

REPORTABLE : HIGH PRIORITY

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 4995/02

In the matter between:

ANITA MARIE ROBERTSON

First Applicant

GUY TREVOR ROBERTSON

Second Applicant

and

THE CITY OF CAPE TOWN

First Respondent

**THE MINISTER OF PROVINCIAL AND
LOCAL GOVERNMENT**

Second Respondent

CASE NO. 9507/02

In the matter between:

JACQUELINE MAY TRUMAN-BAKER

Applicant

and

THE CITY OF CAPE TOWN

Respondent

JUDGMENT: 31 MAY 2004

BOZALEK J:

Introduction

[1] These two applications concern the validity of the provisional valuation roll of properties in the area of jurisdiction of the City of Cape Town (*'the City'*) and the validity of property rates based on those valuations levied by the City for the 2002/3 municipal financial year. The applicants, property owners situated in Camps Bay and Bakhoven respectively, are dissatisfied by what they consider to be the exorbitant increase in the rates levied on their property for the 2002/3 municipal financial year. They attack the rates on the grounds that the provisional valuation roll was invalid or inoperative when the City levied rates based on the rolls' valuations.

[2] In late June 2002 the applicants in what I will term *'the Robertson matter'* (and whom I shall for convenience also refer to as *'the Robertsons'*) brought an urgent application against the City for an order interdicting and restraining it from levying and recovering property rates on the basis of property valuations contained in the

provisional valuation roll which the City opened for inspection and objection on 21 May 2002. The thrust of their case at that stage was directed at the City's reliance on the provisions of the Property Valuation Ordinance, 1993 (Cape) (hereinafter '*the PVO*') in establishing the provisional valuation roll and levying rates on valuations in terms thereof.

[3] The applicants contended that the City was not a local authority as defined in section 1 of the PVO and therefore was not entitled to rely on its provisions. They contended further that the PVO's administration had not been properly assigned to the Province of the Western Cape as required by the provisions of the interim Constitution and, finally, that there were no legislative provisions in existence which permitted the City to levy and recover property rates based upon valuations contained in a provisional valuation roll.

[4] The Robertson matter was due to be heard on 11 November 2002. In the interim, however, the City, pursuant to a '*legal audit*' which it conducted, had taken steps to seek remedial legislation to correct what it then saw as '*the legal technical defects*' in the relevant legislation. At that stage the City's attitude was that the hearing should be postponed to permit Parliament to rectify the defects in question. The postponement was duly granted.

[5] On 24 October 2002, the National Assembly passed the Local Government Laws Amendment Bill ('*the Amendment Bill*' or '*The Amendment Act*'), clause 21 of which dealt with the legal problems identified by the City's legal audit and contained in a memorandum directed to the National Assembly Portfolio Committee on Provincial and Local Government ('*the Portfolio Committee*'). Notwithstanding the fact that the Bill had yet to become legislation, the applicants indicated that they intended impugning its constitutionality. As a result on 11 November 2002 an order was granted, by consent, joining the second respondent ('*the Minister*'), as sponsor of the Bill, and postponing the matter for later hearing. On 5 December 2002 the Local Government Laws Amendment Act, No.51 of 2000 was promulgated, the Bill having been assented to by the President the previous day.

[6] On 29 November 2002 the applicant in the Truman-Baker matter launched proceedings against the City in which she sought a declaration that the City was not entitled to levy or recover property rates on the basis of the valuations in the provisional valuation roll prior to the coming into effect of the aforementioned amending legislation and interdicting the City from levying or recovering rates based on the aforesaid property valuations prior to the commencement of the Act. The comparatively limited scope of the relief sought in the Truman-Baker matter, with its implicit acceptance of the constitutional validity of the remedial legislation, sets it apart from the Robertson matter in which no such concession is made. During August 2003 all parties consented to a consolidation of the two matters which were set down for hearing on 22 October 2003.

Relief sought

[7] At the hearing the applicants in both matters amended the relief they sought. Applicants in the Robertson matter sought the following orders:

- '1. *Interdicting and restraining the [first] Respondent from levying and recovering property rates on the basis of property valuations contained in the provisional valuation roll which the [first] Respondent opened for inspection and objection on 21 May 2002.*
Alternatively
- 2 (a) *Declaring that, in terms of section 172(1)(a) of the*

Constitution, s 21 of the Local Government Laws Amendment Act, 51 of 2002, is invalid; and

- (b) *Interdicting and restraining the first Respondent from levying and recovering property rates on the basis of property valuations contained in the provisional valuation roll which the first Respondent opened for inspection on 21 May 2002.'*

[8] In the Truman-Baker matter the relief finally sought was an order:

- '(a) *Interdicting and restraining [first] Respondent from levying and recovering property rates from Applicant for the financial year 1 July 2002 to 30 June 2003 on the basis of the property valuations contained in the Provisional Valuation Roll which Respondent opened for inspection and objection on 21 May 2002.'*

The background to the applications

[9] It is firstly necessary to set out in some detail the recent history of local government development in the Cape Town metropolitan area over the last decade. That process, mirrored in similar exercises across the country, was one of transforming racially determined local government into democratically determined local government. This complex process, involving a pre-interim transitional period, an interim period and a final phase, was described in general terms by the Constitutional Court in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*¹, similarly a case involving a challenge by ratepayers to the levying of increased rates.

[10] This history, as it applies to the greater Cape Town area, is common cause. The process culminated on 5 December 2001 with the establishment of the City as a municipality in terms of the Local Government: Municipal Structures Act, 117 of 1998, (*the Structures Act*), incorporating six municipal local councils falling within the Cape Metropolitan Area (*the CMA*). They were the municipalities of The City of Cape Town, The South Peninsula, Blaauwberg, Oostenberg, Tygerberg and Helderberg. Prior to this there had been a pre-interim phase running from 2 February 1994, the date of commencement of the commencement of the Local Government Transition Act, 209 of 1993 (*the Transition Act*) until the first democratic local government elections were held in the CMA on 29 May 1996. Thereafter followed the interim phase which ended with the establishment of the City of Cape Town as one overall municipality.

[11] During the interim phase the then existing municipalities in the CMA determined that it was necessary to conduct a metropolitan-wide general valuation of properties. They separately resolved to authorise such a valuation in their areas of jurisdiction, the base date of which would be 1 January 2000. Prior thereto there existed a variety of different valuation rolls with different base dates within the CMA, some more than twenty years old. The discrepancies between '*rates values*' and actual values of properties, coupled with across-the-board uniform property rates increases, led to a perception in some quarters of an unfair distribution of the rates burden and complaints of unfair discrimination.

[12] In *Lotus River, Ottery, Grassy Park Residents Association and Another v South Peninsula Municipality*,² a ratepayers association in one of the six metropolitan

¹ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at 381F-382E

² 1999 (2) SA 817 (C) (*the Logra case*)

local councils which was later incorporated into the City, challenged a uniform increase in the levy for property rates on the basis that it contravened its members' constitutional right to equality. It contended that, given the far greater rate of increase in the value of properties in traditionally white-owned suburbs, such uniform increases reinforced existing inequities and impacted differentially upon black property owners in previously disadvantaged areas. The Court dismissed the challenge holding that, although there was a breach of the applicants' rights to equality, it was, in the circumstances in which the respondent municipality found itself, justifiable in terms of section 36(1) of the Constitution.

[13] Amongst the circumstances advanced by the respondent municipality in justifying its decision to impose a uniform increase was that it was working with an outdated valuation roll and a new roll would only be completed in time for the 1999/2000 budget. In the course of its limitation enquiry the Court made the following remarks:

*'Were respondent to breach its undertaking to complete the new valuation roll in time for the 1999/2000 budget, the position could well be different in that it would be far more difficult to prove that there were not less restrictive means available. In other words, should the council now delay in its undertaking, its justification would have to be analysed differently.'*³

It would not be far-fetched to describe these remarks as a warning shot across the bows of those municipalities soon to be incorporated in the UniCity.

[14] As part of the process of local government development the Unicity Commission, a multi-party transitional body, was established on 25 November 1999 to act as a midwife to the single municipality for the CMA established pursuant to the municipal elections scheduled for 5 December 2000. During the Unicity Commission's existence it was mandated by the six metropolitan local councils to manage the general property valuation which was conducted on a *'land and improvements'* basis with the view to implementation on 1 July 2002. The valuation was conducted in terms of the PVO read with section 93(4) and (5) of the Structures Act, which permitted, pursuant to the insertion of section 10G(6A) in the Transition Act – the use of computer assisted mass appraisal systems or techniques. Shortly after the establishment of the City on 5 December 2000 it resolved to continue with the general valuation and in March 2002 the provisional valuation roll was finalised and advertised in terms of section 15(1) of the PVO.

[15] On 29 May 2002 the City's council resolved that property rates and tariffs for the 2002/2003 municipal financial year be levied in accordance with the 2000 General Valuation Roll, presumably a reference to the provisional roll referred to above. The relevant part of the resolution reads as follows:

'It was resolved that:

...

(d) In terms of Section 10G(7) of the Local Government Transition Act 1993, and for the purposes of balancing the Estimates, the rates be set out as below:

i) Property Rates be levied in accordance with the 2000 General Valuation Roll...'

[16] The general valuation which produced the provisional roll was accompanied by opposition both from some individuals and ratepayer associations. This was not surprising since the property valuations based on the provisional valuation roll led to far reaching financial implications for many property owners. In the case of the

³ At 833E

Robertsons the new rating system led to a 113% increase in their rates for the year 1 July 2002 to 30 June 2003. In the case of Ms Truman-Baker it led to a more than fourfold increase in the rates and service charges which she was called upon to pay.

[17] Before resolving to levy rates based on the provisional roll, the City conducted a legal audit. As a result certain legal problems were identified relating to the City's utilisation of the PVO. These '*technical legal problems*' ultimately formed the basis upon which the Robertsons challenged the rates and service charges levied upon their property with effect from 1 July 2002 onwards. They also formed the subject matter of the remedial legislation which the City pressed for and which was ultimately passed in the form of section 21 of the Amendment Act, 51 of 2002, ('the *Amendment Act*') which amended section 93 of the Structures Act.

[18] In a memorandum dated 11 June 2002, prepared by the Unicity's legal attorney, the problems were specified as follows:

- '(a) *the PVO was not continued in force upon the commencement of the interim Constitution on 27 April 1994, because, though enacted on 8 December 1993, it only came into operation on 1 July 1994, and therefore was not "in force" immediately before that commencement (s 229 of the interim Constitution);*
- (b) *for the same reason:*
 - i) *the PVO's administration was not validly assigned by the President to the Eastern Cape, Northern Cape and Western Cape Provinces (s 235(6) and (8) of the interim Constitution);*
 - ii) *the PVO was not validly amended in the Western Cape;*
 - iii) *the PVO can only be retroactively validated and amended (to deal with the issue in (c) below) by the national Parliament;*
- (c) *it is arguable that the PVO does not apply to local authorities established in terms of the Structures Act because:*
 - i) *in its original form, the PVO defines "local authority" with reference to pre-Local Government Transition Act, 209 of 1993 ("LGTA") local authorities; and*
 - ii) *as amended in the Western Cape, the PVO defines "local authority" with reference to municipalities established in terms of the LGTA – compare section 14(1) of the Structures Act which provides that the new municipalities are the successors in law of the old;*
- (d) *it is arguable that express provision must be made to permit municipalities to rely on valuations appearing on provisional valuation rolls when determining property rates.*

[19] These problems were addressed by the enactment of section 21 of the Amendment Act in December 2002. It amended section 93 of the Structures Act by adding the following subsections

- '(7) *Despite Proclamation No. 148 of 8 December 1993 (Province of the Cape of Good Hope Gazette 4833 of 22 December 1993) and section 38 of the Property Valuation Ordinance, 1993 (Cape), the said Ordinance is deemed to have come into force –*
- (a) *for the purposes of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), immediately before the commencement of that Constitution; and*
- (b) *for all other purposes, on 1 July 1994.*
- (8)(a) *With effect from 5 December 2000 and subject to paragraph (b), any reference in a law referred to in item 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996 (Act No. 108 of*

1996), to a municipal council, municipality, local authority or applicable designation of a local government structure, must be construed as a reference to a municipal council or a municipality established in terms of this Act, as the case may be.

- (b) Paragraph (a) only applies to a law referred to in item 2 of Schedule 6 to the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), in so far as such a law is still applicable or becomes applicable to a municipal council or a municipality, as the case may be, at the time the Local Government Laws Amendment Act, 2002, comes into effect.
- (9) Until the legislation envisaged in section 229(2)(b) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), is enacted, a municipality may use the valuations appearing on a provisional valuation roll or an additional valuation roll when imposing property rates.
- (10) Subsections (7), (8) and (9) apply to matters that are the subject of pending litigation.'

Issues in dispute in the Robertson matter

[20] Although the Robertson and Truman-Baker matters overlap it is convenient to deal firstly with the former. In the Robertson matter a three point attack is made on the validity of the provisional valuation roll and hence the rates levied by the City for the 2002/2003 financial year. The points are as follows:

- i The PVO was not legislation '*in force*' as contemplated by section 229 of the interim Constitution⁴ when the interim Constitution commenced on 27 April 1994 and its administration could therefore not be properly assigned to the province of the Western Cape (as was purportedly done);
- ii even assuming that the PVO was a law in force in the Province of the Western Cape, the City is not a '*local authority*' as defined in section 1 of the PVO and hence could not validly exercise powers in terms of the PVO;
- iii assuming that the PVO was a law in force and furthermore that the City is a local authority as defined by the PVO, that ordinance did not permit the City to levy and recover property rates based upon valuations recorded in a provisional valuation roll.

[21] At the first hearing the Robertson matter was postponed pending the enactment of the Amendment Act, 51 of 2002. The applicants then filed supplementary founding papers contending that the newly introduced sections 93(7), (8), (9) and (10) of the Structures Act were unconstitutional and invalid. Assuming then that at least some of the challenges in paragraph 20 are answered in favour of the applicants the following further questions may arise for determination:

21.1 Should it be found that the PVO was not a law '*in force*', is the new section 93(7) of the Structures Act which purports to revive the PVO, ineffective because such an amendment can only be affected by constitutional amendment and section 93(7) does not purport to make such an amendment or is the attempted revival of the PVO invalid because although it purports to have been constitutionally amended, it has not been enacted in the manner required for amendments of the Constitution?;

21.2 In any event, was section 21 of the Amendment Act invalid for

⁴ Constitution of the Republic of South Africa Act, 200 of 1993.

want of publication for public comment in terms of section 154(2) of the Constitution?;

21.3 Again, in any event, was section 21 of the Amendment Act invalid by reason of non-compliance with section 229(5) of the Constitution which requires the Financial and Fiscal Commission ('*the FFC*') to be consulted before the enactment of national legislation regulating the powers of municipalities to impose rates on property?

[22] In keeping with the rule that in general a court should decide no more than what is absolutely necessary for the adjudication of a matter, particularly in constitutional matters,⁵ I shall address the initial three challenges to the rates decision and, only if the answers require it, shall I consider the constitutional challenges. I turn now to deal with the first major question.

Is the PVO a law "in force" ?

[23] The PVO was enacted on 8 December 1993 and thereafter promulgated on 22 December 1993. It repealed and replaced the old Cape Valuation Ordinance 26 of 1944 but did not come into force on the latter date because it provided in section 38 that it would only come into operation on 1 July 1994. During this hiatus period the interim Constitution came into effect on 27 April 1994. Section 229 thereof provided that all laws '*in force*' immediately before its commencement, would '*continue in force*' thereafter.

[24] The Robertsons contend that since the PVO was not operative when the interim Constitution came into operation, it was not law '*in force*' whose existence was perpetuated by section 229 of the interim Constitution. They appear to contend that the PVO lapsed and thus, when the interim Constitution was replaced by the final Constitution, it did not '*continue in force*' in terms of section 2(1) of schedule 6 of the final Constitution. This appears also to have been the view initially held by the City. However, by the time of argument, its views had changed and it aligned itself with the position adopted by the Minister who contended that the PVO was indeed '*in force*' immediately before the commencement of the interim Constitution.

[25] Mr **Trengove**, who appeared together with Mr **Coppin** for the Minister, relied on the case of *R v Detody* 1926 (AD) 198 in which the provisions of section 135 of the South Africa Act of 1909 fell to be interpreted. That section provided that, subject to the provisions of the Act, all laws in force in the several colonies at the establishment of the Union would continue in force in the respective provinces until repealed or amended by Parliament or by the Provincial Councils. In interpreting the phrase '*in force*' the majority of the court held that Parliament had adopted the English rule that a statute remains in force until duly repealed. It further held, per Innes CJ, that by '*the words "in force" must, ... , be understood "in existence on the statute book"*'⁶ (my emphasis). This was an authoritative interpretation of a provision which has been repeated in substantially identical terms in subsequent constitutions. It appears to me then that, when section 229 of the interim Constitution and item 21 in Schedule 6 of the final Constitution provide for the perpetuation of laws '*in force*', they must be understood to perpetuate all laws '*in existence on the statute book*' whether or not they have been put into operation.⁷

⁵ *Kauesa v Minister of Home Affairs, Namibia & Others* 1995 (11) BCLR 1540 (NmS) and *Zantsi v Council of State, Ciskei* 1995 (1) BCLR 1424 and *S v Mhlungu & Others* 1995 (7) BCLR 793 (CC) 821F-G at 59.

⁶ At 201

⁷ See also *Ynuico Ltd v Minister of Trade and Industry and Others* 1996 (3) SA 989 (CC) at 994 para 7 where the Constitutional Court held that a '*law*' within the meaning of section 229

[26] There are further reasons which support the conclusion that the PVO was a law in force at the relevant time. The first is the requirement that section 229 of the interim Constitution and item 2(1) of schedule 6 of the final Constitution must be purposively interpreted so as to give effect to their purpose and not to undermine it. In *S v Jordan*⁸ the Constitutional Court, referring to pre-democratic statutes which might have been influenced by *'the racist and authoritarian intentions of past legislators'*, stated that *'(i)n response to this problem, the interim Constitution envisaged a principle of interpretation designed to promote principled legislative continuity rather than radical legislative rupture'*. In *Ynuico*,⁹ Didcott J, dealing with the same problem explained the rationale behind section 229 of the interim Constitution as follows:

*'The explanation for that was obviously the impracticality of dismantling all our old statutory law in one fell swoop when nothing had yet been constructed to replace it, a treatment which would have thrown the governmental, administrative and economic infra-structure and functioning of the country into immediate chaos.'*¹⁰

[27] Secondly, it is to be noted that in the headings of section 229 and item 2(1), where they speak of laws *'in force'* include all *'existing law(s)'*. Furthermore section 234(5) of the interim Constitution provided that all legislation in the process of enactment in Parliament or any other legislature upon commencement of the interim Constitution *'shall lapse upon such commencement'*. Significantly, it did not also provide for legislation already enacted but not yet in operation to lapse.

[28] Furthermore, to give the notion of law *'in force'* the meaning which the applicants contend for would lead to anomalous if not absurd consequences. It would mean that there was a *lacuna* in both the interim and final Constitutions and that neither catered for laws enacted but not yet in operation when the respective constitutions took effect. The *lacuna* would extend furthermore to previous constitutions, namely the 1909 Constitution and the 1961 Constitution, since both had sections in terms similar to that found in section 229.¹¹ One such anomalous consequence would be that if the affected act was an amendment act which made changes to existing legislation, the amendments would fall by the wayside whilst the existing legislation continued in force unamended. Further, if the affected act repealed its predecessor, the effect of the commencement of the new constitution would have been not only to lapse the new act but to perpetuate the life of its predecessor despite the legislator's intention to replace the one with the other.

[29] In my view all these considerations weigh powerfully against the interpretation which applicants seek to place on the term *'in force'*, in section 229. I have come to the conclusion that the PVO was indeed law *'in force'* immediately prior to the commencement of the interim Constitution and was thereby perpetuated by section 229 of the interim Constitution and item 2(1) of Schedule 6 of the final Constitution.

of the interim Constitution has the same meaning as a *'law'* as defined in section 2 of the Interpretation Act, 33 of 1957. It defines a law as *inter alia* any ordinance *'having the force of law'*.

⁸ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) at para 112.

⁹ *Supra* at page 994 para E-F

¹⁰ See also *Trivett & Co. v W M Brandt's Sons & Co. Ltd* 1975 (3) SA 423 (A) at 433 and *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 32.

¹¹ Section 135 of the 1909 Constitution, section 107 of the 1961 Constitution and section 87 of the 1983 Constitution.

[30] It follows then that the precaution taken by the introduction of the new section 93(7) of the Structures Act (by section 21 of the Amendment Act) was not necessary and had no effect beyond confirming the existing position.

Is the City a “local authority” as defined in the PVO?

[31] Section 1 of the PVO defines a local authority as meaning ‘a local council, a metropolitan local council, a representative council, a rural council and a district council as defined in section 10(B) of the Local Government Transition Act, 1993’. The City is, however, a municipality established in terms of the Structures Act. Applicants’ case is that prior to the introduction of section 93(8) of the Structures Act (by means of section 21 of the Amendment Act) it was characterised by a *casus omissus*, one furthermore, which the courts could not fill.

[32] The original definition of a local authority in the PVO was amended on 6 June 1997 by Ordinance 8 of 1997 which set out the definition as above with its reference to section 10(B) of the Transition Act. At this interim phase of local government development municipalities in their final form, as were to be established in terms of the yet to be enacted Structures Act, obviously did not exist.

[33] To the extent then that such municipalities would in their general property valuations seek to rely on the provisions of the PVO, some enactment effecting such an authority has to be identified. It is common cause that the exercise performed by the City which culminated in the levying of rates based on a provisional roll for the 2002/2003 budget, was conducted in terms of the PVO.

[34] This link can first be sought in the transitional arrangements clause and specifically in subsections 93(4) and (5) of the Structures Act. These subsections provide, insofar as it is relevant:

‘Application of this Act and transitional arrangements

.....

(4) *Despite anything to the contrary in any other law and as from the date on which a municipal council has been declared elected as contemplated in item 26(1)(a) of Schedule 6 to the Constitution –*

(a) *section 10G of the Local Government Transition Act, 1993 (Act 209 of 1993), read with the necessary changes, apply to such a municipality; and*

.....

(5) *For purposes of subsection (4) –*

(a) *any reference in section 10G of the Local Government Transition Act, 1993 (Act 209 of 1993), or a regulation referred to in subsection (4)(b), to –*

.....

(iii) *“local council”, “metropolitan council”, “metropolitan local council” and “rural council” must be construed as a reference to a municipal council.*

[35] Section 10G of the Transition Act deals with financial matters and sets out at some length the financial standards which every municipality has to comply with. It covers a wide range of subjects dealing amongst others with financial records, the drawing up of budgets, the keeping of accounts, responsibility for losses suffered by a municipality and unauthorised expenditure, all measures designed to ensure financial prudence. Section 10G(6) provides for the valuation of properties within the local authority’s area of jurisdiction but does so relatively briefly and in broad terms using phrases such as *‘subject to any other law’* and *‘all procedures prescribed by*

law. Section 10G(7)(a) provides that a local authority can levy and recover property rates in respect of immovable property provided that a common rating system is used.

[36] The provisions of sections 93(5)(iii) of the Structures Act indicate that the legislature recognised the distinction between a new municipality and those local authorities which existed during the pre-interim phases. However the savings or transitional provisions introduced in section 93(4) and (5) were of limited scope as indicated by their confinement to the continued applicability of section 10G of the Transition Act and by the introductory phrase in section 93(5)(a) '[f]or the purposes of subsection (4)'].

[37] Accordingly, in my view sections 93(4) and (5) of the Structures Act cannot, even by implication, be seen as authorising a municipality to exercise the powers contained in the PVO. Section 10G of the Transition Act, although dealing in broad terms with the valuation of immovable property and the levy and recovery of property rates, not only by its generality, but by its various references to '*procedures*' or '*at intervals prescribed by law*' indicates that any valuation exercise would be governed by the terms of whatever other ordinance or statute was applicable, save to the extent that it was in conflict with any of the provisions of section 10G.

[38] Mr **Binns-Ward**, who together with Mr **Breitenbach** appeared for the City, relied also on section 14, read with section 12, of the Structures Act as providing an independent source of authority for a municipality established in terms of the Structures Act to utilise the provisions of the PVO for the valuation of property and the levying of rates thereon. Section 12 provides for the MEC for Local Government, Provincial, to establish a municipality by notice in the Provincial Gazette and what such notice must contain. Section 14 is entitled '*Regulation of effects of establishment of municipality on existing municipalities*' and provides for the supersession by the newly established municipality of the existing municipality or municipalities within the relevant area. The section, insofar as it is relevant, reads as follows:

- '1.
- (b) *the superseding municipality becomes the successor in law of the existing municipality subject to paragraph (c);*
 - (c) *where a district municipality or one or more local municipalities within the area of the district municipality supersede the existing municipality or municipalities in that area, the district and local municipalities in that area become the successors in law of the existing municipality or municipalities depending on the specific assets, liabilities, rights and obligations allocated to the district and local municipalities respectively in terms of the relevant section 12 notice or notices.'*

[39] The section then proceeds to deal *inter alia* with what the section 12 notice must provide. Not only must it provide for the '*disestablishment of the existing municipality*' but it must also '*regulate the legal, practical and other consequences of the total or partial disestablishment of the existing municipality, ...*'

[40] Sections 12 and 14 of the Structures Act provide a device to implement a smooth transition from interim local authorities to municipalities or local authorities established for the final phase of the local government development process. Subsections 14(2)(b)(i)–(iv) indicate the subject matter which the legislature had in mind would be dealt with by a section 12 notice providing for the regulation of the legal, practical and other consequences of the disestablishment of the existing

municipality(ies). These are matters of a housekeeping or internal nature, for example, staff transfers, transfer of assets, liabilities, rights and obligations, administrative records and the like. On the face of it section 14 does not appear to have been intended as a measure of general application dealing with the question of what pre-existing empowering legislation would continue to apply to all municipalities newly established in terms of the Structures Act.

[41] This interpretation is strengthened by the interplay between 14(1)(b) and 14(1)(c) which makes it plain that the extent to which the superseding municipality becomes successor to its predecessor municipality(ies) is dependent on the '*bequest*' which is made to it in the section 12 notice. Moreover, no mention is made in section 14(1)(c) of '*statutory powers*' or even '*powers*' which would be a more apt description of a municipality's right to levy rates on a provisional valuation roll.

[42] This view is strengthened by the terms of the Section 12 Notice itself.¹² Amongst the matters dealt with were the transfer of staff, human resource matters, the appointment of officers and the first meeting of the municipality. Under the heading '*Legal Succession*' provision was made for the municipality to be the superseding municipality in respect of the disestablished municipalities and to become their successor in law. Provision was also made for the preservation of the existing bylaws and resolutions but no attempt was made, beyond the general statement of legal succession, to record what statutory powers or ordinances the newly established municipality would have at its disposal. The notice did provide for the continuation of existing valuation rolls '*until the introduction of a general valuation roll for the area of the municipality*' but did not directly address the question of whether the City was empowered to carry on the general valuation process which had been commenced by the UniCity Commission and which eventually culminated in the publication by the City of a new provisional valuation roll in May 2002.

[43] At an earlier point the Transition Act itself recognised the need for a savings provision at that stage of development in local government. It was specifically provided in section 16(2) thereof that:

*'... [t]he provisions of the laws applying to local authorities in the province concerned shall **mutatis mutandis** apply to any transitional council or transitional metropolitan substructure ...'*

[44] Apart from section 93(4) and (5), with its limited reach, and prior to the introduction of section 93(8) through the Amendment Act, the Structures Act contained no transitional or savings provisions similar to that contained in section 16 of the Transition Act. Clearly the legislature did not regard section 14(1) itself as constituting a full savings provision, otherwise the provisions of sections 95(3) and (4) would appear to have been superfluous. The introduction of section 93(8) itself tends to suggest that the legislature recognised that there had been an omission in failing to provide statutorily that municipalities newly established in terms of the Structures Act were to be regulated by the same laws which applied to their predecessors or to interim phase local authorities to the extent that such laws were still applicable or were to become applicable.

[45] Taking into account all the circumstances set out above, I have come to the conclusion that there was indeed a *casus omissus* by which the applicability of the

¹² Provincial Gazette No.5588 of 22 September 2000. See Record (R) 107-115

PVO to newly established municipalities was not reserved or saved. In these circumstances the dictum of Schreiner JA in *Jaga v Dönges* is apposite.¹³

*'Ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences and even despite the interpreter's firm belief, not supportable by factors within the limits of interpretation, that the legislator had some other interpretation. So too, if, when interpretation is complete, it is clear that the legislator has failed to deal with a class of case that in all probability would have been dealt with if it had not been overlooked, there is a **casus omissus** which the courts cannot fill.'*

[46] It follows then, in my view that the amendment contained in section 93(8) of the Structures was indeed a necessary amendment for the validity of the valuation and rating exercise conducted by the City.

Was the City entitled to utilise a provisional valuation roll for the purposes of levying rates?

[47] Given my finding that the City was not a '*local authority*' as defined by the PVO it is unnecessary for me to determine the question of whether it was entitled to levy rates on the basis of a provisional valuation roll. Nonetheless, in the interests of minimising the number of hearings which this matter may involve, it is perhaps appropriate for the Court to express its view on the question.

[48] The answer to the question is not immediately apparent either from the terms of the PVO itself or from its general scheme. A provisional valuation roll is a valuation roll in evolution and is subject to a process of preparation, inspection, objection, consideration of those objections and certification which could very easily endure for several years. In the normal course of events, and assuming that a valuation process has been completed at least once before in the life of a local authority, rates would normally be levied only on the (final) valuation roll (namely the provisional valuation roll which has been certified and has in terms of section 18(3) become '*final and binding on all persons concerned for the financial year or years in respect of which the valuation concerned is valid ...*'. The City found itself with no single valuation roll. Against the background of the *Logra* case¹⁴ and given the provisions of section 10G(6)(b) of the Transition Act which required local authorities to compile such a valuation roll, the City's need to introduce one as soon as possible can be appreciated. In that event reliance would perforce have to be placed on a provisional roll with any adjustments to the rates levied on the basis thereof being made before or upon eventual certification of the provisional roll. This, would, however, be an unusual exercise and, in my view, one which would have to be specifically authorised.

[49] No such specific provision can be found in the PVO. This is to be contrasted with Cape Ordinance No.20 of 1974 which provides in section 86(1A) that a council of a municipality may assess rates on ratable property recorded on a provisional valuation roll for a financial year to which such roll is applicable, provided that, except with the approval of the Administrator, such rate was not to be assessed for more than one financial year in succession. This provision however was not called into aid by the City in the present matter since the new municipality of Cape Town, established as it is pursuant to the Structures Act, is not a municipality as defined in the Municipal Ordinance.

¹³ *Jaga v Dönges and Another; Bhana v Dönges N.O. and another* 1950 (4) SA 653 (A) at 664F-H.

¹⁴ *Supra*

[50] What the City did place reliance on was section 10G(6) and (7) of the Transition Act which is preserved by virtue of section 93(4) and (5) of the Structures Act and which continue to govern the imposition of property rates by municipalities. Section 10G(6)(b) thereof requires the City to ensure that '*a single valuation roll of all properties so valued or measured is compiled and is open for public inspection.*' Section 10G(7)(a)(i) requires that '*a common rating system as determined by the metropolitan council shall be applicable within the area of jurisdiction of the metropolitan council.*' Underlying these provisions, seen within the context of the ongoing process of democratisation of local government, appears to be the goal of a single valuation roll and a common rating system to ensure that the rates burden falls equally upon all property owners commensurate with the value of the property owned by them.

[51] However section 10G refers on more than one occasion to compliance with other provisions '*prescribed by law*', thereby indicating that section 10G did not purport to deal exhaustively with the subject matter of valuation rolls and a rating system. It appears to me to be unduly expansive and unwarranted to interpret section 10G as in itself authorising the use of a provisional valuation roll for rating purposes.

[52] Section 93(9) of the Structures Act sought to remedy the lack of a clear provision that the City, or other municipalities in its position, could rely on a provisional additional valuation roll when imposing property rates.

[53] Apart from the above considerations the fact is that the City did not initially purport to rely on the provisions of section 10G(7) of the Structures Act but rather on the PVO. The City issued to rate-payers '*Notice(s) to owner of particulars of property entered on the provisional valuation roll for the financial year 2002/2003.*' This notice refers to the provisions of the PVO and in particular to sections 15(2) and (9) thereof. Clearly, from the point of view of the City, insofar as section 10G(6)(a) and 10G(6)(c) of the Structures Act refer to '*at intervals prescribed by law*' and '*all procedures prescribed by law*', that '*law*' was the PVO. Having made an election to proceed with its valuation exercise in terms of the PVO it was not open to the City, upon its subsequent realisation that the PVO was, at least arguably, not at its disposal, to simply say that it had the power to rely on a provisional valuation roll in terms of the more generally stated provisions of section (10G) of the Structures Act. In contrast to the provisions of the Structures Act (which in any event itself envisages a complementary law to regulate valuation procedures) the PVO sets up a sophisticated valuation system providing for a provisional valuation roll, notices calling for objections and the consequences of certification of a provisional valuation roll. (See sections 15 to 18 of the PVO.) No similar provisions are to be found in section 10G of the Structures Act. In these circumstances it appears to me that it is not open to the City to abandon its reliance on the provisions of the PVO and, faced with a challenge to the rates levied on the basis of the PVO, put up as an answer that it had the power to utilise a provisional roll in terms of the Structures Act. That statute in no way regulates, in any detail, the system of a provisional valuation roll.¹⁵ Such conduct on the part of the City, it appears to me, offends against the principle of legality enunciated in *Fedsure Life Assurance Ltd*¹⁶ which holds that public bodies are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.¹⁷ In the present matter the City

¹⁵ See in this regard *Mohr v Divisional Council, Cape* 1976 (2) SA 905 (A), 915A-C

¹⁶ *Supra*

¹⁷ See *Fedsure (supra)* at paras 56-58

purported to exercise a power or perform a function beyond that conferred upon it by law.

[54] In the circumstances I find that even had the PVO been at the disposal of the City, it would not have been entitled, without the enactment of section 93(9) of the Structures Act, to provide for a rating dispensation based upon a provisional valuation roll for the 2002/3 financial year.

The Constitutional challenges

[55] In the light of the findings which I have made in relation to the first three questions raised in this matter, it follows that in order for the rates decisions underlying the City's 2002/2003 budget to stand as valid, the City requires the assistance of section 93(8) and (9) and, at least in relation to the Truman-Baker matter, that of section 93(10) of the Structures Act. It will be recalled that, in view of my finding that the PVO was law *'in force'* at the relevant time, section 93(7) of the Structures Act is superfluous for present purposes.

[56] Accordingly it is not necessary for me to address applicants' first constitutional challenge to section 21, namely that directed against section 93(7) thereof, to the effect that such an amendment can only be effected by constitutional amendment.

[57] Before considering the remaining constitutional challenges however, it is necessary to set out the nature and legislative history of the Amendment Act, with particular focus on the genesis of section 21 thereof and the role of the FFC.

[58] The Amendment Act was fairly described by the Deputy Director General (*'the DDG'*) in the Minister's department as an omnibus statute by which a wide range of amendments were made to the laws applicable to local government. It affected some forty seven amendments to six local government laws and repealed certain provisions of ten other local government laws. The Amendment Act and the local government laws that it amended and repealed can fairly be described as complex pieces of legislation with wide ranging and intricate provisions.

[59] The legislative history of the Amendment Act and in particular section 21 thereof, is as follows:

59.1 The National Department of Provincial and Local Government (*'the Department'*) prepared the Bill and published it for public comment in terms of section 154 of the Constitution on 15 March 2003.

59.2 On 29 May 2002 Mr Evans, an attorney retained by the City, addressed letters to the Minister, the Chair of the Parliamentary Rules Committee and the Chair of the Portfolio Committee proposing certain additions to address the problems described in a memorandum that accompanied his letters.

59.3 Clause 29 of the Bill as published provided for the amendment of section 93 of the Structures Act but did not include or envisage the amendments to that section ultimately made by section 21 of the Amendment Act.

59.4 On 19 June 2002 the Portfolio Committee held a meeting to consider its business at which meeting Mr Evans was afforded an opportunity to present the problems alluded to in his memorandum.¹⁸

59.5 On 20 June 2002 the Portfolio Committee unanimously adopted

¹⁸ Record (R) 850 para 14

a report supporting the City's proposal that its problems with the PVO be addressed in the Amendment Act.

- 59.6 The report¹⁹ recorded that property valuations had been undertaken in the Eastern, Northern and Western Cape in terms of the PVO but that legal challenges might arise in regard to the applicability of the ordinance. It identified a need for '*legal certainty*' regarding the applicability and interpretation of the ordinance and saw the imminent processing of the Local Government Laws Amendment Bill as a '*window of opportunity*' to address the abovementioned concerns. It duly made a recommendation to that effect.
- 59.7 On 24 June 2002 the National Assembly unanimously adopted the Portfolio Committee's report whereupon the Department prepared an amendment of clause 29 of the Bill that provided for the amendment of section 93 of the Structures Act to address the problems Mr Evans had raised on behalf of the City. By 2 July 2002 the first redraft of the Bill was available.
- 59.8 The Bill underwent further revisions including the crucial clause 29 and on 16 August 2002 a copy of the revised Bill was sent by the Department to the FFC under cover of a letter.
- 59.9 That draft bill contained the same version of the amendment to section 93 of the Structures Act as the Bill which was subsequently introduced into the National Assembly. It contained what subsequently became section 93(7) and (8) of the Structures Act but contained no trace of what became section 93(9) and (10) thereof.
- 59.10 The covering letter to the FFC referred to the relevant provisions as being '*important*' and stated that the legislative measures were necessary to create certainty as a result of the validity of the PVO being challenged. It stated further that '*as this amendment could be interpreted to be regulation in terms of National Legislation as provided for in section 229 of the Constitution, 1996 you are hereby consulted in this matter as required in terms of section 229(5) of the constitution*' and invited the FFC's comments, if any.
- 59.11 On 29 August 2002 the Chairperson of the FFC replied in writing that, upon scrutiny, it was the FFC's view that the matters therein were of a '*legal and transitional nature*' and no comment was made in regard thereto.
- 59.12 The Bill then was submitted to Cabinet which approved it on 18 September 2002.
- 59.13 The Portfolio Committee formally considered the Bill on 25 September 2002. The Chair announced that public hearings on the Bill would be held from 15 October 2002 and the Bill was introduced in the National Assembly on 14 October 2002.²⁰
- 59.14. The hearings commenced and the Portfolio Committee's consideration of the Bill continued until 22 October 2002. In the course of the hearings on 16 October 2002 Mr Evans proposed further amendments to clause 20 of the Bill which eventually became section 21(9) and (10) of the Amendment Act.
- 59.15 The Chair of the FFC, Mr M Morobe, attended the hearings on 16 October 2002.
- 59.16 The Portfolio Committee concluded its deliberations on 22 October 2002 and approved the Bill subject to certain amendments which are of no present relevance.

¹⁹ Record (R) page 695 Annexure MJRE 9.

²⁰ Record (R) page 853 paras 24 & 25

59.17 The Bill as amended by the Portfolio Committee came before the National Assembly on 24 October 2002 and was passed by it.

59.18 The Bill was then referred to a National Council of Provinces which passed the Bill on 7 November 2002.

59.19 The President assented to the Bill on 4 December 2002 and it was published in the *Government Gazette* on 5 December 2002.

Compliance with section 154(2) of the Constitution

[60] Against the above background the Robertsons' first constitutional challenge must be considered, namely, that the draft amending legislation was not published in compliance with section 154(2) of the Constitution.

[61] Section 154(2) reads as follows:

'Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.'

[62] It was common cause that a draft of the Amendment Act was published for public comment in terms of section 154(2) on 15 March 2002.²¹ Although clause 20 of the draft provided for the amendment of section 93 of the Structures Act, it did not provide for any of the amendments ultimately made by section 21 of the Amendment Act. The draft so published was later amended, *inter alia* by the addition of the provisions that ultimately became section 21 of the Amendment Act. The draft was, however, not republished in terms of section 154(2) pursuant to the various changes made to it.

[63] It is clear that the City actively lobbied the Minister, his DDG and other interested parties for the introduction of the *'remedial package'* which constituted section 21. It is also clear that the City's anxiety to have the legislative amendments effected was prompted, at least in part, by challenges to its new valuation and rates system, in particular at the instance of a ratepayers body known as the Ratepayers Action Group ('RAG'). The Robertsons are either members or supporters of RAG which itself was active and vocal in the public hearings before the Portfolio Committee which preceded the eventual enactment of section 21.

[64] As has been previously stated, the Amendment Act is a complex act that made a wide range of diverse changes to a variety of local government laws. The addition of section 21 was but one of a number of changes made to the original draft in the subsequent legislative process. The question which arises then, both generally and in the circumstances of this particular case, is the extent of any duty to republish draft legislation where the draft changes between its first publication in terms of section 154(2) and enactment.

[65] In answering this question consideration must first be given to the purpose of section 154(2) in our constitutional framework. The form of section 154(2), significantly couched in mandatory terms, appears to recognise the principle of participatory democracy. In the Bill of Rights handbook (4th ed) (at 16) *Johan de Waal & Others* the following statement is made:

'Democracy is enhanced where the role of the representative structures is supplemented by allowing and encouraging direct and participatory forms of

²¹ *Government Gazette* No.23233 15 March 2002 Record (R) 865 *et seq.*

democracy. Participatory democracy means that individuals or institutions must be given the opportunity to take part in the making of decisions that affect them. The constitution explicitly recognises the importance of participation in the law making process.'

[66] The authors then refer to section 57(1)(b) of the Constitution which provides that the National Assembly may make *'rules and orders concerning its business, with due regard to representative and participative democracy, accountability, transparency and public involvement'*.

[67] Section 44(4) of the Constitution provides that *'[w]hen exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of, the Constitution.'*

[68] In the new Constitution and Administrative Law Vol.1 *Ian Curry & Others* (First ed.) at page 179 the authors note that *'..... [A]lthough the Government usually consults the public and affected institutions and individuals when legislation is prepared there is no constitutional obligation to do so. However, in respect of certain Bills, the Constitution does require consultation with certain bodies before the bill can be passed.'* A number of examples are then given, one of which is found in the provisions of section 154(2), where the authors comment that *'[t]his additional manner and form requirement must therefore be observed in respect of all Bills that affect local government.'*

[69] In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*²² Chaskalson P, referring to the *'manner and form'* provisions of sections 59, 60 and 61 of the Constitution, stated that those provisions were not *'merely directory'* but *'are part of an entrenched and supreme Constitution. They can only be departed from where the Constitution permits this expressly ... or by necessary implication ... Insistence upon compliance with the manner and form provisions with the Constitution in these circumstances is not elevating form above substance.'*

[70] These statements serve to underline the importance and necessity of compliance with the provisions of section 154(2). On behalf of the Minister Mr **Trengove** argued that section 154(2) required that an early draft of the legislation be published for public comment but that subsequent changes to, omissions from and additions to the draft so published do not require re-publication. He contended that the legislative process would be frustrated and become impossible to implement if re-publication and the concomitant process of representations by municipalities and other interested parties were required whenever alterations were made to the original draft.

[71] Clearly re-publication of every amended draft would involve a potentially never ending process but common sense and a respect for the principle enshrined in section 154(2) suggests that publication of only the first draft of legislation will not satisfy the requirements of section 154(2) in all circumstances. The difficulty is where to draw the line. In this regard Mr **Rosenberg**, against the background of the purpose of section 154(2), namely to invite and obtain public participation in the form of organised local government, municipalities and the wider public, proposed a *'stand alone'* test, ie if the relevant provision had been introduced alone would it have required publication. Such a test is a useful tool in determining whether a particular

²² 1995 (4) SA 877 (CC) at para 62

provision, either in the form of an amendment to an already published provision or a new insertion, requires re-publication of the draft legislation.

[72] It is difficult to formulate a solution which meets all eventualities. In the context of the present matter, however, where the *'remedial package'* was clearly going to have a far reaching effect and where it had not been alluded to at all in the first publication of the draft bill, I have no hesitation in concluding that its introduction into the legislative process at a late stage required publication, at least of the terms of the proposed section 21. The importance of the amendments to section 93 cannot be discounted by describing them as *'technical'* nor by describing them as yet further elements in an already complex *'omnibus bill'*. Their importance is clear alone from this litigation and its potentially far reaching consequences.

[73] In the course of his argument Mr **Trengove** submitted that the question of whether section 154(2) requires re-publication in the event of changes to published draft legislation must be judged in the light of all the various provisions of the Constitution that also provide for public participation in the legislative process. He referred to section 229(5) which provides that national legislation of the kind envisaged in section 229 may only be enacted after organised local government and the FFC have been consulted. He pointed furthermore to sections 57(1)(b), 59(1)(a), 70(1)(b) and 72(1)(a) of the Constitution which require both Houses of Parliament to *'facilitate public involvement'* in the legislative process and pursuant to which Parliament created, for instance, the portfolio committee system and the holding of public hearings as took place in the present matter. Other similar features to which Mr **Trengove** referred were the requirement that legislation may only be enacted in accordance with the procedures under sections 74 to 77 of the Constitution and various other provisions which, when followed, might lead to further amendments to a bill. These procedures do make provision for public participation in the legislative process in more than one form. It does not follow from their existence, however, that the peremptory provisions of section 154(2) can be diluted.

[74] For present purposes it is sufficient to state that re-publication was clearly required once the Portfolio Committee resolved to incorporate the remedial package and that package proceeded through the further stages of the legislative process.

[75] It follows from what I have said that the fact that RAG, or other parties dissatisfied with the content of the amended section 21 (clause 29 of the Bill), participated in the public hearing held by the Portfolio Committee and voiced their objections to the relevant provisions is no answer to non-publication of the redrafted Bill and in particular that portion containing the proposed contents of section 21. The purpose served by re-publication was to notify and afford, amongst others, all *'other interested parties'* an opportunity to comment on the proposed amendments and thereby to influence the legislative process.

[76] The principle of legality also has application to the question of whether the legislature complied with section 154(2) of the Constitution. It serves to emphasise the importance of compliance with section 154(2) and was articulated by the Constitutional Court in *Fedsure*²³ as follows: *'It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the Interim Constitution.'*²⁴

²³ *Supra*

²⁴ At 400D-E

[77] In *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the Republic of South Africa & Others*²⁵ the Court held that the above mentioned doctrine of legality, an incident of the rule of law, was also applicable to the exercise of public power under the 1996 Constitution '*which in specific terms now declares that the rule of law is one of the foundational values of the Constitution*'.²⁶ The Court went on to say that '*(t)he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law*'.²⁷

[78] In my view the doctrine of legality, thus enunciated, underscores the importance of compliance by the legislature with procedures enacted in the Constitution for proper law making.

[79] The evidence indicating why the Bill as initially published did not contain any of the remedial provisions which were subsequently enacted in section 93 of the Structures Act is reasonably clear. It emerges from the affidavit of Wootton who was then the City's Acting Director: Legal Services. The City commenced its legal audit of the entire valuation and rates system in mid 2001 and pursuant thereto identified the problems which later became the subject matter of section 21 of the Amendment Act. In late July 2001 the City wrote to the Minister's DDG requesting an amendment of the PVO. However, it was only in December 2001 that the City received a substantive reply from the Minister's department expressing the view that any legal challenge was highly unlikely to succeed and therefore that no amendment was necessary. Further correspondence and communication took place between the City and the department but only in February 2002 did the latter seem to accept that the amendments as proposed by the City were necessary. Further time passed as legal opinions were exchanged and debated until late May 2002 when the City briefed a second attorney, Mr Evans, '*urgently to initiate and drive a process aimed at the amendment of the PVO by the National Parliament*.' As late as mid-June 2002 the department wrote to the City stating that the amendments which it sought would, due to the constraints of time, only be dealt with in the envisaged Property Rates Bill, then envisaged as being passed later that year. Upon receiving his instruction, Mr Evans had immediately drafted a memorandum setting out the legal problems as perceived by the City and proposing certain amendments to the Structures Act.²⁸ The belated acceptance by the department of the need for the amendments, coupled with the comparatively late stage at which Mr Evans received his brief from the City, makes it clear why the amendments were never published in the original draft bill.

[80] Two further arguments made by Mr **Trengove** require to be addressed. In the course of contending that re-publication of draft legislation need only occur if the substance of a Bill is changed, he submitted that since the Amendment Act was a complex omnibus bill interested parties must be taken to have been warned by the nature of the Bill that they must keep an eye on the process since further amendments, not included in the draft publication, could be introduced during the process. I am unable to accept this argument. Simply because the legislature is dealing with an omnibus bill concerning a single general topic, for example local government or criminal procedure, can hardly give it licence to enact legislative provisions the substance of which is but not even alluded to in the publication of the

²⁵ 2000 (2) SA 674 (CC)

²⁶ *Supra* at 687D

²⁷ At 687H-I

²⁸ Record (R) 673, 679 - 681

draft. To adopt such an attitude solely on the basis that the bill in question is a so-called omnibus bill would be to negate the provisions of section 154(2).

[81] Mr **Trengove** argued further that even if re-publication was needed, to the extent that applicants seek to rely on non-publication of section 93(9) and (10) of the Structures Act, their case was defeated by the fact that it was Parliament itself which introduced the latter two provisions. Furthermore, his argument continued, sections 93(9) and (10) do not meet the test set out in section 154(2), namely, they did not constitute legislation affecting ‘*the status institution, powers or functions of local government*’. Again, I disagree. In relation to the first argument, to say that Parliament introduced sections 93(9) and (10) is to approach the matter from the wrong direction. Having regard to the fundamental purpose of section 154(2), it matters not so much when or by whom contested provisions are introduced but rather whether they can properly be described as an amendment as opposed to an entirely new substantive provision in relation to the published draft. At best for the Minister, sections 93(9) and (10) were amendments of what eventually became section 93(7) and (8). But even if this was so, it does not avail the Minister since the subject matter of sections 93(7) and (8) were themselves never published prior to introduction of the Bill. As regards the second argument, the affording to the City of the power to use a provisional valuation roll when imposing rates clearly, in my view, constituted an addition to the powers of a local government body. The same cannot be said of section 93(10) which is no more than a procedural adjunct to sections 93(7)-(9) and one which makes no lasting change to the powers or functions of the local authority. To afford, as section 93(9) purports to do, a local authority the power to use a provisional valuation roll for rating purposes where it does not already enjoy that power, clearly meets the test set out in 154(2).

[82] Strictly speaking, given my finding that section 93(7) was unnecessary in that the PVO was a law ‘*in force*’ at all material times and that section 93(10) did not fall within the ambit of section 154(2), it is unnecessary for me to consider whether those portions of the eventual Act should have been published.

[83] For these reasons I find that, to the extent that section 21 of the Amendment Act added section 93(8) and (9) to the Structures Act, it was constitutionally invalid for want of compliance with the provisions of section 154(2) of the Constitution. It is arguable moreover that section 93(7) also required publication since, although I have found it was unnecessary, the Minister regarded the question of whether the PVO was still law “*in force*” sufficiently contentious as to require legislative clarification. In these circumstances, it can well be argued, interested parties were entitled to an opportunity to comment on the provision.

Was there compliance with section 229(5) of the Constitution?

[84] The final constitutional challenge by the Robertsons is their attack on the validity of section 21 of the Amendment Act based on non-compliance with the provisions of section 229(5) of the Constitution.

[85] Insofar as it is relevant, section 229 provides as follows:

- ‘(1) Subject to subsections (2), (3) and (4) a municipality may impose –
 - (a) rates on property
 -
- (2) The power of a municipality to impose rates on property,
 - (a)
 - (b) may be regulated by national legislation.
 -

- (5) *National legislation envisaged in the section may be enacted only after organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered.'*

[86] The FFC was established in terms of section 220 of the Constitution and is governed by the provisions of the Financial and Fiscal Commission Act, No.99 of 1997.

[87] Section 220 of the Constitution provides as follows:

'Establishment and Functions

- (1) *There is a Financial and Fiscal Commission for the Republic which makes recommendations envisaged in this chapter, or in national legislation, to Parliament, provincial legislatures and any other authorities determined by national legislation.*
- (2) *The Commission is independent and subject only to the Constitution and the law, and must be impartial.*
- (3) *The Commission must function in terms of an Act of Parliament and in performing its functions must consider all relevant factors, including those listed in section 214(2).'*

[88] Section 3 of the Financial and Fiscal Commission Act provides *inter alia* as follows:

- (1) *The Commission acts as a consultative body for, and makes recommendations and gives advice to, organs of state in the national, provincial and local spheres of government on financial and fiscal matters.*
- (2) *The Commission –*
- (a) *must perform the functions mentioned in subsection (1) to the extent that the performance of those functions are envisaged in the Constitution or required by national legislation; and*
- (b) *may perform those functions –*
- (i) *on its own initiative; or*
- (ii) *on request of an organ of state.'*

[89] Against the background to the legislation set out in paragraph 59 above, applicants contend that section 21 of the Amendment Act constitutes legislation as contemplated by section 229(5) of the Constitution but that there was no compliance therewith in that the provisions of section 93(9) and (10) were not referred to the FFC. The former subsection, they contend, was clearly national legislation as envisaged in section 229(5).

[90] The respondents contend in the first place that it was unnecessary to consult the FFC on the provisions of section 21 of the Amendment Act but that, in any event, the FFC was duly consulted on those provisions. Alternatively, they argued, applicants had not discharged the onus of proving that no such consultation took place.

Were the provisions of section 21 of the Amendment Act legislation as envisaged in section 229(5) of the Constitution?

[91] The question which initially arises is whether section 21 of the Amendment Act (to the extent that it added sections 93(7)-(10) to the Structures Act) was national legislation regulating '*the power of a municipality to impose rates on property*'.

[92] It is unnecessary to decide whether the provisions of section 93(7) and (8) are hit by the provisions of section 229(5) of the Constitution since, as appears hereunder, the evidence establishes that the FFC was indeed consulted regarding those provisions.

[93] The pertinent question is whether the provisions of sections 93(9) and (10) fall within the description of the relevant provisions of section 229(5). Section 93(9) provides that municipalities may use the valuations appearing on a provisional or additional valuation roll for the purposes of imposing rates on property. The fact that this provision is expressly stated to be of a temporary nature in my view no way detracts from the fact that it regulates a municipality's powers to impose rates on property. Giving section 93(9) its plain meaning within the context of the amending clause as a whole, I have no doubt that it meets the description of national legislation set out in section 229(2). Section 93(10) is, as I have said, no more than an adjunct to sections 93(7)-(8), a procedural provision which in itself, in my view, would not require consultation with the FFC before it was enacted.

[94] I find therefore that it was necessary for the FFC to be consulted regarding what became section 93(9) of the Structures Act.

[95] Both respondents' counsel argued that because section 93(9) '*added nothing*', since municipalities in general and the City in particular could, in any event, impose property rates and use a provisional valuation roll in terms of sections 10G(6) and (7) of the Transition Act, there was no need to determine the applicants' section 229(5) attack on section 93(9). I have already found however that section 93(9) of the Structures Act was necessary for the City to validate its rates decisions for the 2002/2003 budget year and thus the constitutional challenge must be considered.

[96] Even if I am wrong in my underlying conclusion and section 93(9) was superfluous, I remain of the view that its provisions had to be referred to the FFC. It was common cause between all the parties that, at that early stage at the very least, there was uncertainty regarding the question of whether the City could, in the absence of section 93(9), utilise a provisional valuation roll. Various memoranda and items correspondence emanating either from the City's representative or the Minister's department bear testimony to this fact. By way of example the memorandum on the objects of the Amendment Bill states:

'The validity of the Cape Valuation Ordinance is at present being challenged, and the resolution was adopted by Parliament that legislative measures would be adopted to create certainty in this regard. Consequently, amendments to section 93 of the Structures Act are being proposed that will create certainty regarding the Cape Valuation Ordinance.'

[97] Under the heading '*Implications for Municipalities*' the memorandum continues:

'9.2 The recent valuations of property in the Western Cape will be validated if the Bill is passed.'

[98] This document constitutes the explanatory summary of the Bill as published in *Government Gazette* No.23864 of 27 September 2002 and formed part of the Bill.²⁹

[99] I see no good reason to exclude from the purview of section 229(5) national legislation which regulates the power of municipalities to impose rates on property solely on the ground that such legislation may be expository. Given the importance

²⁹ Record (R) 744-746

of the role of the FFC as an independent restraint on the national legislature's powers in certain spheres of local government, it seems entirely proper that draft national legislation of the nature described must first be the subject of consultation with that body. It would be inappropriate to dilute this provision and render it inapplicable to expository legislation, bearing in mind that whether legislation is expository can in itself be a contentious issue.

[100] Whilst respecting the language of s 229 it is nevertheless appropriate, in my view, to interpret the rights conferred by the section in a generous manner and not to limit such rights by reading implied restrictions into them.³⁰

Was the FFC consulted in relation to the provisions of what became section 93(9) of the Structures Act?

[101] In contending that the applicants had failed to discharge the evidential *onus*, the Minister submitted that the FFC had in fact been consulted but that, at best for the applicants, the evidence in this regard was inconclusive. Given this gap in their case the applicants, in terms of the principles outlined in *Plascon Evans*,³¹ had failed to make its case. The question of whether the FFC was consulted concerning the content of what eventually became section 93(9) was the only factual dispute between the parties. There was a good deal of evidence on the subject but unfortunately much of it was characterised by vagueness and equivocation.

[102] The DDG, whilst stating that the FFC was duly consulted on the Bill before its enactment, also declared, on the other hand, that she did not have '*knowledge of the full extent to which the FFC was consulted on the Bill ...*'³²

[103] Included in the papers, however, was an exchange of correspondence between the Department and the FFC suggesting that the FFC was consulted by the Department regarding the provisions which subsequently became section 93(7) and (8) of the Structures Act.³³ By letter dated 29 August 2002 the Chairperson of the Commission made it clear that it had no comment regarding these provisions. The memorandum which accompanied the Bill, as it was formally introduced in Parliament, contained a section setting out with which bodies and organisations consultation had been held. The Commission was not listed amongst them. Notwithstanding this I accept that the exchange of correspondence constituted the necessary consultation required by section 229(5).

[104] The position relating to the FFC's knowledge of or sight of the later amendments, ie those which became section 93(9) and (10), is much less clear. The DDG, the only person to file a substantive affidavit on behalf of the Minister, did not explain why she did not have knowledge of the full extent to which the FFC was consulted, nor whether some other person within the Department could not testify thereto and, in that event, why such person did not testify thereto. This strikes one as somewhat strange given that the applicants put squarely in issue the question of whether the provisions of section 93(9) and (10) had been the subject of consultation with the FFC. The applicants were alive, furthermore, to what they considered to be this fatal defect at the very time that the Bill was in the final throes of the legislative process. Between mid-October and 7 November 2002 correspondence passed between the applicants' legal representatives, in their capacity as RAG's legal

³⁰ See *S v Zuma & Others* 1995 (2) SA 642 (CC) 650H-651J

³¹ *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD)

³² Record (R) 857 para 34.4

³³ Record (R) 737 - 738

representatives, and the FFC's legal representatives regarding the role of the FFC in overseeing the legislation. In the first such communication³⁴ the chairperson of the FFC was told in terms that the later amendments sought by the City (sections 93(9) and (10)) had not been seen by the FFC. The FFC's lawyers replied, in dealing with the period after the FFC had seen the clauses which became sections 93(7) and (8) and had declined to make any recommendations, as follows.³⁵

- '...'
3. *Subsequent thereto the Commission Chairperson attended the Portfolio Committee hearings.*
 4. *The Commission received no formal request for Parliament as to whether it had any recommendations on the Bill as amended by the National Assembly.*
 5. *However of its own volition, the Commission requested a copy of the amended Bill and has considered the same.*
 6. *The Commission reiterates its earlier view that it has no recommendation to make with regard to the Bill, as amended.'*

[105] RAG's attorneys then sought the minutes of the FFC's meeting where the amended Bill was discussed and considered.³⁶ The FFC's attorneys then qualified their earlier advices as follows:

*'We understand the position to be that the Commission requested a copy of the amendments from Parliament and circulated the same to all commission members. **As there was no formal request from Parliament for the Commission to consider the amended Bill, the Commission did not come to a formal position on the amended Bill. The Commission will not make any further comments or recommendations on the Bill unless expressly requested to do so by Parliament.** A full Commission meeting is scheduled for 25 November 2002. If the Commission receives a formal request from Parliament to reconsider its position on the Bill following the amendments made to the Bill by the National Assembly, it will do so.'*³⁷ (my emphasis.)

[106] One final item of correspondence is relevant. In a letter dated 2 December 2003³⁸ the Chairperson of the FFC wrote to the DDG stating:

'At a meeting of the Commission held on 25 November 2002, the initial view of the Commission was adopted and reaffirmed.'

[107] In deciding on the facts whether there was compliance with section 229(5), regard must first be had to the nature of the obligation. Section 229(5), read with subsection (2)(b) thereof carries the clear implication that a consultation process must take place between the FFC and either the sponsor of the Bill (either the Minister or his or her department) or Parliament (in one or other form) and the FFC.

[108] Such consultation is a bilateral process. In *Maqoma v Sebi NO and another*³⁹ the Court reviewed the authorities concerning the meaning of consultation and approved the following definition:

'The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice'

³⁴ Record (R) 816 Annexure GR2

³⁵ Letter dated 1 November 2002

³⁶ Record (R) 821 Annexure GR4

³⁷ Record (R) page 823 Annexure GR5

³⁸ Record (R) page 912 Annexure JBM3

³⁹ 1987 (1) 483 SA (Ck GD) at 491E

The Court considered at length the concept of consultation and held that in ordinary legal parlance '*consultation*' would normally be understood as a meeting or conference at which discussions take place, ideas are exchanged and advice or guidance is sought or tendered. In *Hayes v Minister of Housing, Planning and Administration*⁴⁰ the court emphasised that circumstances would dictate the form of the consultations but '[a]s long as the lines of communication are open and the parties are afforded a reasonable opportunity to put their cases or points of view to one another, the form of such consultation will usually not be of great import.'⁴¹

[109] In my view a crucial piece of evidence in regard to the question of whether the required consultation took place lies in the statement by the Commission's legal representatives that there was no formal request from Parliament (and by implication from no other organ of State) for the FFC to consider the amended Bill and that as a result thereof the FFC did not come to a formal position thereon. Given that consultation is a bilateral process it follows, in my view that, up to 1 November 2002, no consultation took place as required with the FFC concerning the provisions which became sections 93(9) and (10). Neither the Minister (or his department), nor Parliament sought to engage the FFC in consultation and that body in effect adopted the attitude that it would only engage in consultation if Parliament requested it to do so.

[110] Judging by the FFC's letter of 2 December 2002 this situation did not alter between 1 November and the enactment of the legislation. That letter stands as final confirmation that no consultation took place between the FFC, the department, the Minister or Parliament concerning what became section 93(9) and (10) of the Structures Act.

[111] I was urged by the Minister's counsel to disregard the contents of these letters as being hearsay. However, no application was made for their striking from the record. Given the source of the letters, ie from the attorneys representing the FFC, and responding to direct queries regarding the extent of consultation, and the fact that their contents were not repudiated or challenged by the respondents, it seems to me that the correspondence must be given due weight.

[112] The further argument on behalf of the respondents that the applicants should have placed the evidence of the FFC before the Court, is unconvincing. The duty to consult, being a bilateral one, was one concerning which the responsible Minister or his deputies should have had full knowledge. The Minister or his DDG would either have been a direct party thereto or, assuming Parliament was the consulting party, would have been fully apprised of the process. The existence or otherwise of the consultations was not a subject solely within the knowledge of the FFC. Furthermore the FFC's communications with the applicants' legal representatives, through the medium of their attorneys, spoke of a guarded attitude. For their part the applicants not only put the alleged failure to consult squarely in issue but sought persistently, through correspondence, to determine from the FFC whether there had been consultation. I do not consider that there was much more which could reasonably have been expected of the applicants.

[113] This aspect of the matter involves a constitutional obligation on the part of either the executive or the legislature to consult with the FFC, an independent institution. The obligation stands as a protection to citizens whose rights may be

⁴⁰ *Hayes and another v Minister of Housing, Planning and Administration, Western Cape and Others* 1999 (4) SA 1229 (C)

⁴¹ At 1242J-1243A

affected by national legislation dealing with the rights of municipalities to levy rates. In such a situation it is inappropriate for the Minister to adopt a tactical or opaque approach to the question of whether or not such consultation took place.

[114] Taking the above circumstances into account, I consider that applicants discharged the *onus* of proving this portion of their case. On their behalf it was contended that, at worst, a situation of ‘*equipoise*’ existed in regard to this issue. In *Gericke v Sack*,⁴² Diemont JA stated as follows:

*‘However, the courts take cognisance of the handicap under which a litigant may labour where facts are within the exclusive knowledge of his opponent and they have in consequence held, as was pointed out by Innes J, in **Union Government (Minister of Railways) v Sykes**, 1913 AD 156 at page 173, that: “less evidence will suffice to establish a **prima facie** case where the matter is peculiarly within the knowledge of the opposite party and would under other circumstances be required”.’*

[115] In my estimation, to the extent that there may be any doubt as to whether the applicants proved a failure to consult, the above *dictum* is apposite to the present matter. It must have been within the knowledge of the Minister or his representatives whether the consultation had taken place between the Minister as sponsor of the Bill or his department or Parliament and the FFC. The Minister’s failure to clarify whether such consultation had taken place in relation to what became section 93(9) and (10) of the Structures Act and his further failure to explain why such evidence was not placed before Court serves to confirm what the correspondence already indicates, ie that no such consultation in fact took place.

[116] Counsel for the Minister argued that on the evidence the likelihood is that there was consultation. To my mind the available evidence drives one to the opposite conclusion if only because, as a key figure in any consultation process, the Minister or his representative could be expected to have been well aware of the nature and extent of such consultation and to have described this unequivocally in response to the constitutional challenge.

[117] Having come to the conclusion that the applicants discharged the *onus* of proving that consultation in relation to the ultimate section 93(9) did not take place, it is unnecessary then to consider the merits of the applicants’ request that this issue be referred for oral evidence should the Court find that element of their case unproven. In the result this constitutional challenge to the validity of the valuation and rates dispensation effected by the City and incorporated in the 2002/2003 budget must also succeed.

The Truman-Baker case

[118] Having dealt with the primary legal issues in the Robertson case it is appropriate to consider those which arise in the Truman-Baker matter before dealing with the question of what relief should be afforded the applicants.

[119] The applicant in the Truman-Baker matter seeks more modest relief than that sought in the Robertson matter. Her relief is based upon the assumption that section 21 of the Amendment Act which created the provisions of section 93(7) to (10) of the Structures Act is valid. The applicant argues, however, that section 93(10) does not amount to giving the remaining provisions of section 93, namely sections 93(7) to (9), retrospective effect. Instead, she suggests, properly interpreted, the effect of section 93(10) is merely to regularise the City’s use of a provisional valuation roll with effect

⁴² 1978 (1) SA 821 (AD) at 827E-F

from the date of enactment of the Amendment Act, namely, from 5 December 2002, prospectively.

[120] The amended relief finally sought by the applicant was an order ‘*interdicting and restraining respondent (the City) from levying and recovering property rates from applicant for the financial year 1 July 2002 to 30 June 2003 on the basis of the property valuations contained in the provisional valuation roll which respondent opened from inspection and objection on 21 May 2002.*’ One of the reasons for seeking this relief is applicant’s contention that the illegality of the valuation process arising out of the City’s reliance on the provisions of the PVO rendered the entire process of the City levying rates and passing the budget for the financial year 2002/2003 invalid and unconstitutional. In this regard reliance was placed on *Fedsure*⁴³ where it was held that when a legislature, including a local legislature, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it exercises a legislative power.⁴⁴ It was held furthermore, in relation to legislation and to executive acts not constituting ‘*administrative action*’, that the principle of legality is necessarily implicit in the Constitution. The conclusion reached by the Constitutional Court, one which of course must apply with equal force to the final Constitution, is that the question of whether a local government body acts *intra vires* in imposing rates and levies and paying subsidies remains a constitutional question.⁴⁵

[121] Before having to decide the relatively narrow issue upon which the applicant’s case is based, it appears to me the following findings would have to be made:

121.1 that the provisions of at least a portion of section 93(7) to (9) of the amended Structures Act were necessary; and

121.2 that section 21 of the Amendment Act passed constitutional muster.

As a result of my findings in the Robertson matter the first condition is fulfilled but not the second. It is therefore not necessary to determine the question of the retrospectivity or otherwise of section 93(10).

[122] However, since another court will in all likelihood hear this matter, at least for the purposes of certification in terms of section 172(2)(a) of the Constitution, it seems appropriate to express a view on the question upon which the applicant’s case is based. I do so, albeit reluctantly, in deference to the indication by the Constitutional Court that where the constitutionality of a legislative provision is challenged on a number of grounds the High Court should express itself on each of the constitutional challenges and thus cater for the eventuality that its other findings on constitutional challenges may not be upheld.⁴⁶

[123] In broad terms, Mr **Donen**, who appeared on behalf of the applicant, contended that section 21 of the Amendment Act does not express or confer authority to retrospectively impose rates based on a provisional valuation roll. In this regard he relied cumulatively on the form of the language used in section 21, on the principle of interpretation which holds that retrospectivity is not lightly assumed and on section 41(1)(f) of the Constitution. This section provides that all spheres of government must refrain from impinging upon each others powers or functions. This principle, it was argued, made it unlikely that the legislature would, through the enactment of section 21 of the Amendment Act, in effect ratify the City’s budget (for the financial year 2002/2003).

⁴³ *Supra*

⁴⁴ At 396E (para 45)

⁴⁵ At 401A.

⁴⁶ *S v Jordan and Others (supra)* at para 21 page 653D-F.

[124] There is a long line of cases affirming the '*long accepted rule that a statute, even where it is expressly stated to be retrospective in its operation, is not to be treated as affecting matters which are the subject of pending litigation in the Supreme Court in the absence of a clear contrary intention appearing from the Act.*⁴⁷ It appears, however, that, at least by necessary implication, section 93(9) read with section 93(10) falls within the qualification of '*a clear contrary intention*'. Section 93(9) permits municipalities to use valuations appearing on a provisional or additional valuation roll when imposing property rates without reference to any time when the decision to impose those rates were taken. Section 93(10) permits municipalities to rely on that permission in any pending litigation ie litigation instituted prior to the commencement of the Amendment Act on 5 December 2002.

[125] Mr **Donen** sought to rely on the phrase '*subject to paragraph (b)*' in section 93(8)(a) with its consequent reference to the coming into effect of the Amendment Act on 5 December 2002 as an indication that the legislature intended that the entire amendment would only have prospective effect from that date. Such a reading, however, strains the meaning of section 93(8) read within the context of section 93(7)-(10) as a whole. Clearly the purpose of these provisions was to ensure that laws repealed between December 2000, the date on which the City was established as a municipality, and December 2002, were not inadvertently re-instated.

[126] In contending for an interpretation of s 93(10) read with 93(9) as having retrospective effect, counsel for the City alluded widely to documentation which arose at the time of the Portfolio Committee hearings and which emanated from persons who took part in its proceedings in one capacity or another.

[127] The question of whether such material could be resorted to when interpreting the intention of the legislature in a particular provision of a statute was left open in the matter of *Thoroughbred Breeders Association v Price Waterhouse*.⁴⁸ Although the rule that legislative history is not admissible in the interpretation of a statute is no longer as firmly entrenched as it once was, given the comparative clarity of the text in this matter it seems to me unnecessary to have regard to either Parliamentary statements or evidence of the detail of the progress of the Bill through Parliament's committees and houses.⁴⁹

Does section 93(10) pass constitutional muster?

[128] The only explicit constitutional challenge by applicant to s 93(10) was the argument based on section 41(1)(f) of the Constitution that it could never have been the intention of the Legislature in '*validating*' the PVO to trespass upon the constitutional domain of local government by rendering lawful the City's previously unlawful 2002/2003 budget. This argument was made in support of the applicant's contention that, properly construed, section 93(10) had no more than prospective effect.

⁴⁷ *Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others* 1995 (3) SA 51 (C) at 64A-B; *Woerman & Schutte NNO v Masondo and Others* 2002 (1) SA 811 (SCA) at para 18; *Bellairs v Hodnett & Others* 1978 (1) SA 1109 (A) at 1148F; *Bell v Voorsitter van die Rasklassifikasieraad & Andere* 1968 (2) SA 678 (A).

⁴⁸ 2001 (4) SA 551 at para 25.

⁴⁹ See *Case & Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) and *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at 405E.

[129] Whether it be viewed as a constitutional challenge or as simply a factor to be taken into account in the interpretation of s 93(10), the argument lacks merit. It disregards the fact that the national legislative authority may, in terms of s 44(1)(ii) of the Constitution, pass legislation regarding any matter save certain scheduled functional areas. The issue of property taxes is not an excluded subject matter. The argument also takes no account of the fact that section 21 of the Amendment Act did not constitute an uninvited intrusion by the national legislature into what might otherwise be perceived as the City's exclusive domain. The City actively pressed Parliament to pass the amending legislation. Furthermore the City drew up its own budget and made its way to Parliament seeking the amended section 93(9) and (10) only when the legality of the budget was challenged by dissatisfied rate-payers. In these circumstances I do not see the legislative exercise undertaken by Parliament as a breach of the principle of cooperative government set out in section 41(1)(f) of the Constitution or, to the extent that it may be a breach thereof, I do not regard it as one justifying a restrictive interpretation of the provisions of section 93(10).

[130] The more obvious constitutional challenge to section 93(10), albeit one not actively pursued by the applicant, is that based on the rule of law requirement that law be accessible and clear and the government in all its actions be bound by rules fixed and announced beforehand. The presumption against retrospectivity and the requirement that it can be rebutted only by express terms or clear implication is based on '*elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.*'⁵⁰ In *National Director of Public Prosecutions v Carolus and Others* the following was stated:⁵¹

'An important legal rule forming part of what may be described as our legal culture provides that no statute be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the Legislature clearly intended the statute to have that affect'

[131] Retrospective legislation doubtably poses difficulties for the rule of law, one of the foundational values of our Constitution,⁵² difficulties which are, for obvious reasons, far more pronounced in the area of criminal law. This fact is recognised by the provisions of section 35(l) and (n) of the Constitution which proscribe retrospectivity of legislation creating increased sentences. Apart from the above provisions the Constitution contains no prohibition of retrospective legislation. Counsel was unable to refer me to any reported South African decisions in which retrospective legislation has been challenged on the rule of law grounds other than a general observation in *Pharmaceutical Manufacturers* that statutes should not be retrospective in their operation.⁵³

⁵⁰ Per Stevens J in *Landgraf v USI Film Products et al* 511 US 244 (1994) at 265 quoted in *National Director of Public Prosecutions v Carolus & Others* 2000 (1) SA 1127 (SCA) at para 36.

⁵¹ *Supra* at para 31.

⁵² See section 1(c) of the Constitution, 108 of 1996

⁵³ *Supra* at para 39: '(T)he standards applied by the courts in judicial review must ultimately be justified by constitutional principles, which govern the proper exercise of public power in any democracy.The rule of law is another such principle of the greatest importance. It acts as a constraint upon the exercise of all power. The scope of the rule of law is broad. It has managed to justify – albeit not always explicitly – a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of court should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no person should be condemned unheard, and that power should not be arbitrarily exercised. In addition, the rule

[132] As regards comparative systems of law, despite a constitutional ban on the passing of any “*ex post facto Law*” in the United States of America, the provision has been construed as applying only to criminal, penal and criminal procedure laws.⁵⁴

[133] According to *Seervai*⁵⁵ the Indian Supreme Court ‘has held in several cases that unless limited by the Constitution, the legislatures in India have power to legislate retrospectively, and also to validate invalid laws or invalid executive act and notifications.’ In one such case⁵⁶ the majority held ‘that the power to validate actions taken under statutes not sufficiently comprehensive to sustain those actions, was a power ancillary or subsidiary to the power to legislate on any subject matter within the competence of the legislature.’ Consequently, validating Acts could not be struck down on the ground that such actions had been declared invalid by courts of law. In *Mahal Chand Sethia v WB*⁵⁷ Mitter J ‘set out the effect of the numerous decisions’ of the Supreme Court and concluded that Legislature’s power to enact provisions with retrospective effect was unfettered.⁵⁸

[134] As Hogg *Constitutional Law of Canada* 48-28, explains, apart from sections 11(g) and 11(i) of the Canadian Charter of Rights and Freedoms (which are similar to sections 35(3)(l) and (n) of our Constitution) Canadian constitutional law contains no prohibition of retroactive (or *ex post facto*) laws.⁵⁹

of law embraces some internal qualities of all public law; that it should be certain, that is ascertainable in advance so as to be predictable and not retrospective in its operation; and that it be applied equally, without unjustifiable differentiation.’ (my emphasis)

⁵⁴ See Tribe *American Constitutional Law* (2 ed 1986) 632-641.

⁵⁵ *Constitutional Law of India* vol 3 (4 ed 1996) 2309

⁵⁶ *Udai Ram v Union of India* (1968) All India Reporter 1138

⁵⁷ An unreported judgment of the Supreme Court delivered on 10 September 1969

⁵⁸ ‘*The position of a Legislature is however different. It cannot declare any decision of a court of law to be void or of no effect. It can however pass an Amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. An Amending Act simpliciter will cure the defect in the statute only prospectively. But as the legislature has the competence to pass a measure with retrospective effect it can pass an Amending Act to have effect from a date which is past. Usually legislature pass Acts styled Amending and Validating Acts, the object being not only to amend the law from a past date but to protect and validate actions already taken which would otherwise be invalid as done without legislative sanction. There is nothing in our Constitution which creates any fetter on the legislature’s jurisdiction to amend laws with retrospective effect and validate transactions effected in the past. Further, there is nothing in our Constitution which restricts such jurisdiction of the legislature to cases where courts of law have not pronounced upon the invalidity or infirmity of any legislative measure. Instances of the legislature’s use of such power, upheld by our courts, are copious.*’

⁵⁹ ‘*Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common. For example, a taxation law is often made retroactive to budget night, when the law was publicly proposed; otherwise, there would be room for avoidance action by taxpayers during the hiatus between the budget and the enactment of the law. Another common example is a retroactive statute to change the law as it was declared to be in a judicial decision: a law that has been interpreted in an unexpected way, or has been held to be invalid on remediable grounds, may be amended or validated retroactively to restore the legal position to what it had been believed to be prior to the judicial decision. The power to enact retroactive laws, if exercised with appropriate restraint, is a proper tool of modern government. Section 11(g) diminishes this power only by excluding the creation of retroactive criminal offences. Other kinds of laws may still be made retroactive.*’

[135] It appears that retrospective legislation may contravene the rule of law where it unreasonably or unfairly impairs the ability of those bound by the law to regulate their conduct in accordance therewith. This cannot be said of sections 93(9) and (10) of the Structures Act (other constitutional challenges aside). Their combined effect is to validate a valuation and rates dispensation and the budget of the City based thereon. The new dispensation is no doubt unpopular in some quarters and may well create varying degrees of hardship for those property owners adversely affected thereby. However, there is little if any evidence to suggest that the applicants (or others in their position) ordered their conduct in accordance with an interpretation of sections 93(9) and (10) having only prospective effect or that they relied to their detriment on such an interpretation.

[136] Accordingly, I would hold that sections 93(9) and (10) are not by reason solely of their retrospective effect, unconstitutional.

Relief and costs

The Robertson matter

[137] Having regard to my finding that the provisions of section 21 of the Amendment Act are unconstitutional it would appear that the appropriate relief to which the Robertsons are entitled is that sought in prayer 2(a) of the Amended Notice of Motion⁶⁰ namely a declaration that, in terms of section 172(1)(a) of the Constitution, section 21 of the Local Government Laws Amendment Act 51 of 2002 is invalid; and 2(b) interdicting and restraining the City from levying and recovering property rates on the basis of property valuations contained in the provisional valuation roll. Although the Robertson case did not purport to be brought in a representative capacity, ie on behalf of other rate-payers, the relief claimed under prayer 2(b) is cast in terms of universal application. The applicants did not contend, either in their papers or in argument, that they were acting on behalf of other persons who could not act in their own or behalf of a class of persons. Despite this, neither respondent objected to the wide form of the order sought under prayer 2(b). In the circumstances, and given the constitutional basis to the applicants' case, there is no good reason to refuse the wide relief sought under prayer 2(b). With regard to costs, the applicants succeeded on a number of bases and I can see no reason why they should not be awarded their costs.

The Truman-Baker matter

[138] The applicant sought much more limited relief, an order interdicting and restraining the City from levying and recovering property rates from her for the relevant financial year on the basis of the property valuation contained in the disputed provisional valuation roll. In the event, it was unnecessary to decide the applicant's matter on the sole point on which her case was predicated, namely, whether section 93(10), read with section 93(9) had retrospective effect or not.

[139] Accordingly, whatever relief the applicant seeks is covered by the general relief sought in prayer 2(b) in the Robertson matter. Ironically, the Robertson matter is determined on the basis of irregularities in the valuation and rates process which were not corrected by section 21 of the Amendment Act by reason of its unconstitutionality. However Ms Truman-Baker impliedly, if not explicitly, accepted that such irregularities as there were in the process were corrected by section 21 of the Amendment Act. In these circumstances it is difficult to conclude that the applicant has enjoyed substantial success and is thus entitled to her costs. Nonetheless, one cannot lose sight of the fact that the applicant challenged a rates system which was found to be and remains invalid. In these circumstances I

⁶⁰ See para 7 of this judgment.

consider that the most appropriate exercise of my discretion is to make no order as to costs in this matter.

The effect of granting the applicants' relief

[140] Taking into account the provisions of section 172(1)(a) of the Constitution and my findings, this Court is obliged to declare that section 21 of the Amendment Act is inconsistent with the Constitution and is invalid to that extent. In terms of section 172(2)(a) such an order has no force unless confirmed by the Constitutional Court. Come what may then this matter must serve before that Court. In terms of section 172(2)(b) this court may grant a temporary interdict or other temporary relief to a party or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.

[141] This court's obligation to make a declaration of constitutional inconsistency and invalidity extends also to '*conduct*'. The question which arises is whether such a declaration is required in the present matter. Counsel for the Robertsons submitted that the court was called upon to decide the validity of the levying of rates based on the provisional valuation roll but it was not required nor called upon to decide on the constitutional validity of the budget adopted by the City. On behalf of the City however it was contended that in both matters the applicants' complaint is one of illegality on the part of the City. This submission appears well founded since the essence of both cases is that the City was not entitled in law to conduct property valuations on the basis of a provisional valuation roll and, by definition, to levy rates based on such valuations.

[142] The City argued further that the applicants in both cases rely on the principle of legality which is implied in the Constitution and is accordingly a determinant of constitutionality. Thus, it argued, upholding the applicants' cause of action will lead to findings of unconstitutionality. The City contends further that if the applicants are successful, in addition to granting an interdict, the Court must issue a declarator that the City's conduct of the general valuation, its publication of the provisional valuation roll on 10 May 2002 and its decision on 29 May 2002 to impose property rates based on that roll were inconsistent with the principle of legality in the Constitution and invalid.⁶¹ Having regard to the finding in *Fedsure*⁶² that the question of whether a local government acted *intra vires* its powers remains a constitutional issue as well as the finding that when a local legislature exercises the power to raise taxes or rates it exercises a legislative power, I am of the view that this Court has an obligation in terms of sections 172(1)(a) to declare at least certain of the conduct by the City which has been the subject of these applications, inconsistent with the Constitution and invalid to that extent.

[143] In my view, however, the submission that this Court must issue a declarator that the City's conduct of the general valuation and its publication of the provisional valuation roll was inconsistent with the Constitution and invalid, overstates the case as does the suggestion that the City's budget, based as it was upon the impugned rates exercise, must likewise be set aside. In my view the core complaint raised by the applicants is met by a declaration that the City's conduct in resolving, on 29 May 2002, that property rates be levied in accordance with the 2000 General Valuation

⁶¹ The authorities upon which the City's counsel relied in this regard were the principles set out in the *Fedsure Life* case (*supra*) as well as confirmed in *Pharmaceutical Manufacturers (supra)* and *The South African Association of Personal Injury Lawyers v Heath & Others* 2001 (1) SA 883 (C).

⁶² *Supra*

Roll, as set out in section (d)(i) of its resolution,⁶³ is inconsistent with the Constitution and invalid to that extent. This relief, coupled with the general interdict the applicants have won, adequately addresses the issues.

Suspension of any order of invalidity in terms of section 172(1)(b)(ii)

[144] Both respondents asked that should any finding of constitutional invalidity be made such order be suspended in terms of section 172(1)(b)(ii) of the Constitution to allow the competent authority to correct the defect. This relief was opposed by the applicants. On behalf of the City it was contended that there would be adverse consequences should aspects of the valuation process or its decision to impose property rates based on the provisional valuation roll be declared unconstitutional with immediate effect. The City's attempts to enter a new equitable era in which, for the first time, municipal property rates would be charged in relation to all properties in the CMA using a comprehensive general valuation of properties, would be dealt a blow. The fear was also expressed that the consequences of any such order would be a lower incidence of tax compliance once the obstacles on which the applicants' cases were based had been removed. I take this to be a reference to legislative obstacles. The City contended furthermore that in the long term neither the applicant nor other persons in their position could benefit from an order dealing with aspects of the provisional valuation since these would inevitably be addressed by Parliament and the President through the national legislative process. Again I presume this to be an oblique reference to an intention to have section 21 or a variation thereof '*re-legislated*' but in compliance with the provisions of the Constitution.

[145] In motivating further for a suspension order, Mr **Binns-Ward**, on behalf of the City, referred to the matters addressed by section 21 of the Amendment Act as '*possible technical deficiencies*' and to the present applicants as '*opportunistic litigants*'. The reference to the litigants as '*opportunistic*' is unfortunate. Every citizen of the country who is a property owner has the right to expect that any valuation or rates process will be *intra vires* the empowering legislation and that any such legislation or amendment thereto will comply with the procedures which the Constitution lays down as a necessary prior condition thereto. When a citizen, perceiving defects, irregularities or inequities in a valuation or rates dispensation *vis-à-vis* the empowering legislation, turns to court he or she is not being '*opportunistic*'. Any such person is exercising the rights which every citizen enjoys under our Constitution and, irrespective of the outcome of the litigation, is thereby making a contribution to a social and legal order based on respect for and the supremacy of the Constitution.

[146] On behalf of the Minister it was contended that the purpose of section 21 of the Amendment Act was merely to ensure that proper effect was given to the purpose of the existing national and provincial legislation on local government in general and the imposition of rates on property in particular. To the extent that any provision of section 21 was found to be unconstitutional, it was only because the legislature had '*slipped up in the mine field of complexity*' of the transition from racially determined to democratic local government. It was also argued that the applicants did not contend that section 21 violated any of their fundamental rights. Both respondents' counsel submitted that there was no evidence to the effect that the applicants had ordered their affairs in accordance with the inapplicability of the PVO arising from the deficiencies and therefore that the prejudice which they would suffer if the order of suspension was granted would be very limited. In my view these submissions have much weight.

⁶³ Para 7 of this judgment and Record (R) 595 and 596

[147] With some justification the point was made by the respondents that irrespective of whether there had been full compliance with section 154(2) of the Constitution, the fact remained that the Robertsons (and other members of the Rates Action Group) had enjoyed the opportunity to make representations regarding the provisions of section 21 of the Amendment Act and had in fact availed themselves of that opportunity at every step of the legislative process.

[148] The DDG also testified that an immediate declaration of constitutional invalidity would not only disrupt the implementation of an equitable system of property rates but again give rise to the uncertainty which prevailed in the provinces before section 21 was enacted. She too expressed the fear that the valuation of property and the collection of property rates on the strength of the PVO might well be considered illegal resulting in a low incidence of tax compliance and further litigation. This disruption in the system of collection of property rates could also detrimentally affect the delivery of services on local government level.⁶⁴

[149] For their part the applicants submitted that there was no basis for the suspension of any order of invalidity and expressed scepticism that the consequences feared by the respondents would eventuate. Applicants postulated rather that, absent an order of invalidity, the City would have to do no more than pass a fresh resolution providing for rates to be levied on the array of valuation rolls which had previously been used, making adjustments either on a uniform or a differentiated basis until such time as the City regularised its new valuation and rates system. It was argued that the applicants had suffered significant financial distress and prejudice as a result of the new rates system which the City sought to impose.

[150] In *S v Bhulwana; S v Gwadiso*⁶⁵ O'Regan J, discussing a suspension order in terms of the interim Constitution, stated as follows:

'Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle, too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants.'

[151] In *S v Steyn*⁶⁶ the Constitutional Court added that the power of suspension is a mechanism *'intended to avert disorders or dislocation that may arise as a result of an immediate declaration of invalidity. This is understandable and accords with good governance, but the mechanism by no means sanctions tolerance for that which has already been adjudged inconsistent with the Constitution. Even in the face of this Court's suspension of an order of validity, it is imperative that obligations imposed by the Constitution remain. Any unconstitutionality must be cured "diligently and without delay"'*.

[152] In *Moseneke & Others v The Master & Another*,⁶⁷ faced with a decision whether to abolish a manifestly racist law or to suspend the order for a period by making practical alternative arrangements for the administration of the deceased

⁶⁴ Record (R) 862-863. On behalf of the Minister the DDG also sought a year's suspension of the order in order to cure any defects.

⁶⁵ 1996 (1) SA 388 (CC) at page 399 para 32

⁶⁶ 2001 (1) SA 1146 (CC) at 1167H-1168A (para 45)

⁶⁷ 2001 (2) SA 18 para 25

estates of Black persons, the Constitutional Court considered that the former course might '*provoke confusion and risk injustice*.'

[153] The valuation and rates exercise, embarked upon even prior to the City's establishment in December 2000, was a lengthy and complex one. The decision to impose the present rates dispensation based on the provisional valuation rolls and contained in the City's resolution of 29 May 2002, attracted widespread publicity and political debate. It has now been in place, however, since July 2002, a period of almost two years. Given the huge number of affected ratepayers and the fundamental change in the valuation system, no doubt the new system was preceded and accompanied by a considerable amount of publicity, information dissemination and educative communications to ratepayers. The task of introducing the new rates system to a large number of property owners has largely been accomplished. To give an idea of the scale of the exercise, the City's unchallenged evidence was that the provisional valuation roll comprises a total of just over half a million residential properties and 36 000 non-residential and sectional titled properties with a total value of R195 billion. Direct expenditure on the valuation process was R100 million. Little imagination is needed to realise that even the process of passing a fresh resolution and readjusting rates on the basis of the disparate rolls which existed prior to the establishment of the provisional valuation roll would be a major administrative exercise. Every ratepayer would then be either in debit or credit in relation to rates paid since the inception of the new rates system and could demand an appropriate adjustment, thus compounding an already substantial additional administrative burden. Such an exercise is potentially a recipe for administrative confusion, if not chaos, particularly when the present *status quo* might well be restored within a limited period by appropriate constitutional amendments to existing legislation. Similarly, should no suspension order be granted and should the Constitutional Court reach a different conclusion to this court, the *status quo* will be restored and the entire disruptive exercise would have served no lasting purpose. The potential for further disruption of local government in the collection of rates and possibly the disruption of services are also not difficult to imagine. In these circumstances it seems to me that a suspension of the order of constitutional invalidity insofar as it affects the conduct of the City in continuing to collect rates based on the provisional roll valuation is entirely appropriate.

[154] As far as the interdictory relief claimed, it is arguable the applicants should at least be entitled to an interdict in respect of the rate increases which they face. As I have noted, however, the Robertson case is in effect one brought in a representative capacity. In these circumstances it would be invidious to suspend the relief in relation to every ratepayer in the City but allow it in respect of the applicants. This would offend against the principle referred to by O'Regan J that, as far as possible, all persons entitled to the relief should be treated equally.

Orders

The following orders are made:

1. It is declared that:

- 1.1 Section 21 of the Local Government Laws Amendment Act 51 of 2002 is inconsistent with the Constitution and invalid to that extent;**
- 1.2 The first respondent's conduct in passing its resolution of 29 May 2002 that property rates be levied in accordance with the 2000 General Valuation Roll as set out in section (d)(i) of its resolution (as recorded in Annexure RW28 to the Opposing Affidavit of R Wootton at page 595 and 596**

of the record in case No.4995/02) is inconsistent with the Constitution and invalid to the extent thereof.

2. *First respondent is interdicted and restrained from levying and recovering property rates on the basis of property valuations contained in the provisional valuation roll which the first respondent opened for inspection and objection on 21 May 2002.*
- 3.1 *First and second respondents, jointly and severally, the one paying the other to be absolved, are to pay the applicants' costs in case 4995/02.*
- 3.2 *The parties in case 9507/02 will each bear their own costs.*
4. *The order referred to in 1.1 above is referred to the Constitutional Court for confirmation.*
5. *The orders referred to in 1 and 2 above are suspended for a year from date of the conclusion of the proceedings referred to in 4 above to allow the competent authorities to correct the defects which gave rise to the declarators.*
6. *Execution of the order in 3.1 above is suspended pending the outcome of proceedings in 4 above.*

.....
L J BOZALEK