Levying property rates

A NEW DISPENSATION

From the COURTS

CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality and Others [2007] SCA 1 (RSA)

With the gradual implementation of the Local Government: Property Rates Act (Act 6 of 2004), the impact of the new constitutional regime in the levying of property rates is slowly filtering through. The latest conflict concerned whether a provision of the old Cape Ordinance requiring the Administrator's consent for an increase in the rate was constitutionally valid.

In *CDA Boerdery (Edms) Bpk v The Nelson Mandela Metropolitan Municipality and Others* [2007] SCA 1 (RSA), the Supreme Court of Appeal asserted the fundamental change effected by the 1996 Constitution in the supervisory role of the provinces over municipalities. The Court also dealt with the way rates should be levied.

Administrator's consent

The Cape Provincial Ordinance of 1974 required the permission of the provincial Administrator (now the Premier) before a rate over two cents in the rand could be imposed. The applicants argued that because the municipality had not obtained the Premier's consent for an increase in rates above two cents in the rand, the rates levied were invalid. The High Court found that requiring the Premier to give such approval was in conflict with the new constitutional dispensation, in which the municipality had the original power to impose a rate.

The Supreme Court of Appeal agreed. In giving the majority judgment, Cameron JA held that, in view of the new status of local government in terms of the 1996 Constitution, the requirement of obtaining the Premier's permission was impliedly repealed by section 10G of the Local Government Transition Act of 1993. The approval requirement was a product of the pre-1994 dispensation, "tailored to its hierarchy and matched to the Administrator's supervisory control over municipalities and his executive role in relation to them". Under the 1996 Constitution, the Court held, the Premier enjoys no "special supervisory powers over the exercise of local government functions, or special duties in relation to the determination of rates".

key points

- Under the new constitutional dispensation giving municipalities original property rating power, provinces now have a limited oversight role in respect of municipalities levying rates.
- The requirement (under old-order legislation) of the Premier's consent for an increase in rates is unconstitutional.
- Municipalities' power to levy such rates is now subject to the broad framework outlined in section 229(2)(a) of the Constitution.
- However, courts will be reluctant to interfere by limiting a municipality's power to levy rates.

The Supreme Court of Appeal explicitly expressed no opinion on whether legislation enacted in terms of section 229(2)(b) of the Constitution could permissibly require that the Premier should approve municipal rates. The Court also expressed no opinion on the curbs on municipalities' rating powers in terms of the Property Rates Act, though it described section 16 as conferring "limited and carefully defined powers of supervision and limitation regarding rates on the Cabinet member responsible for local government".

Limits of a municipality's power to levy rates

Section 229(2)(a) of the Constitution provides that a municipality may not exercise its power to levy rates in a way that would "materially and unreasonably prejudice –

(a) national economic policies;
(b) economic activities across its boundaries; or
(c) the national mobility of goods, services, capital or labour."

The applicants claimed that the drastic increase in rates on agricultural land would prejudice national economic policy. While not giving a final answer to the question, the High Court suggested two reasons why courts should be cautious when approaching this question. First, the matter of national economic policy (or any of the matters listed in section 229(2)(a)) must be set within the context of cooperative government as set out in Chapter 3 of the Constitution. With reference to the duty to avoid litigation in settling intergovernmental disputes, the judge noted that courts have a limited role to play in the settlement of such disputes. Because the dispute before the court centred on "national economic policies", the matter could not be resolved without citing the relevant national organs of state in the different spheres as parties.

Second, given the nature of the matters listed in section 229(2)(a), the courts are not well equipped to judge when a rates policy materially and unreasonably prejudices national economic policies or activities. Inasmuch as courts do not want to pronounce on the merits of administrative decisions in the context of the separation of powers doctrine, the matters listed in section 229(2)(a) are also not questions the courts should interfere with.

There is also no direct violation of individual rights in judging these matters. Poor judgments on economic policy may prejudice citizens, but the remedies available in our democracy lie outside the courts, namely cooperative government and even democratic elections. With no national organs of state joined in the proceedings, the Court concluded that a judgment could thus not be made since there was no evidence of what the national economic policies were.

On appeal, the Supreme Court of Appeal shared the High Court's reservations about the justiciability of section 229(2)(a) but refrained from expressing a final view on the issue.

Arbitrary levying of property rates

The appellants also complained that the rates were arbitrary because the municipality had stated that it arrived at the general rate by ascertaining the total funds required, then dividing that figure by the total valuation of properties within the areas to be rated. The problem was that in some areas only the land valuation without improvements was taken into account, resulting in lower rates for those properties. The Court accepted the municipality's explanation that it had inherited a differential system of rates from the previous local government authorities and, in introducing the rates for the first time, it was constrained to make use of the previous interim valuations. The Court found that the use of the interim valuations was perfectly rational and thus not arbitrary.

Notice to ratepayers

The applicants also complained that they had not personally received notification of the rates increase and argued that the levying of the rates was therefore invalid.

The purpose of the notice requirements, the Supreme Court of Appeal said, was that "persons affected by a valuation and possible rates assessment are afforded adequate opportunity to object to such valuation and to have such objection adjudicated by the valuation court". In dealing with the provincial ordinance the Court held that the fact that the appellants had not received proper service of the notice of the rates change as required by the Ordinance did not affect the validity of the rates. The appellants were fully aware of the rates changes as they had participated in the proceedings of the valuation court. There was thus effective public notice, achieving the very purpose of the notice requirement.

Comment

The Supreme Court of Appeal's decision confirms the limited role that provinces now have in overseeing decisions by municipalities in levying property rates. This power is not unlimited, however. Section 229(2)(a) imposes a broad framework which is enforceable, like any other provision of the Constitution. But a court would approach the matter with caution. In terms of the general principle of legality, a rating by-law may be challenged for being inconsistent with the constitutional framework of section 229(2)(a), but a court will not interfere lightly.

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Disconnecting electricity supply as a debt collection mechanism

A REVIEW OF CASE LAW AND LEGISLATION

Previous issues of the *Bulletin* have reported on various judgments concerning the disconnection of electricity supply as a debt collection mechanism. This is a review of the status quo on the disconnection of electricity supply as a debt collection mechanism in light of relevant case law and new legislation.

key points

- A municipality must adopt, maintain and implement a debt collection and credit policy.
- A municipal council must adopt and promulgate a by-law to give effect to the municipality's credit control and debt collection policy, its implementation and enforcement.
- In respect of limiting or discontinuing water services to a consumer as a device to collect debt, a debt collection by-law must also comply with the prescripts of sections 4 and 21 of the Water Services Act of 1997.
- Electricity may be disconnected or, where prepaid electricity is supplied, the purchasing of vouchers blocked for a debtor being in arrears in respect of other services, in accordance with the debt collection policy and by-law.
- Limiting or discontinuing the water supply to a debtor is a legitimate debt collection device, provided the requirements of section 4 of the Water Services Act are met and, of course, it is incorporated in the municipality's debt collection policy and by-law.

Case law

Senekal Inwonersvereniging en I Ander v Plaaslike Oorgangsraad Senekal/ Matwabeng 1998 (3) SA 719 (0)

In this case a group of residents paid the amounts they owed the former Senekal / Matwabeng Transitional Local Council in respect of services and rates into a bank account. They authorised the bank to pay to the council only the amounts each of them owed the council in respect of electricity supply, which they purchased on credit from the council. The council gave notice to the defaulting debtors that it intended to disconnect their electricity supply because they were in arrears in respect of services other than electricity and rates.

The defaulting debtors applied for an interdict restraining the council from discontinuing their electricity supply on the basis that they did not owe the council any money for electricity consumed. Relying on section 11(b) of the (repealed) Electricity Act (Act 41 of 1987) Van Coller J granted the interdict. Section 11(b) of the (repealed) Electricity Act of 1987 determined that:

> A licensee shall not … reduce or discontinue the supply of electricity to a consumer, unless—
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> (b) the consumer has failed to pay the agreed charges … and has failed to remedy his default within 14 days after receiving… a written notice… to do so.

B G Beck and Others v Kopanong Local Municipality and Others (Case No 3772/2002, unreported)

In *Beck v Kopanong*, the applicants were substantially in arrears to the municipality in respect of their water accounts. The municipality relied on its credit control and debt collection policy to block the applicants from purchasing prepaid electricity coupons. The policy provided, among other things, as follows:

> 7.2.4 … electricity supply will be disconnected if any of the services delivered by Council or rates and taxes due to Council are in arrears. In cases where pre-paid electricity meters have been installed, the purchase of electricity coupons will be blocked.

The judgment in the *Senekal* case was distinguishable from the *Beck* case in important respects. First, the applicants in *Beck* used prepaid electricity whilst those in *Senekal* purchased electricity

on credit. Second, between the time *Senekal* was decided (in 1998) and *Beck* was to be decided (in 2002), important legislation in the form of the Local Government: Municipal Systems Act (Act 32 of 2000) had been enacted.

In essence the Court found that section 11(b) of the (repealed) Electricity Act had to bow to section 97(1)(g) of the Systems Act. Section 97(1)(g) of the Systems Act provides that a municipality's credit control and debt collection policy must, among other things, provide for the termination of services or restriction of the provision of services when payments are in arrears. The Court was persuaded by the argument from counsel for the municipality that section 97(1)(g) of the Systems Act empowers a municipality to terminate the provision of any service to a consumer if the municipal services account of such a consumer is in arrears.

Taking the matter further, the Court was of the opinion that the services a municipality provides should be seen and treated as a 'package' of services. Rampai J said:

> The municipal service account should be seen, treated and settled as a single account for various services provided. It should not be … treated as if… residents have the right freely to choose what they like to consume and to partially settle the service account only for that which they freely chose to consume ... A local government provides a single municipal service.

Hartzenberg and Others v Nelson Mandela Metropolitan Municipality (Despatch Administrative Unit) [2003] JOL 10625 (SE)

In *Hartzenberg* the issue to be decided was whether the municipality was entitled to cut the prepaid F electricity supply to the applicants' houses because they had failed to pay their water accounts over a considerable period of time. Counsel for the applicants argued that because the electricity was prepaid and therefore not in arrears, the municipality was not entitled to discontinue the supply thereof because the water accounts were G substantially in arrears.

Although the municipality had a credit control and debt collection policy as required by section 96 of the Systems Act, it had not adopted by-laws to give effect to its policy, and to the implementation and enforcement of the policy, as required by section 98(1) of the Act. The Court questioned the enforceability of the policy in the absence of such a by-law.

The municipality also attempted to rely on a council resolution predating the Systems Act which stated that consumers having prepaid electricity meters would be barred from the prepaid electrical system if they failed to pay for other municipal services. The Court also declined this argument as the resolution had never been published as a by-law. The Court found that the fact that the municipality had not enacted by-laws as required by section 102 of the Systems Act also did not assist it. It therefore ordered the municipality to reinstate the applicants' electricity supply.

Review

In *Beck* the Court did not consider the fact that the municipality had not adopted and promulgated by-laws to give effect to its credit control and debt collection policy, and to the implementation and enforcement of the policy, as it did in *Hartzenberg*. In *Hartzenberg*, the Court did not consider the relevant prescripts of the (repealed) Electricity Act, as it did in both *Senekal* and *Beck*. In *Beck* the Court was persuaded by the argument that section 97(1)(g) of the Systems Act empowers a municipality to terminate the provision of any service to a consumer if the municipal services account of such a consumer is in arrears, whilst in *Hartzenberg* the Court said that section 97(1) of the Systems Act clearly does not by itself provide any powers to a municipality. It requires that a municipality's debt collection policy must provide for the termination or restriction of services in certain instances. Only when the policy incorporates such a provision, is it enforceable. Of course, if the policy does not contain such a provision, the policy as a whole may fall foul of the requirement.

The judgment in *Hartzenberg* regarding the dubious enforceability of the municipality's debt collection policy in the absence of a by-law to give effect to the policy, its implementation and enforcement appears to be correct. Section 98(1) is couched in peremptory terms: a municipality "must adopt" these by-laws. Beyond the peremptory nature of section 98(1) of the Systems Act, our law requires that a legislative power cannot be exercised in an administrative manner.

In *Beck* and *Hartzenberg* the municipalities' problem was the collection of debt arising from the applicants' water consumption. None of the judgments considered municipalities' powers in respect of discontinuing or restricting the water supply to the applicants as a method of getting them to pay their water accounts. In terms of section 27(1)(b) of the Constitution of the Republic of South Africa 1996, everyone has the right to have access to water (see also section 3(1) and (4) of the Water Services Act (Act 108 of 1997), which affords everyone the right of access to basic water supply and basic sanitation, subject to the limitations contained in the Act). Although access to water is a basic right, water services may be limited or discontinued in certain circumstances and after following certain procedures.

Legislation

Section 4 of the Water Services Act states that water services must be provided in terms of conditions set by the water services provider, which must be contained in by-laws promulgated by the relevant water services authority in terms of section 21 of the Act. The conditions for supplying water services must, amongst other things, provide for the circumstances under which water services may be limited or discontinued and procedures for doing so. Such procedures must be fair and equitable. They must provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless other consumers would be prejudiced, there is an emergency situation or the consumer has interfered with a limited or discontinued service. Procedures for the limitation or discontinuation of water services may also not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services.

The Electricity Act of 1987 was repealed in terms of section 48 of the Electricity Regulation Act (Act 4 of 2006) with effect from 1 August 2006. Section 22(5) of the Electricity Regulation Act, which is similar (although not identical) to section 11 of the (repealed) Electricity Act, reads as follows:

> A licensee (ie the holder of a license for operating electricity generation, transmission and distribution facilities issued by the National Energy Regulator) may not reduce or terminate the supply of electricity to a customer, unless—
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> (a) the customer is insolvent;
> (b) the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or
> (c) the customer has contravened the payment conditions of that licensee.

Municipalities may, in terms of section 156(2) of the Constitution, make and administer by-laws for the effective administration of the matters which it has the right to administer. One of the matters which municipalities have the right to administer is "electricity reticulation" listed in Schedule 4B to the Constitution.

Section 96 of the Systems Act obliges a municipality to collect the debts owing to it and to adopt, maintain and implement a credit control and debt collection policy for that purpose. Section 97 of the Act prescribes the minimum content of such a policy, whilst section 99 requires that a municipal council must adopt by-laws to give effect to the municipality's credit control and debt collection policy, its implementation and enforcement. Section 102 of the Act further empowers a municipality to (a) consolidate any separate accounts of debtors, (b) credit a payment by a debtor against any account of that debtor and (c) implement any of the debt collection and credit control measures provided for in the Act in relation to any arrears on any of the accounts of a debtor.

Comment

On the face of it, the judgments in *Senekal*, *Beck* and *Hartzenberg* and the Electricity Regulation Act of 2006 did little to create certainty; one could say they merely added to the confusion and complexity of contemporary municipal law. In *Hartzenberg* and *Beck* the principle was that a credit control and debt collection policy and by-law made in terms of the Systems Act could trump section 11 of the repealed Electricity Act of 1987 where prepaid electricity was supplied. It should be noted that the legislature, which is presumed to be aware of existing law, did not specifically overturn the *Hartzenberg* and *Beck* decisions when it made the Electricity Regulation Act of 2006. Had the legislature intended to do so, it should have been clear from the enactment that it passed.

On the contrary, the scope of a licensee's powers appears to have been extended by providing that the latter can set payment conditions. These conditions could include giving effect to sections 97(1)(g) and 102(1) of the Systems Act by treating the municipal service account as a composite bill of services, thus giving effect to the sound policy reasons for viewing the various municipal services as "an integral and indivisible single service" (*Beck* at para 30).

In terms of section 156(3) of the Constitution, a by-law that conflicts with national or provincial legislation is invalid, except if the national or provincial legislation in question compromises or impedes a municipality's ability or right to exercise its powers or perform its functions. However, a municipality cannot determine whether a national or provincial law compromises or impedes its ability or right to exercise its powers or perform its functions – it will have to approach the courts for a declaratory order or to strike down a statute, or provision in a statute, which it alleges compromises or impedes its ability or right to exercise its powers or perform its functions.

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