



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

CASE NO. 1217/2019

In the matter between:

OWN HAVEN HOUSING ASSOCIATION NPC
LORLES CC

First Applicant
Second Applicant

And

BUFFALO CITY METROPOLITAN MUNICIPALITY First Respondent
MINISTER OF HUMAN SETTLEMENTS,
WATER AND SANITATION

Second Respondent

JUDGMENT IN REVIEW APPLICATION

HARTLE J

Introduction:

[1] The applicants seek an order declaring the resolution of the first respondent's Council on 30 May 2018 adopting its rates policy ("the impugned resolution"), and the rates policy itself ("the rates policy"), to be inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution") and accordingly invalid.

[2] They seek a further order declaring the resolution of the first respondent's Council on 30 May 2018 adopting rates on land; alternatively, adopting a rate for the "*industrial, business and commercial*" category of property and the rates themselves; alternatively, the rate for the "*industrial, business and commercial*" category of property itself to be inconsistent with the Constitution and accordingly invalid.¹

¹ The rate adopted by the first respondent's Council for the 2018/2019 financial year for the commercial category of properties was .026649 cents for each R1.00 of property value. In a "Further Affidavit" filed late in the proceedings on 19 August 2022 the first respondent agreed that "massive amendments" were made to the rates policy of 2017. A further significant change was introduced by the addition of a definition of a business and commercial property whereas it had not been defined in the "last" rates policy preceding it, this according to the "2018/19 Property Rates Policy Review" put up by the first respondent as one of the annexures to its answering affidavit at pages 439-40 of the indexed papers. (See fn 6 below.) By the first respondent's own admission that it refuses to recognize the first applicant as a public benefit organisation for rating or exemption purposes (a refusal that took root in 2010 already), this would have meant that its fate fell to be determined under the contentious new rates policy with reference to the definition of business and commercial property latterly added to it. For this reason, the revision of the rates policy, not just as represented in a rands and cents impact to the first applicant, but by necessary implication putting an owner such as itself, carrying on a specified public benefit as a social housing institution into a commercial category, would have entailed a change of significant import to it.

[3] Both applicants contest the legality of the impugned resolution on the ground that in adopting the rates policy (as an integral part of its budget for the relevant financial year), the first respondent fell afoul of statutory requirements binding on it by virtue of the provisions of the Local Government : Municipal Rates Act, No. 6 of 2004 (“The Rates Act”), the Local Government: Municipal Systems Act, No. 32 of 2000 (“the Systems Act”) and the Local Government: Municipal Finance Management Act, No. 56 of 2003 (“the MFMA”) in respect of public participation in its decision-making.

[4] The first applicant in addition asserts that the rates policy failed to meet the rationality test because the first respondent failed in adopting it to have regard to the prescriptive requirements of the Social Housing Act, No. 16 of 2008 (“the SHA”) and the Regulations and Rules made pursuant thereto.²

[5] The claim of illegality thus goes to both the process that led to the adoption of the contentious rates policy and the rates policy itself (especially *vis-à-vis* the first applicant as a social housing institution) and the relief each seeks ultimately, apart from the antecedent declaration of constitutional invalidity, is to be relieved of their liability to pay to the first respondent the rates levied on their respective properties

² The Social Housing Regulations, GNR. 51 dated 26 January 2012 (“the Social Housing Regulations”); See also the Rules on the transfer or disposal of social housing stock funded with public funds (GN 64 dated 21 January 2015), which the first applicant relied on to make the point that it cannot simply be expected to change its “business model” and sectionalize its rental housing stock. This has been suggested by the first respondent as a fix to the dilemma posed by the commercial characterisation of it for rating purposes given the onerous obligations on it as a social housing institution imposed by law. Also, of relevance to the first applicant’s institutional integrity and official status (as a not for gain public benefit entity) are the “Rules on long-term accreditation of social housing institutions” promulgated per GN 624 of 2016 (“the accreditation regulations”), which stipulate, for example, the requirements for social housing institutions going to appropriate legal form, namely that they are not for profit entities, practice “good governance,” and maintain financial sustainability.

for the period in contention (2018/2019) imposed consequent to adopting the impugned resolution as “just and equitable relief”.

[6] Both applicants further seek condonation of the time taken by them to bring the application.³ As an aside, the first respondent does not stand in the way of condonation being granted but contends that the lengthy time it took for the applicants to launch the present application is an entirely relevant factor that should conduce to its favour in the event that this court might be inclined to grant any relief to the applicants. For example, the first respondents submits that it will have far reaching consequences if its budget or rates policy adopted more than five years ago is set aside, whether in whole or in part, not only for the 2018/19 budget and rates policy, but also for any subsequent budget and rates policies that have come into effect since then. However, its primary submission is that the application is without merit and should accordingly be dismissed.

The first applicant (“Own Haven”):

[7] Important from the first applicant’s perspective is that it is a non-profit company accredited⁴ and operating as a social housing institution in terms of the provisions of section 13 of the SHA.

[8] It further emphasises that it is an approved “public benefit organisation” pursuant to the provisions of section 30 (3) of the Income Tax Act, No. 58 of 1962

³ The application was issued on 25 October 2019.

⁴ See footnote 2 regarding the stringent criteria for accreditation by the SHRA of social housing institutions especially under the accreditation regulations.

(“the ITA”) and that the South African Revenue Services (“SARS”) recognizes its operations as constituting “public benefit activities” within the meaning of that Act’s terms, no doubt on the premise that it is compliant with the Minister of Finance’s conditions prescribed under the ITA by way of regulation to ensure that its operations and resources are and continue to be directed in furtherance of its object as such an organisation, whereas the first respondent, so it complains, ignores this significant feature of what it is and what it does (and is legally restrained from doing for that matter as a social housing institution) for purposes of levying rates against it despite its not-for-gain existence and the uniquely differentiated use of its properties for social housing.⁵

[9] Own Haven is the registered owner of five rateable properties in the first respondent’s area stymied by the categorisation of its properties under the commercial category and the resultant imposition of rates for such category by the budget and rates policy under scrutiny. It asserts that not only has the policy caused it to be liable to pay rates unfavourable to its unique disposition as a social housing institution but it has also been precluded from applying for any rebate by virtue of

⁵ A “public benefit activity” is defined in section 30 of the ITA as one listed in part 1 of the Ninth schedule to the ITA which, under item 3 thereof relative to “Land and Housing”, under paragraph (a), refers to the “development”, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000.00” (probably now R22 000.00 since the second respondent has increased this threshold of the secondary market’s household income limit per GN. 2009 of 8 April 2022, in order to align it with the National Housing Programme commonly known as the Financed-Linked Individual Subsidy Programme (“FLISP”)). A “public benefit organisation” is further, in turn, defined in section 30 (1) of the ITA under sub-paragraph (a), as any organisation which is a non-profit company as defined in section 1 of the Companies Act formed or established in the Republic and (b) which has as its sole or principal object, the carrying on of one or more public benefit activities, where (i) all such acts are carried on in a non-profit manner and with an altruistic or philanthropic intent; (ii) no such activity is intended to directly or indirectly promote the economic self-interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee; and where each such activity carried on by that organisation is for the benefit of, or is widely accessible to the general public at large, including any sector thereof.

the first respondent's regard of it as an ordinary "for gain" commercial entity for rating purposes.

[10] The only category of property from the recognized list "created" by first respondent in the contentious rates policy under which Own Haven can naturally resort (since the first respondent does not regard it as a not for gain public benefit organisation carrying on specified public benefit activities which fall under the separate differential property category made provision for in section 8 (2) (b) of the Rates Act), is the "Business/Commercial" category.⁶

[11] Although rates relief measures provided for in the impugned rates policy (paragraph 9 refers) identify "public benefit organizations and not for gain institutions" as a category of owners as defined in the Rates Act who are entitled to apply for rates relief measures up to 100%, this is limited to situations where the usage of such owners' property falls into certain defined scenarios, the only item that could most possibly have been of application to Own Haven's differentiated use of its property providing as follows in paragraph 9.2.2:

“(x) Privately owned properties used exclusively as a home catering for persons with disabilities, a hospital, clinic, mental institution, frail care centre, orphanage, non-profit retirement schemes, old age homes *or any other benevolent institutions, provided that any profits from the use of such properties are used entirely for the benefit of the institution.*”
(Emphasis added)

⁶ Under the impugned rates policy's definitions, "**Business and Commercial Property**" refers to property on which the activity of buying, selling or trading of goods/or services and any other commercial activity occurs and a property used for the purposes of eco-tourism or for the trading in or hunting game. Commercial property includes any office or other accommodation, the use of which is incidental to the business. This includes hostels, flats, communes, old age homes, self-catering/holiday flats, bed and breakfast (regardless of number of rooms) *and any property used for a purpose which does not fall within any other category defined in this policy.*" (Emphasis added) Own Haven does not resort under the category of a public benefit organisation according to the first respondent's perception of it as a "for gain" entity, hence it can only be placed in the commercial category.

[12] As an aside, in an earlier iteration of the rates policy that the first respondent put up as an annexure to its answering affidavit (Annexure “AS 11”) as representing the edition of its policy that preceded the one finally adopted, before the introduction of the controversial addition of the definition of “business and commercial property”, Own Haven’s properties could have come in for consideration for the levying of a differential rate under the category vaguely described as “Properties owned by Public Benefit Organisations,” and might have been eligible for rates relief measures as a category of property under the mantle of “Duly registered Public Benefit Organisations.”⁷

[13] Although its properties resort under a strained definition of business or commercial, Own Haven points out however that social housing institutions are in a league of their own. It explains that each of its properties has been improved by the construction thereon of residential buildings (uniformly blocks of flats) for the express purpose of providing subsidised housing. The properties were acquired with the assistance of state subsidies prior to the coming into effect of the SHA, the two most recently developed being from the then Social Housing Foundation. They were developed explicitly for the provision of subsidised housing at the time and are now regulated and operate under the SHA, providing rental stock for those qualifying for social housing at the complexes in the first respondent’s area at which they have been built.

⁷ I say “might” because the iteration was also not without obvious typos and poor syntax. It is significant on its own though that so bold a change was effected to the draft policy on the applicants’ case without any consultative process preceding the final version of the policy that was adopted. Own Haven was prejudicially implicated in two ways twixt cup and lip, so to speak, both in the loss of its recognition as a duly registered public benefit organisation and its reversion, by default and because of the significant definition added to the final draft version of the rates policy, to that of a “for gain”, ordinary commercial entity. The latter result of course had as a further consequence that it was hit with prohibitive commercial rates in respect of all of its properties which, for the relevant budget year under scrutiny, were quite substantial.

[14] Its accreditation as a social housing institution with the Social Housing Regulatory Authority (“SHRA”) obliges it, in accordance with the applicable statutory and policy framework, to provide rental housing options for low to medium income households on an affordable basis at the complexes, all of which require institutionalized management and are located within “restructuring zones” designated by the first respondent in its area with the concurrence of the provincial government for these specific purposes of providing social housing therein.⁸

[15] This description of who it is and what its objectives are accords with the definitions in section 1 of the SHA of “social housing” and “social housing institution” respectively.

[16] Ironically the first respondent put the first applicant to the proof of its accreditation as a social housing institution.⁹ Further, although acknowledging it as a non-profit company, it nonetheless still views Own Haven as a “for gain” (i.e., ordinary commercial) entity for rating purposes.¹⁰

⁸ The first respondent mused in its answering affidavit that it was “not clear” what Own Haven intended to mean by its reference to the “concurrence of the provincial government”, but the answer surely suggests itself from the definition in section 1 of the SHA of a “restructuring zone”. This means “a geographic area which has been – (a) identified by the municipality with the concurrence of the provincial government, for purposes of social housing; and (b) designated by the Minister (the second respondent) in the *Gazette* for approved projects.” It appears from such a *Gazette* that Buffalo City is one of those areas. Own Haven’s status as a housing institution in the zone is therefore not a random coincidence.

⁹ It is almost inconceivable that the first respondent should not acknowledge Own Haven’s existence and status as an accredited social housing institution and not-for-profit organisation. It should also be aware of Own Haven’s tax-exempt status with SARS. Both of these critical certification documents appear to have been furnished to the first respondent together with Own Haven’s several applications for rates rebates and other representations made to be rated as a public benefit organization in respect of the use of its five properties.

¹⁰ This is also unfortunate and loses sight of the significant accreditation criteria for a non-profit organisation that the SHA imposes on companies seeking to be recognized as accredited institutions to engage in the sector as social housing institutions. One would expect a municipality to have a sufficient working knowledge of, and interest in, the provisions of the SHA and the impact of its provisions on existing social housing institutions including those inherited under earlier dispensations or social housing initiatives.

[17] Own Haven has had a significantly strained interaction with the first respondent evidently since it ceased to enjoy the benefit of any rebates in respect of its properties.¹¹ The first respondent however asserts that its entitlement to be reckoned as a “public benefit organisation” for rates purposes fell away in 2010 already when the Minister for Provincial and Local Government promulgated an amendment to the Ministry’s Regulations on the Rate Ratios between Residential and Non-Residential Properties (“the Amended Rate Ratios Regulation”)¹² which, by definition, and from that moment on in its view, operated to exclude it as a beneficiary of any rates largesse.

¹¹ It appears that this troubled history preceded the significant amendment to the first respondent’s rates policy voted into law for the 2018/2019 financial year. Own Haven does not however say when it obtained its properties or provide any details of its early entry into the social housing sector which ought to have brought it into a particular relationship with the first respondent as a social housing institution and its challenges thereby. It seems to be common cause though that it enjoyed the benefit of a phased in rebate over a five-year period applicable to all newly developed commercial or industrial properties. This may have placated it at the time. The first respondent also pleaded that its valuer has valued Own Haven’s properties on the basis of its actual rental income rather than on their market values, so this favourable variable may also have kept it from judicially reviewing the first respondent’s regard of it as a business rather than as a social housing institution *per se*. Given the first respondent’s allegation that this has resulted in Own Haven’s property being valued at a lower rate than other commercial properties, this may have amounted to a “reduction” within the meaning of the Rates Act, but neither party dwelt on this aspect in presenting their respective cases. “(R)eduction” in relation to a rate payable on a property, means, in section 1 of the Rates Act: “...the lowering in terms of section 15 of the amount for which the property was valued and the rating of the property at that lower amount.”

¹² The original rate ratios regulations were promulgated per GNR. 363 of 27 March 2009, and amended by R 195 of 12 March 2010 (effective from 1 July 2010). It is referred to as the “Amended Municipal Property Rates Regulations on the Rate Ratios between Residential and Non-Residential Properties” (“Amended Rate Ratios Regulations”). It is apparent from *Kalil N.O. & Others v Mangaung Metropolitan Municipality & Others* 2014 (5) SA 123 (SCA) at para [18] that the only difference introduced by the amending regulation was the addition of the category of “Public Benefit Organizations Property” in the schedule that had not been there before. The definition of a “specified public benefit activity” within the meaning of the Rates Act that excludes housing activities has however been there since the commencement of the Rates Act so it is uncertain why the Amended Rate Ratios Regulations should have had anything to do with a change in approach or regard for Own Haven in 2010.

[18] The definition contended for by the first respondent in this respect and which appears to have caused the consternation under play herein is set out in the Amended Rate Ratios Regulations as follows:

“public benefit organisation property” means property owned by public benefit organisations and used for any specified public benefit activity listed in item 1 (welfare and humanitarian), item 2 (health care), and item 4 (education and development) of part 1 of the Ninth Schedule to the Income Tax Act.”

[19] It is immediately evident from this exposition that *item 3* under Part 1 of the Ninth Schedule to the ITA (entailing activities by a public benefit organisation in the “land and housing” arena under which Own Haven falls),¹³ is not under consideration in the stated category of public benefit organisation property as a subgenus of non-residential property concerning which a pre-determined ratio to the rate on residential property is not to be exceeded by a municipality in determining its rates policy.

[20] The impugned rates policy itself appears to confound what kind of public benefit organisation is worthy of any rates largesse. The description of the kind of property owned by public benefit organisations and not for gain institutions in respect of which such owner category is entitled to apply for a rebate appears correctly to concern itself only with the *use* to which the property is put. This would make sense in the context that Own Haven clearly participates in a public benefit activity in the manner in which it uses its properties, but the rates policy then undoes that objective by limiting its reference under the definitions to how a public benefit organisation itself is to be construed.

¹³ See fn 5.

[21] In this respect that definition cobbles in the damning definition contended for by the first respondent in the Amended Rate Ratios Regulations but clumsily so because an *organization* can hardly be described as a “property,” but yet it is. The policy’s definition is best repeated below for effect:

“Public Benefit Organization” means property own by public benefit organisation and used for any specific public benefit activity listed in item 1 (Welfare and Humanitarian), item 2 (Health Care), and Item 4 (Education and development) of Part 1 of the Ninth Schedule of the Income Tax Act,” (*Sic*)

[22] The definition of “Specified Public Benefit Activity” in the rates policy, also clumsily copied over from the definition in section 1 of the Rates Act, similarly bears repeating to demonstrate the first respondent’s lack of thought for its significance:

““Specified Public Benefit Activity” means an activity listed in item 1 (welfare), 5 (humanitarian), 2 (health care), and 4 (education and development) of Part 1 of the Ninth Schedule to the Income Tax Act.”¹⁴

[23] As an aside and by way of explaining Own Haven’s dilemma, although section 3 (3)(g) of the Rates act behoves a municipality in adopting a rates policy to have regard to the effect of rates on organisations conducting “specified public benefit activities and registered in terms of the ITA for tax exemptions because of those activities, in the case of property owned and used by such organisations for those activities” (which is the position as far as Own Haven is concerned), the definition of “Specified public benefit activity” in section 1 of the Rates Act also

¹⁴ The reference to “5” is an obvious mistake, which demonstrates the lack of attention to detail.

excludes activities under *item 3* of Part 1 of the Ninth Schedule to the ITA, under which mantle its activities obviously fall.¹⁵

[24] Be that as it may, Own Haven bemoans the fact that it is not a commercial operation, but rather a social housing institution constrained by the provisions of the SHA and government policy on social housing, in other words, unique in both its make up as a category of owner and in its highly differentiated usage of its properties, yet it is paying 2.5 times more in rates for each unit in its social housing complexes than it would pay for those units should the complexes be converted into sectional title schemes which would naturally put them into the residential category. (The first respondent ironically suggests that it should do exactly that, namely change its “business model” by sectionalizing its rental and housing stock. It disparages Own Haven as the author of its own misfortune for not having taken independent positive steps to have ameliorated the complained of financial burden caused to it by it having to manage and maintain its stock under the auspices of the statutory and regulatory framework of the SHA.)

[25] Not surprisingly, Own Haven complains that the prohibitive rate levied against it as the owner of commercial properties pursuant to the offending rates policy became the proverbial “last straw” for it, rendering the payment of rates at that level no longer sustainable for it as a social housing institution, a worrying

¹⁵ The reason for the exclusion of item 3 from this definition (repeated in the Amended Rate Ratios Regulations) is unclear. It may have been deliberate, which is the puzzle for me, but it was clarified by counsel that this was not an issue that this court was required to decide. The second respondent was only cited for her interest in the application but her thoughts on the matter may have been of some assistance in gleaning the reason for the differentiation (in existence since the commencement of the Rates Act) between public benefit organisations conducting public benefit activities listed in item 3 of Part 1 to the Ninth Schedule to the ITA versus those under items 1, 2 and 4 under Part 1 listed therein.

concern to any municipality that should be aligning itself with the objectives of providing affordable rental accommodation by such owners under the auspices of the SHA.¹⁶

[26] Own Haven clarifies that, unlike in a commercial development, the increasing costs cannot be passed on to the tenants in its complexes. Not only would that be contrary to regulated rentals, but the tenants simply cannot afford more.

[27] As a result, on legal advice taken, it resolved to withhold payment of rates levied on its properties for the relevant budget year (unlawfully so, the first respondent reminds it), and has periodically recorded disputes with the first respondent in respect of such payments withheld by it.¹⁷

[28] Apart from this present challenge - which was prefaced by a formal request in terms of the provisions of the Promotion of Access to Information Act, No. 2 of 2000 ("PAIA") for the first respondent to make available copies of the relevant documents relating to the adoption of its budget under consideration (it is a trite principle that the levying of rates by a local government constitutes an integral part of its budget process)¹⁸ in order to satisfy itself as to its legality, Own Haven emphasises that it also submitted numerous unsuccessful applications for rebates in respect of its properties to the first respondent (pointing out to an unmoved municipality in

¹⁶ Own Haven's professed dilemma also raises a threat to the security of tenure of the relevant tenants and the first applicant's very existence as an accredited SHI, because financial sustainability of any entity undertaking business as a social housing institution is key to its continued accreditation according to the accreditation regulations.

¹⁷ The disputes, which are numerous, have been recorded pursuant to the provisions of section 102 of the Systems Act.

¹⁸ *South African Property Owners Association ("SAPOA") v Council of the City of Johannesburg Metropolitan Municipality & Others* 2013 (1) SA 42 (SCA).

representations made since 2015 that the imperative for the granting of rebates should flow logically and rationally from the Social Housing Statutory and Regulatory Framework and its differentiated use of its properties under such auspices) and has lobbied, to no avail, for an amendment of the definition of eligible public benefit organisations that qualify for rates exemptions to include subsidised social rental housing stock owned by them.

[29] I may as well state it here that the first respondent has firmly set itself against any difference in its treatment of Own Haven apart from any other regular commercial entity operating in its area despite its peculiar make up as a social housing institution having a responsibility to support and sustain social housing. It does so in the contentious rates policy and in its answering papers. It avers that it is lawfully justified in not responding to its request for differential treatment rates-wise and maintains that it is not deserving of any special support provided for by its rates

policy.¹⁹ It has additionally made it clear that it will not treat it as a special use owner even if other municipalities are handling such a category of owner or property usage differently around the country.

[30] In this regard, and as a further aside, it is common cause that the Nelson Mandela Bay Metropolitan Municipality in Gqeberha recognizes social housing institutions as a separate category of owner for rebate purposes. The City of Cape Town also allegedly affords certain recognition to and endorses a more favourable rates dispensation towards social housing institutions operating in its area by making them eligible in terms of its peculiar rates policy for rates rebates.

[31] There are two particular bases upon which the first respondent resists giving in to Own Haven's claimed entitlement even to be equitably considered for

¹⁹ The first respondent asserts that Own Haven has misinterpreted the relevant provisions of the SHA and the policy and guidelines which have been issued pursuant to such statute and that it is especially misguided in its approach as to what social housing is about. In summary its beliefs in this respect, which have no doubt infused its rates policy, are summarised below:

1. Regard being had to the general principles to social housing in terms of section 2 of the Social Housing Act, all levels of government are ultimately expected to provide ownership and title to persons qualifying for assistance to social housing.
2. It is accordingly not desirable, nor compatible with the long-term object of social housing in South Africa, for persons occupying such housing, to continue to pay rent indefinitely without ever obtaining any right to such property or title thereto.
3. Own Haven's present business model does not give effect to these underlying principles.
4. It has encouraged entities, such as Own Haven especially, to refocus their social housing involvement in order to encourage the conversion of existing buildings and developments into sectional title or other individual title in order to enable the occupants of such social housing to obtain permanent title and transfer of the housing occupied by them.
5. It is Own Haven's own misfortune that it has failed to head the calls by it to have allowed the occupants of its complexes to ultimately obtain permanent titles and having such properties transferred to them.
6. Notwithstanding requests and suggestions by the first respondent, that the relevant properties be sectionalized, there has been an insistence that the landlord and tenant model is to be pursued by Own Haven.
7. That model inevitably gives rise to the application of commercial or business rates and service charge liabilities which is its own choice.
8. A number of Own Haven's "competitors" (Sic) within its area have indeed proceeded to sectionalize their properties and accordingly those competitors do not face the same financial difficulties.

discretionary rebates. The first is its insistence that it is entitled to formulate its own policy even with the guiding principles of the SHA in mind (which it insists it subscribes to as it is obliged to except for not regarding the act's provisions as prescriptive of its role when it comes to meting out any rates largesse) against encouraging the landlord-tenant model in its area that Own Haven adopts in its social housing projects. Evidently it is not its case that the SHA entails a process for its intended beneficiaries to acquire title only, but it argues that there has been a change in the focus of social housing away from rental where the original focus was. It thus advocates a modern rent to buy model, hence its view that Own Haven should be sectionalising and selling off its units.²⁰ Secondly, it believes that it is constrained by the definition of "public benefit organisation property" referred to in the Amended Rate Ratios Regulations (applicable since 2010) from recognizing Own Haven as providing a specified public benefit activity as referred to therein that qualifies it to be accorded a differential rate for the use of its properties, or any rate rebate for that matter.²¹

[32] I will enlarge upon these reasons below but in essence Own Haven says that the first respondent has got it wrong on both scores.

[33] On the issue of what the SHA and the regulatory framework provides, Own Haven asserts that the first respondent cannot constrain it in the direction of selling off its rental stock, the disposition of which is severely proscribed thereby. As for

²⁰ See Fn 19.

²¹ There is no contest that Own Haven's properties do not resort under section 8 (2) (a) of the Rates Act as a fixed category already existing based on their use or permitted use that a municipality is obliged to determine for purposes of levying different rates in terms of section 8 (1). It argues however that the first respondent may and should, because it is entitled to differentiate, determine an additional category of rateable property in respect of social housing institutions, and that such entities should not by default as a result be excluded for consideration for a rate rebate.

sectionalising its rental stock, although it felt itself compelled in that direction to sectionalise the units in one of its complexes because of the first respondent's intransigence in accommodating social housing as a differential category of property for rating purposes or granting it any rebates, this has not promoted the reach of affordable housing to the beneficiaries targeted by the SHA's provisions. Instead, it has artificially increased the valuations of the now sectionalised units which are no longer based on rental income but instead on the notional amount the property would have realised if sold in the open market by a willing buyer to a willing seller, a concept which is untenable giving the fact that there is no willing buyer or seller in these constrained circumstances. This exercise has therefore only served to increase the rates in respect of the relevant complex. In any event the modern approach contended for by the first respondent is antithetical to the objectives of the SHA in achieving affordable rental accommodation and doesn't quite sound like any of the feasible options promoted under the SHA's provisions neither has the first respondent produced any evidence that supports its view that Own Haven is instead misguided in how the social housing policy is expected to be evolving. Own Haven argues that what the first respondent proposes is in fact in conflict with the provisions of the SHA, the processes and procedures and mechanisms to be used as stipulated by the regulatory authority and certainly contrary to its legal obligation to be facilitative of the social housing sector. It rails against been treated as a business enterprise when in any sensible consideration of what it does, it is not a commercial "for gain" operation.

[34] Most importantly it is circumscribed by what it can charge based on the incomes of the individuals whose interests Own Haven serves, cannot pass on its increased rates charges to the tenants, and is obliged to maintain its financial

sustainability in a manner that enables it to do so effectively and viably without threat to the loss of its accreditation as a social housing institution. It is constrained by the regulations promulgated under the SHA even in respect of any decision to opt out regarding how it must dispose of its residential stock that was acquired with public funding.

[35] On the second score, it points out that it makes no sense to contend that the Amended Rate Ratios Regulations can determine its fate for any kind of rates largesse under the Rates Act. This is because the intended purpose of these regulations was merely to fix ratios that the municipality cannot exceed for properties owned and used by public benefit organisations (other than those operating in the field of land and housing) in relation to residential property. It remains a public benefit organisation providing an essential service by the use of its properties in the first respondent's area which is crucial to one of the fundamental rights in the Constitution, namely section 26, which deals with the provision of adequate housing. It is not unrealistic, so it asserts, to expect that it be afforded some recognition and assistance in accordance with the provisions of the Social Housing Act which constrains it from doing what the first respondent invites it to do to avoid the so-called inevitable burden of being regarded as a commercial entity instead.

The second applicant ("Lorles"):

[36] Lorles, a close corporation, is the registered owner of an immovable property zoned for industrial 1 purposes also within the area of the first respondent.

[37] It has in common with the first applicant that it has been placed in the commercial category for the purposes of rates being levied by the first respondent by virtue of the impugned resolution but its position is obviously distinguishable from that of the first applicant as it does not operate as a social housing institution.²²

[38] Lorles has similarly declared disputes in terms of section 102 of the Systems Act regarding its liability to the first respondent imposed under the impugned rates policy, but its reason for having done so and withholding payment of its assessed rates was premised on its belief that the adoption of the impugned rates policy (the process) for the relevant financial year was tainted by illegality for want of proper public participation in the first respondent's decision-making.

[39] It has however joined in the application in seeking the relief set out in the notice of motion "to the extent that such relief relates to it".²³

[40] It appears to be common cause that Lorles stands or falls by the public participation process challenge outlined below.

²² As can be gleaned from correspondence exchanged on behalf of Lorles with the first respondent on the issue of its liability for rates, its challenge seems to have been confined to the issue of the valuation of its property asserting that: "In adopting its 2018/2019 municipal budget, BCM approved a rate for the commercial category, which, in conjunction with the valuation of (its) property determined pursuant to a supplementary valuation and a consequent supplementary valuation roll, has rendered the property rates levied in accordance therewith unaffordable and unreasonable and excessive, given the total lack of services to (its) property (save for sporadic refuse services), the area has become a high crime area which has lowered market appeal, it is in close proximity to informal settlements which has decreased the desirability of the property and attempted "land grabs" in the area have created uncertainty and loss of confidence in the area."

²³ Both claim that the right to the relief they seek depends upon the determination of substantially the same questions of law and the same body of fact which if separate applications had been instituted, would arise in each of them.

The conduct which offends the principle of legality:

[41] As aforesaid each of the Own Haven and Lorles properties have been placed by the first respondent in the “industrial, business and commercial properties” category (“the commercial category”) for the purposes of determining the rates payable by them in respect thereof *arising from the rates policy adopted by it.*

[42] Both continue to contest their liability for the rates levied by the first respondent on its respective properties by such legislative fiat *with particular reference to the impugned resolution and rates policy* pursuant to which the offending rates became payable.

[43] There are two essential bases upon which the applicants contest the legality of the impugned resolution.

[44] The primary challenge (concerning both applicants) is that, in adopting the rates and the policy itself, the first respondent failed to comply with certain peremptory requirements binding on it by virtue of the provisions of the ternary collection of local government legislation that pertains to its processes, namely the Rates Act, the Systems Act, and the MFMA, to which I will shortly refer. In essence the applicants assert a lack of compliance with the requirements for public participation which they claim tainted the entire process and which renders the final impugned resolution and the rates policy breathed into life thereby invalid. They take no prisoners in asking that the entire policy be set aside on the basis of the claimed illegality.

[45] Own Haven in addition asserts that the first respondent in its policy making failed to have regard to the mandatory requirements of the SHA and the regulations and rules made pursuant thereto.

[46] They submit that in adopting the impugned resolution, the first respondent acted outside and in a manner inconsistent with its statutory and regulatory authority and further acted contrary to its obligations in terms of Section 7(2), 26 (2) and section 152 (1)(c)²⁴ of the Constitution.

[47] In the result they assert that the budget having been unlawfully adopted, the rates policy implicated thereby falls to be set aside to the extent of its inconsistency with the Constitution.

The nature of the review:

[48] The parties are in agreement that the present challenge concerns a legality review. Indeed, it is fundamental to the relief sought by the applicants, and the opposition to such relief, that the impugned resolution under scrutiny, according to the established principle enunciated in *Fedsure Life Assurance Limited and others v Greater Johannesburg Transitional Metropolitan Council and others*,²⁵ constitutes legislative rather than administrative action.

²⁴ This subsection focuses on the object of local government “to promote social and economic development”.

²⁵ 1999 (1) SA 374 (CC) at para [45].

[49] The recognition that the adoption of a rates policy is quintessentially a political decision that involves the interests of various parties, does not however render its passing immune from judicial review.²⁶

[50] Whereas legislative action may be set aside on grounds of alleged illegality, this inevitably involves a fundamentally different approach to the grounds upon which administrative action may be set aside in accordance with the relevant provisions of the Promotion of Administrative Justice Act, No. 3 of 2000 (“PAJA”). In *Fedsure* the Constitutional Court expressly contrasted an attack on administrative law grounds with a “legality” challenge. Generally, in passing legislation (such as the approval of a budget by a local authority) it is for the members of the legislative body, in this instance the councillors, to judge what is relevant in the circumstances and a court will be loath to interfere with a municipal council’s business of passing a budget vote.

[51] It is only where it is established that legislative action is in conflict with the empowering statute, or the Constitution, that such legislative action can be set aside.

[52] The test in such a case is whether the relevant council of the municipality has acted *intra vires* in passing the budget including the rates which form a part thereof.

²⁶ See *SAPOA Supra* at [5] with reference to the legal position that the Constitution entrenches the principle of legality and provides the foundation for the control of public power as was endorsed in *Affordable Medicines Trust & Others v Minister of Health & Others* 2006 (3) SA 247 (CC) at paras 48 – 49. See also the approach adopted by the Supreme Court of Appeal in *Kalil N.O. Supra* at para [3]; *Blair Atholl Homeowners Association & Others v Tshwane City* 2016 (2) SA 167 at para [23]; and Hoexter’s *Administrative Law in South Africa*, 3rd Edition, at 228 *et seq.*

[53] The irrationality ground relied upon by Own Haven cuts to the flawed understanding by the first respondent of Own Haven's unique position (and other social housing institutions for that matter) and lack of appreciation of the highly differentiated use of its properties which has not received proper traction in the policy.

[54] Own Haven complains that notwithstanding the first respondent's autonomy to write its own rates policy it has irrationally disregarded the legal imperative on it to factor in the provisions of the SHA and its legal obligation to be facilitative of the social housing sector.

[55] It is simply unlawful, so it contends, for the first respondent to disregard the positive obligations imposed upon it by both the Constitution, the SHA, and the various provisions of the Rates Act that pertain to the required approach to be adopted when considering rates and especially, insofar as it concerns Own Haven, the latter's entitlement as a social housing institution to any rate exemptions.

[56] The rationality standard does not have a high threshold. All it requires is that the impugned decision must be aimed at the achievement of a legitimate government object and a rational relationship between the chosen method and that object.²⁷

²⁷ *Democratic Alliance v Ethekiwini Municipality Supra* at [37].

[57] It is further a trite principle in this respect that both the process by which a legislative decision is made, and the decision itself, must be rational.²⁸

[58] In *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd & Others*²⁹ the court noted as follows regarding the approach to be adopted by a court where both process rationality and substantive rationality are implicated:

“[48] I do not believe that we can separate process rationality and substantive rationality in the way the second judgment purports to. The relevant question for rationality is whether the means (including the process of making a decision) are linked to the purpose or ends. To my mind, rationality necessarily, whether found in PAJA or anywhere else, must include some evaluation of process. If not, then we are simply asking whether a decision is right or wrong based on *post hoc* reasoning.

[49] It is a natural and inescapable denouement that the process leading to a decision “must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred”.³⁰ As stated in *Democratic Alliance*:

“The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred.”

[50] Additionally, in *Zuma*, Navsa ADP stated that a rationality review also covers the process by which the decision is made.³¹ There is no reason why rationality under PAJA should be given a different (more restrictive) meaning. It follows that rationality under PAJA includes an assessment of whether the means (including everything done in the process of taking the decision) links to the end. Problems found in the process used to reach a decision can be very useful evidence or illustration of a faulty rational link. How far that evaluation of process goes depends on the facts of a particular case.”

²⁸ *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at [33] and [34]; *Albutt v Centre for the Study of Violence and Reconciliation & Others* 2010 (3) SA 293 (CC); *Zuma v Democratic Alliance & Others; Acting National Director of Public Prosecutions & Another v Democratic Alliance & Others* 2018 (1) SA 200 (SCA) at [82].

²⁹ 2020 (1) SA 450 (CC).

³⁰ *Democratic Alliance v President of the Republic of South Africa*, *Supra* at para 36.

³¹ *Zuma v Democratic Alliance* *Supra* at para [82].

[59] The primary end hoped for in this instance would have been a decision (represented by the adoption ultimately of the contentious rates policy) that was, apart from meeting the legal criteria enumerated in section 3 of the Rates Act for its adoption and content, a product of democratic and accountable government for local communities. In this instance, *vis-à-vis* Own Haven especially, it is contended that proper regard should have been had to the interests of social housing institutions and the beneficiaries served by them, and the recognition by the first respondent of its own legal obligations arising from the provisions of the SHA to be facilitative of social housing in its area.

[60] Own Haven does not challenge the absence of any reference to Item 3 in the definition of “public benefit organisation property” referenced in the Amended Rate Ratios Regulations but contends that the first respondent’s failure in any event to give its use of the property as a social housing institution any recognition by not levying a differential rate to make provision for who it is and the activities it in fact undertakes, is in conflict the objects of the social housing legal framework, which renders the policy unlawful. So too for the purposes of its entitlement to be reckoned in for any exemption from rates, it claims that the first respondent’s reliance on the definition as a tool to exclude it for any beneficial purposes is illegal because the Regulations do not prescribe that which the first respondent believes it does. To the contrary the Regulations do not impose any negative obligation on a municipality to not recognize organizations coming in under item 3 of Part 1 of the Ninth Schedule to the ITA as being entitled to claim a rebate or to absolutely not qualify for a

differential rate.³² Indeed, the Amended Rate Ratios Regulations merely fixes the rate that the municipality may not exceed in relation to residential properties in determining rates for public benefit organizations carrying on the activities delineated therein.

The Statutory and Legal framework:

[61] It is necessary briefly to allude to the material statutory and policy framework applicable in this instance to glean the source of the first respondent's power and obligations to impose rates including the process prescribed to levy rates as an integral part of a municipality's budget process; the prevailing view of our courts concerning the significance of an effective public participation and consultative process in the latter respect; as well as the expectation of the first respondent to make particular policy provision for social housing schemes. Except for the last aspect, these obligations on the part of a Category A municipality, such as the first respondent is, are extensively and helpfully summarized in both *SAPOA*³³ and *Borbet South Africa (Pty) Ltd & Others v Nelson Mandela Bay Municipality*.³⁴

The obligation and power of the first respondent to impose rates:

[62] Section 229 of the Constitution bestows local government with original powers to impose rates and taxes on immovable property.

³² Own Haven would be content it seems if it were able to apply as a social housing institution in terms of policy, because of its self-limiting status and how it is expected to carry on its activities under the auspices of the SHA, to benefit by way of a rate rebate. This recognition should, it says, lawfully be extended to it.

³³ *Supra* at para [7] - [15]

³⁴ 2014 (5) SA 256 ECP at paras [8] - [20] concerning a municipality's obligation to encourage public involvement in matters of local government, and [21] - [33] regarding the procedures for the adoption of a municipal budget.

[63] The relevant provision directs that:

- “(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; and
 - (b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax and customs duty.
- (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 any way that materially and unreasonably prejudices national economic policies, economic activities across municipality boundaries, or the national mobility of goods, services, capital or labour; and
- (3)
- (4)
- (5) National legislation envisaged in this section may be enacted only after organized local government and the Financial and Fiscal Commission have been consulted; and any recommendation of the Commissioner have considered.”

[64] The powers of a municipality are set out in the provisions of section 151 (3) of the Constitution and provide that “a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation”.

[65] The manner in which it exercises its original power to impose rates is further made provision for in the ternary suite of legislation empowering it in this respect, namely the Rates Act, the Systems Act and the MFMA.

Public participation in the context of the Systems Act and MFMA:

[66] The Constitution records that the objects of local government include the provision of democratic and accountable government for local communities and to encourage the involvement of communities and community organisations in the matters of local government.³⁵

[67] In *Borbet* the court confirmed that this obligation “extends to all facets of the functioning of the local sphere of government”.³⁶

[68] The nature and extent of the constitutional obligation to encourage the involvement of local communities³⁷ in matters of local government must be taken into account in having regard to the particular provisions of the Systems Act and the MFMA, each of which give expression to the constitutional obligations of the local sphere of government and reflects the means by which national government ensures the effective performance by municipalities of the functions of local government.³⁸

³⁵ Section 152 of the Constitution.

³⁶ At para [9].

³⁷ In both the Rates and Systems Acts, “local community”, in relation to a municipality is defined to mean: “that body of persons comprising of (a)—

- (i) the residents of the municipality;
 - (ii) the ratepayers of the municipality;
 - (iii) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality; and
 - (iv) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality; and
- (b) includes, more specifically, the poor and other disadvantaged sections of such body of persons.”

³⁸ *Borbet, Supra*, at para [10].

[69] Section 4 of the Systems Act, in setting out the rights and duties of municipal councils, provides that it must exercise the municipality's executive and legislative authority and finance the affairs of the municipality by *inter alia* imposing rates on property and further provides in section 4 (2) that it has the duty to exercise its executive and legislative authority in the best interests of the local community, encourage the involvement of the local community and consult the local community about the level, quality, range and impact of municipal services provided by it including, so the applicants submit, the amount of fees, rates and surcharges imposed to finance such services.³⁹

[70] Members of the local community are afforded the right "through mechanisms and in accordance with processes and procedures provided for in terms of Systems Act to contribute to the decision-making processes of the municipality". Indeed, section 5 of the Systems Act gives expression to the participatory nature of local democracy.⁴⁰

[71] Chapter 4 of the Systems Act sets out in detail the "mechanisms ... processes and procedures" for community participation referred to in Section 5 (1)(a) thereof and gives rise to extensive obligations on the part of the Municipality.⁴¹

[72] Provision is further made for the manner in which a municipality must notify the local community through the media when required to do so and in which

³⁹ Sections 4 (1) and (2) of the Systems Act. Also see *Borbet Supra* at [11].

⁴⁰ *Borbet Supra* at [13].

⁴¹ *Borbet Supra* at [15] with reference in particular to sections 16 and 17 of the Systems Act.

documents that must be made public by a municipality in terms of a requirement of the Systems Act or the MFMA must be conveyed to the local community.⁴²

[73] The manner in which municipalities must develop and adopt annual budgets, the concomitant resolutions, and budget related policies, is provided for in Chapter 4 of the MFMA.⁴³

[74] *Inter alia* in terms thereof:

74.1 The mayor of a municipality must coordinate the processes for preparing the annual budget and for reviewing the municipality's integrated development plan ("IDP")⁴⁴ and budget related policies to ensure that the tabled budget and any revisions of the IDP and budget related policies are mutually consistent and credible.⁴⁵

74.2 The mayor must also at least 10 months before the start of the budget year table in the Council a time schedule outlining key deadlines *inter alia* for

⁴² Sections 21, 21A and 21B of the Systems Act.

⁴³ "Budget-related policy" is defined as a policy of a municipality affected by the annual budget of the municipality and pertinently includes the rates policy which the municipality must adopt in terms of the Rates Act.

⁴⁴ Section 25 of the Systems Act (and section 26 for that matter) describes what such a plan entails. This plan would no doubt encompass the second respondent's and the provincial department's plans and planning requirements binding on the first respondent in terms of legislation including the SHA. Indeed section 2 (1)(c)(iii) of the Housing Act, no 107 of 1997, mandates all spheres of government to ensure that housing development is based on integrated development planning and in terms of section 9, as part of its integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to achieve its housing delivery objectives. Local policy should by obvious implication therefore be consistent with and speak credibly to national and provincial policy concerning the provisioning of social housing. The whole Chapter 5 dealing with integrated development planning is of particular relevance to the Social Housing Sector and should be amongst a municipality's most critical developmental needs. It is inconceivable that the interests of social housing institutions would not firmly be on the radar in the first respondent's planning for the city periodically coming up for reflection and discussion in an annual budget vote, but more especially so in the context of a review of its rates policy where the intention is to lump public benefit organisations providing such a service under a commercial category.

⁴⁵ Section 21 (1)(a) of the MFMA.

the preparation, tabling and approval of the annual budget, the annual review of the budget related policies, the tabling and adoption of any amendments to the budget related policies and any consultative processes forming part thereof.⁴⁶

74.3 The mayor must table the annual budget at a council meeting at least 90 days before the start of the budget year when it must be accompanied by draft resolutions approving the budget and imposing any municipal tax (including rates on property), and any proposed amendments to the budget related policies of the municipality.⁴⁷

74.4 Immediately after the budget is tabled in the above manner, the accounting officer must make it and its accompanying documents (including the rates policy) public in accordance with Chapter 4 of the Systems Act.⁴⁸

74.5 The municipal council must thereafter (and before considering approval of the annual budget) consider any views of the local community and give the mayor an opportunity to respond and if necessary to revise the budget and table amendments.⁴⁹

74.6 The council must at least 30 days before the start of the budget year consider approval of the annual budget and then approve it and any

⁴⁶ Section 21 (1)(b) of the MFMA.

⁴⁷ Section 16 (2) of the MFMA.

⁴⁸ Section 22 (a) of the MFMA.

⁴⁹ Section 23 of the MFMA.

resolutions imposing municipal tax and approving any changes to budget related policies, before the start of the financial year.⁵⁰

The Focus of the Rates Act:

[75] The Rates Act, in Part 1 of Chapter 2 thereof, requires a municipality to adopt a rates policy compliant with these stipulated requirements.⁵¹ In particular, it must treat persons liable for rates equitably; must determine or provide criteria for the determination of categories of properties for the purpose of levying different rates; take into account the effect of rates on the poor and include appropriate measures to alleviate the rates burden on them and must allow the municipality to promote local, social and economic development. Section 3 (3)(g) also behoves a municipality in adopting a rates policy to take into account the effect of rates on organizations conducting specified public benefit activities and registered in terms of the ITA for tax exemption because of those activities, in the case of property owned and used by such organizations. (It cannot be gainsaid in my view that Own Haven is such a registered entity and tax exempt at least even if its activity resorts under Item 3 of Part 1 of the Ninth Schedule to the ITA which is excluded from the definition of “specified public benefit activity” for differential rate purposes referred to in section 8 (2)(h) of the Rates Act. Its case is however that although its properties may not resort in such category it does not preclude a category for social housing institutions from being created under section 8 (3) of the Rates Act, neither should it condemn it from being eligible for any discretionary rate rebates at the very least.).

⁵⁰ Section 24 (1) of the MFMA.

⁵¹ Section 3 (3) of the Rates Act.

[76] Before it adopts its rates policy a municipality is obliged to follow a process of community participation in accordance with chapter 4 of the Systems Act⁵² and to comply with the further specific notification and participation processes set forth in section 4 (2) of the Rates Act itself.

[77] A municipality is further obliged annually to review and, if necessary, amend its rates policy. Any (proposed) amendments to a rates policy must accompany the annual budget when it is tabled in the council in terms of section 16 (2) of the MFMA (that is 90 days prior to the end of the financial year in question).⁵³

[78] The provisions of the MFMA relating to publication of annual budgets and consultations on tabled budgets apply also to any proposed amendments to a rates policy.⁵⁴

[79] I need not repeat the critical nature of the first respondent's obligation to encourage public involvement in the complex process of passing its annual budget, as well as the obligation to take comments raised by such public processes under consideration when it comes to Council putting its collective mind to work in producing a rates policy for ultimate adoption, more especially in my view where substantive revisions of the policy are implicated thereby and different iterations of

⁵² Section 4 (1) of the Rates Act.

⁵³ Sections 5 (1) and (2) of the Rates Act.

⁵⁴ Section 5 (2) of the Rates Act. Sections 22 and 23 of the MFMA.

a policy document have been generated, the final one obviously redounding pointedly to the applicants' disadvantage.⁵⁵ The court in *Borbet* sets out the significance of and compunction for meaningful local community involvement in such a process very eloquently.⁵⁶ Public participation in all its intended facets would be essentially vital in the context of anticipated changes to a policy that is expected to have far reaching consequences for its rate payers and the general public at large, albeit the involvement of the local community is not just premised upon potential prejudice or upon the notion of legal interests. It is instead a necessary feature of the democratic process at local government level.⁵⁷

The Social Housing Imperative:

[80] The SHA defines social housing as “*rental ... or co-operative housing options for low to medium income households at a level of scale and built form which requires institutionalized management and which is provided by social housing*

⁵⁵ Section 5 (1)(a)(ii) of the Systems Act also confirms the right of members of the local community to “submit written or oral recommendations, representations and complainants to the municipal council...or the administration of the municipality” which would then be a matter of public record in my view. The constant refrain of the first respondent in these proceedings is that the applicants did not participate in the public participation process that it contends for, yet the objections (and representations) of both applicants have been repeatedly voiced to it.

⁵⁶ *Borbet, Supra*, at paras [8] - [33]. See also paras [57] - [74] in which the court summarises the principles applicable in deciding when a municipality such as the first respondent can be regarded as having complied with its constitutional and statutory obligations relating to public participation with reference to the leading case law in this respect against a yardstick of reasonableness and sensitive especially to the nature and the importance of the legislation and the intensity of its impact on the public. The more discreet and identifiable the potentially affected section of the population (read the social housing sector) and the more intense the possible effect on the interests, the more reasonable it would be to expect the legislature (read municipality adopting a rates policy) to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the law maker, the court will have regard to what it considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation. (See *Matatiele Municipality v President of the Republic of South Africa (No 2)* 2007 (6) SA 477 (CC) at [68])

⁵⁷ See *Borbet Supra* at [78].

*institutions or other delivery agents in approved projects in designated restructuring zones with the benefit of public funding as contemplated in the Act”.*⁵⁸

[81] In setting out the general principles applicable to social housing development,⁵⁹ the SHA imposes obligations on the national, provincial and local spheres of government and social housing institutions, which in giving priority to the needs of low- and medium-income households in respect of social housing development, must *inter alia*:

81.1 ensure that their respective housing programs are responsive to local housing demands with special priority given to the needs of women, children, child-headed households, persons with disabilities and the elderly;

81.2 support the economic development of low to medium income communities by providing housing close to jobs, markets and transport;

81.3 afford residents the necessary dignity and privacy by providing them with a clean, healthy and safe environment;

81.4 consult with interested individuals, communities and financial institutions in all phases of social housing development; and

⁵⁸ Section 1 of the SHA.

⁵⁹ Section 2 of the SHA.

81.5 ensure the sustainable and viable growth of affordable social housing as an objective of housing policy.

[82] Social Housing entities are further obliged to promote, *inter alia*:⁶⁰

82.1 an environment which is conducive to the realization of the roles, responsibilities and obligations by all role-players entering the social housing market;

82.2 incentives to social housing institutions and other delivery agents to enter the social housing market;

82.3 an understanding and awareness of social housing processes;

82.4 the provision of institutional capacity to support social housing initiatives;

82.5 the creation of sustainable, viable and independent housing institutions responsible for providing, developing, holding or managing social housing stock; and

82.6 the use of public funds in a manner that stimulates or facilitates private sector investment and participation in the social housing sector.

⁶⁰ Section 2 (1)(i) of the SHA.

[83] The SHA in addition allocates particular roles and responsibilities to municipalities.⁶¹ A municipality *must*, where there is a demand for social housing within its municipal area, as part of its process of integrated development planning,⁶² take all reasonable and necessary steps, within the national and provincial legislative, regulatory and policy framework *inter alia* to:

83.1 facilitate social housing delivery in its area of jurisdiction;

83.2 encourage the development of new social housing stock and the upgrading of existing stock or the conversion of existing non-residential stock; and

83.3 provide access to land and buildings for social housing development in designated restructuring zones.

[84] The preamble to the SHA in reflecting on the factors giving rise to the need for the enactment thereof, pertinently refers to section 26 of the Constitution in terms of which everyone has the right to have access to adequate housing and obliging the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

⁶¹ Section 5 of the SHA.

⁶² It can hardly be envisaged that there is not a demand for social housing in the first respondent's area or, as indicated in footnote 44 above, that there is not an IDP in place concerning the first respondent's recognizable role required to be played in the social housing sector in the context of the complexes which it operates. As I have also highlighted elsewhere, it is no random coincidence that Own Haven operates as a social housing institution in the first respondent's area in restructuring zones or in respect of specified projects that have been proclaimed, and its projects must form part of the integrated development planning of the city.

[85] The preamble further refers to the stipulation in section 2 of the Housing Act, 1997, obliging all three spheres of government to give priority to the needs of the poor and in respect of housing development, the fact that there is a need for social housing to be regulated, and further that there is a dire need for affordable rental housing for low to medium income households which cannot access rental housing in the open market.

[86] The SHA evidently forms part of the reasonable legislative measures referred to in section 26 (2) of the Constitution.

[87] Although the SHA does not spell out in positive terms that financial assistance is to be provided to accredited social housing institutions, municipalities are certainly required pursuant to the provisions of section 5 of the SHA to be *facilitative* of social housing in their areas of delivery.

[88] It bears emphasizing that the Executive Summary of the 2017 *State of the Social Housing Sector Report* (“SoSR”), being a mid-term review of the national government’s Medium Term Strategic Framework for the period 2014 to 2019 that the applicants put up in their founding papers, recognizes that an enabling environment for social housing delivery requires a holistic intergovernmental response in order to give effect to the constitutional right of everyone to have access to adequate housing. Comprehensive municipal rental housing policies (that would require to be on the agenda of any budget process by necessary implication) are necessary and should establish an enabling framework for social housing, addressing issues such as land availability, the expedition of planning approvals, the alignment

of funding sources, the discounting of development contributions and the adoption of appropriate tariff and rates policies.

[89] In a further information document published by the SHRA to elucidate its objectives based on the content of the *State of the Sector Report 2017* entitled *2017 SoSR Quick Guide 2*, being one of five put up by the regulatory authority published on its website, it provides a table listing the “*significant number of instruments at a municipality’s disposal to assist with enabling social housing delivery*” in scenarios where non municipal entities are the enablers of such delivery. Municipal assistance includes the provision of land, reduction of various municipal charges and “*rates exemptions or rebates to reduce the operational cost of units and with the rental levels.*”⁶³

[90] Whilst on the subject of the nature and purpose of social housing and in the context of the first respondent’s refutation that it is obliged to accommodate social housing institutions differentially rates wise, or by extending any rebates to them as an example of a facilitative measure in the overall scheme of delivering on the social

⁶³ An early policy document available in the public domain entitled *A Social Housing Policy for South Africa: Towards an Enabling Environment for Social Housing Development*, Revised Draft, June 2003, suggests that local government would have been expected to “provide access to municipal infrastructure and services for social housing projects and where appropriate, ...fiscal benefits (e.g., through rebates on municipal rates and service charges)”. In a later public document issued by the Department of Human Settlements (Circa 2009) entitled *The National Housing Code, Social and Rental Interventions*, Table 2 listing a Summary of the Roles and Responsibilities of the Sector Stakeholder’s expectations, it records that local government “will provide local fiscal benefits (e.g. through rebates on municipal rates and service charges)”, and under paragraph 9.5 thereof dealing with tax incentives for social housing institutions, that “(p)rovincial and/or local governments may decide on local tax benefits for social housing institutions within their jurisdiction (e.g. municipal rates rebates)”. This expectation that the role of the local government would be measured in any fiscal currency so to speak, has certainly not been recorded in section 5 of the SHA amongst the legal obligations of the Municipality, neither was such an expectation carried forward as a legal obligation in the Bill preceding the promulgation of the SHA. Although direct funding by local government is not demanded in the SHA municipalities cannot however in my view adopt a hands-off approach concerning the impact of their rates policies on social housing institutions. This is a matter that does require certain reflection and review through a democratic process in the first respondent’s decision making.

housing imperative, the applicants in reply also put up information documents published on the SHRA's website targeting both potential developers of social housing and beneficiaries, which adopts an opposite view to the one subscribed to by the first respondent that at all levels of government the emphasis of social housing is to provide ownership and title to persons qualifying for assistance by way of social housing, leading to its insistence that Own Haven should be converting all its schemes to sectional title with a view to selling their rental stock. The object of a developer is plainly stated in the information documentation to provide quality *rental housing options* for the poor which does not include the provision of "*rent to buy*" options. The attraction on the opposite side for potential beneficiaries is that social housing provides "*affordable and well-located rental accommodation,*" and if there is any doubt that such beneficiary may own his or her unit even in the long term down the line, the clarification is provided that: "*applying to rent a social housing unit means you can never own the unit as the law does not allow for ownership of social housing units. All tenants sign a lease which is a rental agreement and this is the only way to access social housing in South Africa.*"

[91] Whereas the first respondent contends that it is not unlawful to promote a policy that encourages ownership rather than rental in the realm of social housing development and delivery, it cannot however in my view ignore the impact of its policy on already existing accredited social housing institutions operating in its area under the rigours of the applicable social housing legal and policy framework.

[92] Mr. Buchanan who appeared on behalf of the first respondent could refer me to but one example to elucidate the so-called change in the focus of social housing contended for by it referenced in the strategic framework report of the Department

of Human Settlements Water and Sanitation mentioned above (entailing a progressive focus away from what he emphasised was initially on rental accommodation) to justify laying down the gauntlet to Own Haven that if it wishes to persist with the rental model in this city, that it would then have to live with the consequences of that.⁶⁴ In this regard he referenced a passage in the Executive Summary of the State of the Sector Report which portended that: *“As the social and economic circumstances may improve, it is proposed that mechanisms are put in place to encourage qualifying households to move from social housing to private rental units, especially in mixed market rental models. For those households seeking ownership, the Finance Linked Individual Subsidy Programme (FLISP) should be promoted for upward mobility in the housing market.”*

[93] The first respondent failed to produce evidence of any recognisable progression in this respect since the publication of the State of the Sector Report,⁶⁵ and most significantly of any discussion or interrogation of its agenda versus the national strategic framework plan and its own deliverables in the public domain, whether in preparation for the budget vote under scrutiny, or since 2010 from when it adopted the view that public benefit organisations such as Own Haven delivering on social housing in its area, obviously subject to the law giving expression to the stated social housing objectives, were no longer eligible for any rates largesse from that moment on.

⁶⁴ The inevitable consequence of Own Haven not sectionalising its rental stock is that its properties will resort under the category of commercial or business, this because the first respondent maintains that it can write it off as a public benefit organisation using its properties for specified public benefit activities *as defined in the Amended Rate Ratios Regulations* (as it sees it).

⁶⁵ The input of the second respondent would have been helpful in this respect as well.

[94] Whether the first respondent's policy of formally excluding public benefit organisations carrying on activities such as Own Haven (by placing their properties in the default business or commercial category) from any rate rebates amounts to an irrational illegality will be discussed below.

The municipalities alleged non-compliance with the stipulated requirements for public participation:

[95] The applicants aver, with reference to the documents put up by the first respondent to show the processes followed by it to get to the final impugned resolution, that these (at least such of those as they have referenced in their papers) yet demonstrate its failure to have meaningfully complied with the public participation and consultative processes mandated against the required yardstick of reasonableness.⁶⁶ As stated more specifically, Own Haven contends that: “(t)here is a paucity of information relating to any public participation process” and in particular relating to a rates policy and the review thereof”. In fact, it goes on to allege that in its view such documentation does not exist.

[96] Conversely, the first respondent baldly contended that the public participation process (which it suggested this court would naturally find reflected in volumes 1 – 4 of the review “record” which they put up in response to the applicants’ notice in terms of Rule 53 (3)) amply illustrates not only that proper and full notice was given of public meetings, but that such meetings took place and comments were received

⁶⁶ *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 SCA at para 24; *Borbet Supra* at [68] - [73].

from the public and considered before the final approval of the budget including the contentious rates policy.

[97] The applicants however in their founding affidavit registered the following (abiding) complaints against the first respondent based on a thorough assessment of the documents that were made available to them by it.

97.1 Accepting what they know now that significant revisions and amendments were effected to the rates policy, there is vitally no indication of the process followed in such respect especially with regard to public participation.

97.2 The “IDP and budget process plan” (which they presently accept were evidently tabled in the Council as required), makes only passing reference to the review of *budget related policies* and makes no mention of the tabling and adoption of any amendments thereto or any consultative process forming part of the annual review thereof.

97.3 The document “IDP and budget roadshows 19 April - 10 May 2018” consists of no more than a proposed schedule, and the first respondent provided no documentation to demonstrate that any roadshow or shows occurred and, if so, that proposed revisions to the rates policy were presented and that any comments from communities were minuted in that important respect, nor has it placed any acceptable evidence before this court to such effect.

97.4 The minute of the Council meeting of 28 March 2018, which as it contended in its founding affidavit did not include the reports to Council referred to therein, includes a reference by the Executive Mayor to policies which had been subjected to scrutiny in the workshop and that proposals at a workshop of councillors would be considered by councillors for inclusion before being submitted for adoption by the Council. The Council nevertheless resolved to adopt the “revised” policies. No mention whatsoever was made of any public process with regard thereto.

97.5 Notice 3478 (Annexure “AS 9” to the first respondent’s answering affidavit) makes no mention of budget related policies and or any proposed amendments thereto being available for public inspection and comment. Additionally, it provided no documentation or other evidence that the documents referred to were indeed made available for public inspection and if so whether the proposed amended rates policy was included therewith.

97.6 The first respondent has provided no information or documentation demonstrating that the accounting officer took the steps required by section 22 of the MFMA and section 21 of the Systems Act, nor that the Council considered any views of the local community which may have been elicited from the required publication or gave the Executive Mayor an opportunity to respond to submissions or indeed that the Council met for that purpose at all.

97.7 The minutes of the councillor's "IDP and Policy Workshop" reveals that the councillors present declined to consider a "new draft" of the rates policy.

97.8 In the report of the Executive Mayor to the Council meeting of 30 May 2018, the process ostensibly followed in developing the budget is set out but the only mention in it of policies is in relation to the councillor's workshops and not to any public process; and

97.9 Notwithstanding comprehensive discussion of the budget and resolutions to be adopted by the Council in the aforesaid meeting, there is no mention whatsoever of budget related policies and the extent to which they were obviously intended to be revised and amended as the applicants know now with hindsight.

[98] The separate averments may appear pedantic but at the crux of it the applicants complain that mere lip service was paid to the process and that there was simply an absence of any participatory democracy when it came to the substantial revision of the rates policy in the critical respects referred to above. The statutory requirements for public engagement with the revision and adoption of the rates policy are however peremptory and the adoption of the revised policy without compliance therewith, so it was submitted, renders that adoption illegal.

The first respondent's answer to the claim that the process was deficient or lacking in public participation:

[99] An awkward tangent evolved concerning the evidential material placed before the court upon which it was expected to determine the “issue” whether the first respondent complied with its statutory obligations in regard to publication and community participation before adopting its budget and the contentious rates policy implicated thereby.

[100] By way of background Own Haven asserted that in order to consider the legality of the rates imposed on its properties by the first respondent for the relevant financial year it, and the second applicant together with it, had been obliged as a consequence of the first respondent's obdurate refusal to provide it with any documents relating to the budget and process for that year to launch an application in this court compelling it to comply with its request and appeal in terms of the provisions of the PAIA.

[101] It submitted a comprehensive request (the summary outlined in *SAPOA* of a municipal budget process, repeated in *Borbet*, providing a very helpful guide of the clear processes that the first respondent would have been expected to follow in this regard) and according to it, provided the first respondent with every opportunity to deliver every document material to compliance by it with its statutory obligations foreshadowed by it as found wanting. In response to such request, the first respondent ultimately delivered a substantial number of documents.

[102] The applicants also in their notice of motion in the present application, alluding to the provisions of Uniform Rule 53 (3), sought all records pertaining to the impugned decision. In responding, the first respondent delivered to the applicants 9 lever arch files containing these supposed documents. After considering these, the applicants elected not to certify any of such documents as constituting the “record” as contemplated in Rule 53 (3).

[103] There is as a result, so the applicants assert, no review “record” before this court. To the extent that the first respondent purported to refer to any other documents delivered by it, and not put up by the applicants, they submit that it was obliged to attach such document to its answering affidavit,⁶⁷ and where such documents were offered up as proof and referenced in its answering affidavit, it was further required of it also to have identified the material portions relied upon by it and obviously to have incorporated it specifically in its formal answer.⁶⁸

[104] They ultimately proceeded on the assumption that the documents provided made up all of the material relevant to the present challenge and applicable to the relevant budget process and most particularly the review of the rates policy and the concomitant purported public participation process. Indeed, the first respondent conceded in its answering affidavit that the applicants were indeed furnished with all the information “required and relevant for the determination of this matter”,

⁶⁷ The applicant’s attorneys heralded unequivocally in correspondence addressed to the first respondent’s attorneys that this was the approach that would be adopted by them, warning at the same time that if it considered any other documentation to be relevant that it should introduce it into evidence as annexures to its answering affidavit.

⁶⁸ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324; *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 185 (SCA) at 200.

which must obviously be contained in the numerous lever arch files that accompany the court file.

[105] It follows, so they assert, that that the inexorable conclusion is that where documentation or other admissible evidence of any required step or process was not provided by the first respondent, that that step or process did not occur.

[106] The applicants allege further that having reviewed the documentation (most of which it seems was probably made available to it pursuant to their PAIA pursuit) they themselves attached those which they considered to be material (to prove a negative) and incorporated the relevant provisions in their founding affidavits. The first respondent, by contrast, did nothing more than make cursory reference to documents contained in volumes 1 to 4 of the assumed record of proceedings as supposedly evidencing the public participation process followed by it. It further made no attempt whatsoever in any event to identify the documents on which it wished to rely in any particular respect, to give it a particular context, or to incorporate any portion of its contents thereof into its affidavits and this objectionable exercise formed the basis on its own merits for an application brought by the applicants to strike out such inadmissible matter, and then a later similar application when the first respondent persisted in treating the so-called “record” as purported evidence in a further affidavit filed to deal with the applicant’s first request to strike out inadmissible evidence.

[107] The applicants maintain that the documents contained in the 9 volumes purporting to be the “record” as contended for by the first respondent, as well as the references to any reliance thereon by it in the answering affidavit, are inadmissible

and fall to be left out of account as evidential material in support of the first respondent's broad sweeping averment that a proper public participation process preceded its decision to adopt the contentious rates policy.

[108] For their part the applicants explain that they had (before the launch of the review application) extracted from the 9 volumes provided to it that which they contended in their founding papers “*comprehensively demonstrates the failure of the (first respondent) to (have complied) with the public participation and consultative process required*”, as outlined above.

[109] In support of the applicants' stance in this respect. Mr. Ford acting on their behalf, referred me to the *dictum* in *Venmop 275 (Pty) Ltd & Another v Cleverlad Projects (Pty) Ltd & Another*⁶⁹ that clearly sets out the expectation of parties concerning the production of a record in a review application launched in terms of the provisions of Rule 53 as follows:

“Rule 53 of the uniform rules of court provides a mechanism for an applicant, in review proceedings, to obtain a record of the proceedings and to facilitate the presentation of the applicant's case in the review. Rule 53(1) provides for the notice of motion to call for the dispatch of the record of such proceedings to the registrar. Rule 53(4) provides the applicant with an opportunity, after having inspected the record, to vary the terms of the notice of motion and supplement the supporting affidavit. The provisions of rule 53(3) are quite clear. They require the applicant to “cause copies of such portions of the record as may be necessary for the purpose of the review” to be made. The purpose of the rule is equally clear. It is to provide an aggrieved applicant, who might not necessarily have all the evidence at his or her disposal, the opportunity to supplement the case made in the application by providing potential evidence in the full record of the review proceedings. Having been given such opportunity, it is the duty of the applicant to select what is relevant from the record to serve as evidence for the purpose of the review application. It is only what is selected by the applicant in terms of rule 53(3) that serves as

⁶⁹ 2016 (1) SA 78 (GJ) at para [17].

evidence. Should there be documents forming part of the record omitted, which in the view of the respondent are relevant, these can be introduced into evidence as annexures to the answering affidavit. Any other part of the record omitted which is necessary to rebut what is said in answer might similarly be introduced as an annexure to the replying affidavit.”

[110] Contrariwise, Mr. Buchanan criticised the applicants who, once having utilised the machinery of the provisions of Rule 53 to obtain the necessary documentation bearing upon the making of the impugned resolution and having elicited from it the numerous documents in response which were collated, indexed and paginated by them as evidencing the required record, thereupon prevailed upon the court to treat the body of documentation as constituting inadmissible evidence. He also made much of the applicants’ unequivocal election in the process not to supplement their founding papers concerning their existence and obvious purport which the first respondent says supports its case, quite tersely made, that there was due compliance with the necessary public participation consultative process.

[111] In this respect Mr. Buchanan referenced the trite principle that it is for the applicants to have made out their case in their founding papers⁷⁰ and of the further rule that an applicant is generally not allowed to supplement his/her founding affidavit by adducing supporting facts in a replying affidavit.

[112] He contended that these trite principles are particularly relevant in the present case especially because of the “generalised” allegations of a lack of public

⁷⁰ This is of course not strictly applicable here because when an applicant in review proceedings files its supplementary affidavit, after having sight of the record, it is in effect fully stating its case for the first time. See *Minister of Co-Operative Governance and Traditional Affairs v De Beer and Others* [2021] ZASCA 95 (1 July 2021) at [93], citing *City of Cape Town v South African National Roads Agency & Others* 2015 (3) SA 386 (SCA) at [36]. However, in this instance the applicants were clear that they did not intend to say anything more than they had, having already had sight before the review proceedings were instituted of such documents as the first respondent contended were the essential and relevant documents upon which they then predicated their case.

participation raised by the applicants in the founding affidavit and the obvious lack of any supplementation thereafter especially since, after having had access to all the relevant documents provided by the first respondent in response to their notice in terms of Rule 53 (3), they made a conscious election not to supplement their founding papers.

[113] A spat about onus also emerged. The first respondent decried the implication by the applicant's approach that there was some sort of onus on it to establish adequate public participation. Rather, so it was contended on its behalf, the onus fell to the applicants to establish and prove their allegation of a lack of adequate public participation yet had done so in a very broad and generalised manner relying on particularly unspecified allegations in this regard. Having additionally pertinently invited the applicants to particularise the alleged deficiencies in the public participation process in reply, an invitation which they brazenly ignored, Mr. Buchanan made capital of the fact that they had not availed themselves of such an opportunity to their own detriment.

[114] In the result, so he concluded, the substance of the dispute fell to be decided according to the usual approach adopted where there are factual disputes in proceedings of this kind as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints*,⁷¹ which is essentially to accept the correctness of the respondent's version with regard to the areas of dispute.

⁷¹ 1984 (3) SA 623 (AD) at 634. See also *Herbstein and Van Winsen: The Civil Practice Of The High Courts Of South Africa*, 5th edition, volume 1 at 468-469.

[115] Although the issue of the record and the applications to strike out loomed large and took up a lot of the court's time, at the end of the day neither party expected me to have regard to the several volumes constituting the "record", and Mr. Ford seemed to take comfort in the suggestion that I would naturally determine what was properly before me, eschewing the reading in of copious unreferenced documents or accepting any hearsay evidence or assertions unsupported by proper evidence.

[116] It is so that the applicants having pleaded a breach by the first respondent of its obligations to have followed a public consultative process, they bore the onus to allege and prove such breach but the applicants were in this instance seeking to prove a negative. The answer to their case lay particularly within the knowledge of the first respondent and, if it existed, in the documentation under its control. I am not in agreement with Mr. Buchanan that the applicants made general unspecified accusations of any shortcomings in this respect. To the contrary I have already remarked above upon the pedantry nature of their complaint having apprised themselves of the import of all the documentation made available to them by the first respondent.

[117] I add too that far from providing an answer that would satisfy the dictates of reasonableness by demonstrating that the first respondent had meaningfully invited the local community to participate (especially with regard to the substantive amendments that were implicated in adopting the rates policy) and had taken Own

Haven's already known concerns into consideration,⁷² the first respondent made a belated attempt in October 2022, in a "further affidavit" filed in response to the applicants' application to strike out and to co-incidentally condone its delay in having filed its answering affidavit timeously in the first place, to excuse why prior consultations had not been had with the relevant officials and councillors of the first respondent who were purportedly involved in the approval of the IDP, the budget and budget related policies. This in itself was in my view a concession that questions raised by the applicant at the outset concerning what steps the first respondent had undertaken (especially concerning any discussion around the revised rates policy of substantial for social housing institutions) had been left begging and that the applicants were therefore not being unrealistic in their estimate of things that the first respondent had failed to make any particular effort to allay their concern of a lack of proper public participation.

[118] Even the belated account given by the deponent on behalf of the first respondent in dealing with the shortcomings highlighted by the applicants were elliptical, if not in my view evasive, and raise no real dispute of fact. There is indeed merit in Mr Ford's submission that one would search in vain in any of the documents put up by the first respondent for a public participation focused on what is required in terms of the Rates Act with regard to the rates policy, the provisions of which a municipality properly focused on the participatory nature of local democracy and the interests of the people it serves, should be acutely aware of.

⁷² I have mentioned elsewhere that Own Haven's objections that would certainly have had a bearing on the critical revisions to the rates policy were already on record. The first respondent referenced these in an index to the assumed "record", but adduced no evidence to support how the objections were received, their import, what was discussed in relation thereto, or why the proposed revisions would still be implemented by the Council notwithstanding the clear concerns raised by Own Haven.

[119] The applicants readily conceded what aspects of the rates adoption process were properly undertaken (there were at first additional manner and form complaints raised by them in respect of the budget process that they conceded along the way were compliant with the expected processes) but some gaps starkly remain, leaving one to conclude inexorably that a meaningful public participation process was lacking. There was also the surprise belated admission by the first respondent of massive amendments to the policy that had been introduced, yet in a letter put up by them to Own Haven amongst its annexures to the “further affidavit”⁷³ dated 16 October 2019 it resolutely disavowed any amendments made to its policy. Instead, it is stated in the letter (expressly with regard to the issue of community participation in amendments to the policy. that: *“(t)he policy was reviewed during the 2018/19 financial year however, there were no amendments made and the policy was noted by Council as per minute number BCMC256/19 dated 29 May 2019.”*

[120] As for the supposed views that the first respondent claims to have elicited by the participation process it contended for it does not say what those were or how each view was treated in relation to the amendments to the rates policy and the budget that were rendered essential thereby.

[121] The first respondent claims that the issue of the social housing institutions was addressed when comments were made in relation to the rates policy (Own Haven assumes with reference to the concept of public benefit organizations), but in this respect put up nothing more than a copy of a slide presentation that does not even

⁷³ At pages 619-620 of the indexed papers, although not identified or given any context in the affidavit to which it was attached.

begin to suggest the complexity of the problem by sidelining social housing institutions in the position of Own Haven, how the community perceived the problem, or what recognition it gave to the issue. In any event it has plainly stated its bias against social housing institutions with reference to its supposed mandate to leave out public benefit organisations such as Own Haven, courtesy of the Amended Rate Ratios Regulations, as well as by pressing its view (not supported in the evidence, leave alone any empirical data to sustain it) that it has no obligation, legal or otherwise, to support a social housing institution that wishes to persist with a dated rental model that does not align itself with its own ideas on what social housing is about.

[122] The first respondent claims to have no knowledge of the policies of other cities regarding social housing, but this is certainly an issue that would have been required to be raised in the budgetary process for comparisons to be made in the interest of social housing institutions *inter alia*.⁷⁴

[123] In the premises the so-called dispute of fact is nothing but a bald assertion of supposed compliance without any flesh to its tentative bones.

[124] In conclusion I am satisfied that the impugned resolution fell afoul of the peremptory requirements for public participation, rendering the policy implicated thereby invalid to the extent of such inconsistency and falls to be set aside in its

⁷⁴ It does not only concern Own Haven but other social housing institutions operating in the first respondent's area as well.

entirety.⁷⁵ This obviously redounds to the benefit of the second applicant who has come along for the ride so to speak, but I emphasize that its legal interests or offence to it by the impugned rates policy have hardly been at the forefront of this court's focus or decision. The issue of the reasonableness of the public participation process in relation to Own Haven's interests have especially influenced my determination.⁷⁶

Is the first respondent's exclusion of Own Haven from any entitlement to a rates rebate, or conversely its regard for it as an ordinary commercial entity, in the rates policy itself illegal on any of the bases contended for by Own Haven?

[125] Having found that the process whereby the policy was adopted is tainted with illegality for want of reasonable engagement with the local community, more especially Own Haven, and falls to be set aside in its entirety, it is strictly unnecessary to flog a dead horse, but perhaps some observations will be of assistance going forward.

[126] The complaint by Own Haven is that there should be different category provided for it and social housing institutions in the first respondent's rates policy, alternatively a special rebate. The commercial category is not a natural fit for it under the *subgenera* of non-residential property. In my view it is plain that it is not and

⁷⁵ See *Allpay Consolidated Investments Holding Pty Limited and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC); *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC).

⁷⁶ It would be exhausting if on the ticket only of being a ratepayer the process of the adoption by a municipality of a rates policy were routinely challenged in legality reviews to confirm that every "i" was dotted and every "t" crossed. I am certain that not every municipality would achieve a scorecard of absolute perfection but against the yardstick of reasonableness, Own Haven's interests prevail and the obvious import of that is that the policy as a whole falls to be declared invalid.

that it should be recognized for what it is (with reference to its registration both as a public benefit organisation and as an accredited social housing institution subject to very stringent criteria to maintain its existence as such). It should especially be recognized as an entity not for gain, which sets it apart from ordinary commercial entities. Social housing institutions should also be recognized for what they bring in service to the community, in comity really with a municipality, contributing to the delivery of an important developmental need that also promotes the realisation of a significant constitutional right of access to housing. The first respondent's strained concept of what a social housing institution is and where it fits it cannot be rationally sustained.

[127] More significantly, the first respondent's interpretation of the Amended Rate Ratios Regulation to mean that social housing institutions do not qualify as public benefit organisations *per se* for any kind of rates largesse is also plainly unsustainable and irrational.

[128] Whether it was deliberate or due to an oversight that public benefit organisations conducting social housing activities are excluded from the definition of specific public benefit activities referred to in the Rates Act (which I emphasise does not constrain the first respondent from excluding social housing institutions from any rates largesse otherwise provided for in section 15 thereof) should perhaps be properly interrogated, given the significance of land and housing activities undertaken by social housing institutions in pursuit of the meaningful realisation of the constitutional right of access to housing, but that is not for this court to decide. Certainly, however, this distinction seems to have been responsible for the

disadvantage that has redounded to Own Haven and infuses the first respondent's thinking when it comes to its decision making in this respect.

[129] The first respondents submits that it is not in conflict with the provisions of the SHA or social housing when arguing for a progressive evolvement of the policy in the direction of rent to buy. It maintains that even within the context of the State of the Sector Report, rental is but one possibility, but that obtaining title is a different and hopefully better policy which can be applied and is perfectly consistent with the SHA. It does not disregard the provisions of the SHA, but simply takes a different view from the applicants.

[130] It is not restrained from being entitled to give expression to the ideal it entertains because notionally the strategic plan envisages short- and long-term goals in the social housing sector, but it is certainly illogical in my view to disregard the fact that there are existing social housing institutions that have been inherited which are constrained to act within the law as their registration and accreditation dictates.

[131] The first respondent contends that there is nothing in the SHA that places a positive obligation on it to show social housing institutions any rates largesse. Ironically though, it claims to have already done so in more than one respect, having granted it a commercial rebate for new developments and also by way of having afforded it a reduction, this evidenced by it having valued its properties on the basis of rental income rather than on the premise of their market values. Inasmuch as it has already explored options to show it a favourable disposition, that objective should be revisited with every revision of the rates policy.

[132] As for the applicants' allegation that the first respondent acts illegally by disregarding the mandatory provisions of the SHA, the act does not in my view order it to facilitate social housing delivery in actual fiscal currency. The chief funding under the act in the form of subsidies and grants appears to emanate from national and provincial coffers. Though it might have been envisaged that fiscal support could come from municipalities in the form of discounts and rate rebates (not exemptions), it cannot be argued that a municipality contravenes any provision of the SHA when it does not offer such largesse in fact when adopting its rates policy.⁷⁷

[133] Where it may fail is in taking the reasonable and necessary steps, within the national and provincial legislative, regulatory and policy framework, as are delineated in section 5 of the SHA, facilitation however not prescribing that municipal rates should *not* be imposed in respect of social housing. To the contrary the first respondent is legally obligated to levy a rate on property in its area. Section 2 (2) of the Rates Act indeed provides that a municipality must exercise its power to levy a rate on property subject to section 229 and any other applicable provisions of the Constitution; the provisions of the Rates Act; and the rates policy it must adopt in terms of section 3 thereof.

[134] National government is required by section 3 (1)(j) of the SHA to determine norms and standard to be adhered to by provinces and municipalities for the effective delivery and management of social housing, which is essentially the object of the SHA, namely, to establish and promote a sustainable housing environment. The act seems not to concern itself with parochial issues of a social housing institution's

⁷⁷ This appears mostly to have been expressed in wishful language.

liability for rates. I should mention however that Own Haven puts its accreditation dangerously in jeopardy when it complains that its operations are not financially sustainable.

[135] The primary legal instrument which by a municipality determines its rates policy is the Rates Act according to which it is not obliged to create any special dispensations. The Rates Act does provide for rebates depending on which categories a municipality creates in line with those proposed in section 8 (2) of the Rates Act. New and additional categories can be created, but require the approval of the relevant Minister, something which Mr. Buchanan suggested was already the subject matter of litigation in the Makhanda High Court. The fact that such an extra curial option exists confirms to my mind that a court should be slow to interfere when a municipality interprets these prescripts differently for its unique circumstances, subject of course to my suggestion above that the first respondent should be alive to the fact that the properties of social housing institutions do not comfortably resort under the definition of business or commercial property.

[136] No ratepayer can demand a rebate which is discretionary and depends on the resources of a particular municipality. In deciding who may qualify the first respondent exercises a legislative choice and the scope to question those by way of a legality review are limited. Section 15 (1)(b) of the Rates Act however provides that a municipality *may* in terms of criteria set out in its rates policy grant to a specific category of owners of properties, or to the owners of a specific category of properties a rebate on or a reduction in the rates payable in respect of their properties and *may* when doing so determine such categories in accordance with section 8 (2) of the Rates Act. There is no obligation on it to rigorously follow such category

determinations however, when it comes to deciding what rebates or reductions it may grant. Indeed, the fact that the first respondents admits that it has granted reductions to Own Haven before suggests that it has and can come to its assistance under the provisions of section 15 of the Rates Act by having regard to it as a duly registered public benefit organisation carrying on the activity which it does that enables SARS to exempt it from the payment of tax.⁷⁸ It therefore appears to be a fair statement that its exclusion of Own Haven from any entitlement to rebates at all because it is excluded from the category envisaged in section 8 (2)(a) is irrational. It is even more unsustainable in my view for the first respondent to suggest that the Amended Rates Ratio Regulations has sealed Own Haven's fate as it were from being considered for a rebate, ever.

[137] The point is well taken by Mr. Ford that it is absolutely irrational for the first respondent to have adopted the stance that the Amended Rate Ratios Regulations have put Own Haven forever beyond the reach of any entitlement to be considered for a rebate under the provisions of section 15 of the Rates Act. They simply do not dictate the prohibition contended for.

Remedy:

[138] This court's conclusion that the impugned resolution infringes the principle of legality and accordingly that the relief in prayers 2 and 3 of the notice of motion fall to be granted (it is sufficient if prayer 2 prevails in my view) constitutes a

⁷⁸ See the definition of "reduction" in the Rates Act which takes on a peculiar meaning: "'reduction", in relation to a rate payable on a property, means the lowering in terms of section 15 of the amount for which the property was valued and the rating of the property at that lower amount."

decision as contemplated in Section 172 (1)(a) of the Constitution that empowers it to make “any order that is just and equitable” including an order limiting the retrospective effect of the declaration of invalidity, and an order suspending the declaration of invalidity to allow the competent authority to correct the defect.

[139] The parties are in accord that the latter option would not be of any practical effect given that the financial year in question has long since passed and the budget already implemented.

[140] Faced with similar situations where municipal councils have adopted rates policies illegally, our courts have recognised that they are obligated by the provisions of section 172 (1)(a) of the Constitution to declare the resolution adopting the rates in question to be invalid but have nevertheless been reluctant to apply such declaration of invalidity retrospectively in circumstances where the rates policies in question have been applied and in large part collected.⁷⁹

[141] Mr. Ford however submitted that the circumstances in this matter differ from those in the cited cases gone before and that this court should in the exercise of its discretion to craft just and equitable relief do more than simply issue a declarator such as in *Borbet* to the effect that the first respondent failed to comply with its constitutional and statutory obligations to ensure meaningful public participation in the preparation and adoption of its budget under scrutiny introducing massive amendments to its rates policy and ordering compliance with its obligations in this

⁷⁹ See in this regard *SAPOA Supra* at [70] - [71], *Borbet Supra* at [104] - [110], and *Kalil N.O Supra* at [14] where the court observed metaphorically that “a great deal of water has flowed under the bridge” with reference to a year having passed between an impugned budget resolution and the date of the court’s order setting it aside in circumstances where the municipality was already considering its next annual budget.

respect concerning future budgets. He pointed to the fact that after the adoption of the illegal rates policy in question, the applicants in this instance declared a dispute and withheld payment of the rates claimed by first respondent. He noted that whilst the first respondent had had the opportunity to press its claims against both by the institution of action, it chose not to do so and in fact took no steps with regard to the disputes so declared.⁸⁰ Further, so he submitted, it was obstructive in the face of the applicants' constitutional right to access to information in getting to the bottom of whether it had legally adopted the amended policy in the first place. He noted that a declaration of the first respondent's resolution adopting the applicable rate to be invalid would also remove its *causa* for recovery of the rates withheld by each of the applicants.

[142] He submitted that an order generally limiting the retrospective effect of a declaration of invalidity would have the effect of rendering nugatory the applicants' reliance on their statutory right to declare disputes and ultimately to have their disputes resolved in a fair public hearing in terms of section 34 of the Constitution. It would also effectively reinstate claims on the part of the first respondent for payment of the rates withheld by the applicants in circumstances where this court has found that it acted illegally in imposing such rates in the first place, and that it will in such circumstances be unjustly enriched.

[143] In *Allpay Consolidated Investments Holding Pty Limited and Others v Chief Executive Officer, South African Social Security Agency and Others*⁸¹ the

⁸⁰ Mr. Buchanan pointed out the converse, which is also true, that the first respondent has been precluding from recovering its assessed rates because of the invocation by the applicants of the provisions of section 102 of the Systems Act.

⁸¹ *Supra*.

Constitutional Court emphasised the importance of an appropriate order in terms of section 172 (1)(b) in order to account for any unjust or impractical consequences of a declaration of invalidity. In that matter the circumstances allowed for an order suspending the invalidity to allow the defect to be corrected, by ordering a “rerun” of an impugned tender process, allowing the invalid contract to continue essentially by judicial warrant in the interim.

[144] In this regard, in crafting the order made by it in *Allpay*, the Constitutional Court albeit in a different context made reference to the respective constitutional obligations which arise when a service provider assumes the obligations of the state under a contract awarded to it.

[145] In this instance, Own Haven, by registering as a social housing institution has assumed, to the extent provided for in the SHA and together with other social housing institutions, the responsibility of the State to fulfil the right in section 26 (1) of the Constitution. Whilst it also has an obligation to pay rates, it is entitled to require that such rates are not imposed in a manner which detracts from its primary obligations or that fails to recognize the role played by it in meaningfully promoting the constitutional pursuit of the delivery of social housing to the targeted beneficiaries it serves by its housing projects.

[146] Should this court simply follow the approach in *SAPOA*, and *Borbet*, on the basis that “the egg could not be unscrambled” and not order the repayment of rates that were not validly imposed without making the further orders as prayed for in

paragraph 4 to 6 of the notice of motion, so Mr. Ford contended, that would result in the extensive adverse consequences to the ability of Own Haven at least to deliver on the constitutional mandate assumed by it.

[147] There is I believe merit in the argument advanced at least on behalf of Own Haven that it would be just and equitable for this court to limit the retrospective effect of the declaration of invalidity to the date of this order, save to the extent that it has withheld payment of rates to the first respondent for the relevant financial year pursuant to its declarations of dispute given the import of the illegality that tainted the adoption of the rates policy implicating amendments thereto that have been severely prejudicial, to it and in respect of which it has constantly sought to defend its position.

[148] I do not however consider the position of Lorles to be on a par with that of Own Haven for the reasons which I have already stated above.

[149] In the circumstances I am inclined to exercise my discretion in terms of section 172 (1)(b) of the Constitution by granting the ancillary relief sought by Own Haven at least.

[150] To the extent that both applicants have achieved substantial success (the second applicant quite by default), there is no question that they are entitled to their costs which Mr. Buchanan fairly conceded should include the costs of second counsel.

Order:

[151] In the result I issue the following order:

1. The delay in the time taken by the applicants to bring this application is condoned.
2. The resolution of the first respondent's Council on 30 May 2018 adopting its rates policy and the rates policy implicated thereby is declared inconsistent with the Constitution and accordingly invalid.
3. The order in paragraphs 2 shall be effective as from the date of this order, save with respect to the rates withheld by the first applicant pursuant to the declaration by it of its disputes with regard to its liability therefor.
4. The first applicant is relieved of its liability to pay to the first respondent the rates levied for the social housing schemes on erven 53726, 4995, 53722, 67843 and 61213 Buffalo City withheld by it for the 2018/2019 financial year.
5. No relief is granted to the second applicant pursuant to this court's order of constitutional invalidity referred to paragraph 2 above.
6. The first respondent is directed to pay the costs of the application, such costs to including the costs attendant upon the use of two counsel.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 8 & 9 September 2022

DATE OF JUDGMENT : 26 June 2023

Appearances:

For the applicants: Mr. E A S Ford SC together with Mr. J Richards instructed by Bax Kaplan Russell Inc., East London (ref. Mr. S Clarke).

For the respondents: Mr. R Buchanan SC together with Mr. L X Mpiti instructed by Makhanya Attorneys, East London (ref. Mr. Makhanya).