg. Section 93B gave the City discretionary

powers to include in its rates policy the category of “illegal use” or “non-permitted use”. This was an oversight in the historical evolution of the MPRA.

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