

COPY

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No: 3251/2018

In the matter between:-

**ST FRANCIS BAY (WARD 12) CONCERNED
RESIDENTS' ASSOCIATION**

Applicant

and

**KOUGA LOCAL MUNICIPALITY
ST FRANCIS BAY PROPERTY OWNERS
ASSOCIATION**

First Respondent

Second Respondent

ST FRANCIS BAY PROPERTY OWNERS NPC

Third Respondent

**FIRST RESPONDENTS' NOTICE OF APPLICATION
FOR LEAVE TO APPEAL**

BE PLEASED TO TAKE NOTICE that the First Respondent in the main application (for sake of convenience the parties will be referred to in accordance with their citation in the main application) hereby intends making application on a date to be arranged for leave to appeal against the Judgment and Order delivered by Her Ladyship Madam Justice Mjali on 26 April 2022.

BE PLEASED TO TAKE NOTICE FURTHER that the First Respondent applies for Leave to Appeal to the Supreme Court of Appeal; alternatively, the Full Bench of the above Honourable Court.

BE PLEASED TO TAKE NOTICE FURTHER that the First Respondent contends that leave to appeal should be granted as the appeal would have a reasonable prospect of success and that there are compelling reasons, having regard to the public interest factor, that the appeal should be heard. Accordingly, the First Respondent's grounds for seeking leave to appeal are set out hereunder.

1. Her Ladyship erred in the finding that the First Respondent contravened sections 64, 65 and 79 of the Local Government: Municipal Finance Management Act, 56 of 2003 by recovering levies for the special ratings area (“*SRA*”) and paying over to the Third Respondent upon receipt of invoice for funds recovered, as opposed to payment for works done.
2. The alleged contravention of the Municipal Finance Act¹ as a ground of review was introduced by the Applicant for the first time in their supplementary heads of argument, and not raised on affidavit.
3. The First Respondent was not given an opportunity to answer these allegations and the resultant prejudice is plain, as was held *Global Environment Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* (“*Global*”)² where in that case the Applicant attempted to make out a case in reply, the Court had the following to say, “*the reason is manifest – the other party may well be prejudiced because evidence may have been available to refute the new case on the facts.*” In this case it was worse, the ground was raised for the first time in argument.
4. Her Ladyship should have rejected the new ground of review and challenges raised by Applicant in accordance with the following further principles expressed in *Global*,³ “(I)n motion proceedings, the affidavits

¹ And other grounds of review and/or challenges which will be dealt with below.

² [2021] ZASCA 13 (09 February 2021) at par 96.

³ *Ibid* at par 95.

constitute both the pleadings and the evidence. The issues and averments in support of a party's case should appear clearly therefrom. They serve not, just to define the issues between the parties, but also to place the essential evidence before the court. An applicant must therefore raise in the founding affidavit the issues as well as the evidence upon which it relies to discharge the onus of proof residing on it."

5. It was accordingly not permissible for the court *a quo* to adjudicate upon disputes other than those defined in the affidavits.⁴
6. Her Ladyship should have found that all new grounds and/or challenges should be rejected on the basis set out above, and not have taken same into account in arriving at her judgment.
7. Her Ladyship further erred in finding that the First Respondent *divested its powers and responsibilities* in relation to consulting the community, as notices were issued by the Second Respondent, and the proposal and establishment of the SRA was driven by the Second Respondent.
8. Her Ladyship should have found that in terms of the Rates By-Law and the Part which were adopted by the First Respondent's council of 19 December 2017, a framework was recognised in terms of which owners of properties within the municipality could initiate the establishment of a SRA and undertake the improvement/upgrading of the SRS subject to the First Respondent's *oversight*, as specifically provided for in the Part.
9. Furthermore, Her Ladyship erred in not having regard to the purpose of the Part, which in terms of clause 2.1 "*...shall not detract from the entitlement of the municipality to initiate the establishment of a SRA and*

⁴ *Molusi & Others v Voges NO & Others* 2016 (3) SA 370 (CC) at par 27; *Minister of Safety and Security v Slabbert* [2020] 2 All SA 474 (SCA) at par 11.

to levy a SRA rate on SRA properties for the purposes of raising funds for the improvement or upgrading of the SRA in compliance with applicable legislation.” In the premise, there was no divesting of control.

10. Her Ladyship further erred in finding that the First Respondent also divested financial control in conflict with the Municipal Finance Management Act and Municipal Public-Private Partnership Regulations and in particular held that *“there [sic] is no evidence that certain requirements associated therewith, were adhered to, namely, notify the National Treasury of such intention in writing, conducting a feasibility study and then entering into a procurement process for the establishment of a commercial relationship.”*⁵
11. The First Respondent repeats *mutatis mutandis* the content stated above regarding new grounds of review and/or challenges raised for the first time in argument.
12. Had these grounds been raised by the Applicant in its founding papers, the First Respondent would have had an opportunity to answer to it. It did not and the First Respondent is criticised for its lack of explanation, in circumstances where it was not called upon to answer this issue.
13. In addition, and in any event, clause 2.3 of the Part expressly recognises that in certain instances, *“it would be justifiable for the accounting officer of the municipality to dispense with the official procurement processes established by the Supply Chain Management Policy of the municipality.”*

⁵ Paragraph 28 of the judgment.

14. This provision is in keeping with Regulation 36 of the Municipal Supply Chain Management Regulations published in terms of section 168 of the Local Government: Municipal Finance Management Act, which allows for deviations.
15. Accordingly, Her Ladyship should have found that this deviation was permissible in terms of the enabling legislation.
16. Her Ladyship further erred in finding that the public participation meetings were fraught with difficulties. In this regard Her Ladyship referred to:
 - 16.1. The special needs of those unable to read or write.
 - 16.2. The meeting having been conducted to the exclusion of the poor community.
 - 16.3. The failure to display the relevant documents at the municipality's satellite offices and various smaller settlements.
17. The First Respondent repeats *mutatis mutandis* the content stated above regarding the Applicant introducing new grounds of review and/or challenges in argument. Her Ladyship erred in not finding that there was an absence of primary facts to substantiate these grounds.⁶
18. This aspect is further compounded by the following statement in the Applicant's replying affidavit "*(B)e that as it may, the Applicant's case is*

⁶ Regarding primary facts, see *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (W) at 323G; *Willcox and Others v Commissioner of Inland Revenue* 1960 (4) SA 590 (A) at 602A; *Reynolds NO v Mocklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78I; *Ratlebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-E; *Hülse-Reuter and Others v Godde* 2001 (4) SA 1336 (SCA) at par 14; *Reese and Others v Harris and others* 2012 (1) SA 583 (GSJ) at par 33 – 36.

*focused on the content of the By-Law and the manner in which the SRA came into existence, not the public participation phase thereof.*⁷

19. In the Applicant's main heads of argument, the focus of the review is reiterated in one of the introductory paragraphs⁸ wherein they limit their submissions to address the By-Law and the Part being at odds with the Rates Act, 6 of 2004.⁹
20. Her Ladyship erred in having regard to new grounds of review and/or challenges, in absence of evidence substantiating these grounds, in circumstances where the Applicant confined themselves on affidavit to certain grounds which they intended to pursue (which confinement they later appeared to have disavowed by virtue of their supplementary heads of argument).
21. Her Ladyship erred in her finding that the First Respondent suffered from a further difficulty in that the municipal manager did not attend all the public participation meetings, in circumstances where there exists no such requirement (see clause 6.4 of the Part).¹⁰ All meetings were attended by a representative of the First Respondent, as is required by the Part.
22. Her Ladyship further erred in her finding that the SRA proposal should have been made by the First Respondent, not the Second Respondent.
23. By virtue of the By-Law and the Part, owners within the municipality's jurisdiction are expressly entitled to initiate the establishment of a SRA. It is within the First Respondent's council's sole and absolute discretion

⁷ Indexed application: p 533 par 25.2 – our own emphasis.

⁸ Indexed heads of argument: p 2 par 7.

⁹ Indexed heads of argument: pp 5 - 12 par 21 - 43.

¹⁰ Which reads "*the public meeting must be chaired by a suitably qualified and experienced person, attended by a representative of the Municipality...*"

to approve/not approve the SRA application (see clause 8.5 of Part), which it duly did.

24. Her Ladyship further erred in finding that a majority in favour of the SRA had *not* been achieved because '*numerous complaints*' were received '*pertaining to the exclusion of certain member of the community*'. The First Respondent repeats *mutatis mutandis* the content stated above regarding new grounds of attack and/or challenges.
25. Out of 1590 rateable properties within the proposed SRA, a total number of 807 valid '*yes*' votes were received. A majority in favour of the SRA was established.
26. A total of 39 objections were received after the vote after a public invitation notice was issued by First Respondent. These objections are not to be conflated with the votes. These objections were considered by the council at its special meeting where the SRA application was approved.
27. In the premise, Her Ladyship failed to appreciate that a majority vote was secured in favour of the SRA.
28. Her Ladyship furthermore erred in conflating the committee which *can* be established by the First Respondent to act as an advisory forum for the municipality in terms section 22(3)(d) of the Rates Act and the role of the Third Respondent, which are two entirely different bodies.
29. The Third Respondent is the management body established to manage and control the implementation of the SRA business plan, subject to the First Respondent's oversight.

30. Her Ladyship should have found that the Third Respondent's management and control of the implementation of the SRA is a permissible deviation.
31. Her Ladyship further erred in finding that the Third Respondent usurped the functions within the exclusive domain of the First Respondent.
32. Her Ladyship misdirected herself in finding that the First Respondent was prohibited from delegating certain functions to a third party (the management body) by virtue of the peremptory language of section 22 of the Rates Act, in circumstances where the By-Law and Part specifically cater for the appointment of a management body to implement the SRA, and where such deviations are sanctioned in terms of Municipal Supply Chain Management Regulations and the Part itself.
33. Her Ladyship further erred in finding that at the special meeting held on 19 December 2017 '*certain amendments were effected to the Rates By-Law and Policy,*' and adopted and promulgated without calling for public comment.
34. Factually, no amendments were made to the By-Law and Policy, as is apparent from the minutes of the special council meeting (annexure CDP7 of the answering affidavit).¹¹ Accordingly, Her Ladyship misdirected herself in this regard.
35. If Her Ladyship intended to refer in paragraph 34 of the judgment *a quo* to amendments made at the council meeting held on 23 May 2018, where the SRA application was considered and approved, such '*amendments*' constituted only a correction of a recordal error which bore no financial


¹¹ Indexed application: p 380.

implication on the owners of rateable properties. In the premise, Her Ladyship should have found that it was unnecessary for such '*proposed amendment*' to be published for comment.

36. Alternatively, Her Ladyship should have found that this constitutes a real factual dispute which cannot be determined on the affidavits alone and should have been referred for the hearing of oral evidence.
37. Her Ladyship further erred in declaring that section 23 of the Rates Policy, read with Part A thereof, unconstitutional, as being in conflict with section 22 of the Rates Act. No grounds exist for such a declarator, there being no such conflict. Her Ladyship further erred in not exercising her discretion in terms of section 172 of the Constitution of the Republic of South Africa, 1996 (without making any concession that the Policy and the Part are invalid).
38. For the aforesaid reasons Her Ladyship erred in granting the application and making the orders as set out in paragraphs 35.1 – 35.4 of the judgment *a quo*.

KINDLY PLACE THE APPLICATION ON THE ROLL ACCORDINGLY.

DATED at GQEBERHA on this the 9th DAY of MAY 2022



McWILLIAMS & ELLIOTT INC
First Respondent's attorneys
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GQEBERHA

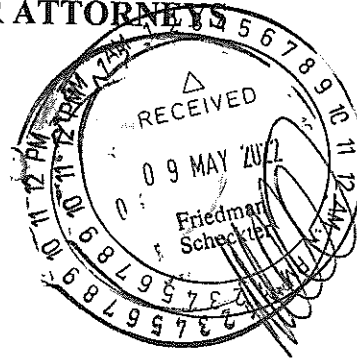
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Subject: ST FRANCIS BAY (WARD 12) // KOUGA LOCAL MUNICIPALITY & OTHERS - CASE NO: 3251/2018
Attachments: FIRST RESPONDENT'S NOTICE OF APPLICATION FOR LEAVE TO APPEAL.pdf

OUR REF: A. SNYDER/sm
YOUR REF:

Dear Sir

RE: ST FRANCIS BAY (WARD 12) // KOUGA LOCAL MUNICIPALITY & OTHERS - CASE NO: 3251/2018

Herewith for your kind attention:

*** First Respondent's Notice of Application for Leave to Appeal.

Kindly acknowledge receipt.

Sandy Masimla

Secretary to Alicea Snyder

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