

**FEDSURE LIFE ASSURANCE LTD AND OTHERS v GREATER  
JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL AND OTHERS**

**CCT 7/98**

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Explanatory Note

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*The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

*Factual Background:*

The appellants, ten corporate ratepayers in the Eastern Metropolitan Substructure (EMS), objected to a substantial increase in their property rates. They challenged the lawfulness of certain resolutions (adopted by the Greater Johannesburg Transitional Metropolitan Council (TMC) and the EMS in relation to their 1996/97 budgets) which had given rise to this increase.

The budgets had been drawn up in accordance with a policy negotiated and agreed to by the TMC and its four substructures. At the heart of this policy lay two principles: (1) that a uniform rate should be imposed on land and rights in land across the greater Johannesburg region and (2) that the combined budgets of the individual bodies should balance.

Calculations revealed that if a general rate of 6,45 cents in the Rand was charged on land and rights in land within the greater Johannesburg area, total income would meet total expenditure. Specifically, deficits in the TMC, the Western Metropolitan Substructure (WMS) and the Southern Metropolitan Substructure (SMS) would equal surpluses in the EMS and the Northern Metropolitan Substructure (NMS).

Therefore, by means of the challenged resolutions, surpluses generated in the EMS and NMS were paid as levies to the TMC. The TMC retained funds sufficient to balance its own budget and paid the remainder to the WMS and SMS in the form of subsidies. The effect of this policy was that some ratepayers faced an increase in their existing property rates whilst others enjoyed a decrease. Still others were required to pay property rates for the first time.

The appellants applied initially to the Witwatersrand High Court to have the rates, levies and subsidies set aside. Goldstein J found the resolutions to be lawful and dismissed the application.

The appellants appealed against this decision. The Supreme Court of Appeal (SCA) found, however, that it was not able to entertain the appeal since the attacks raised constitutional issues.

Accordingly it referred two questions to the Constitutional Court: (a) whether the resolutions were consistent with the interim Constitution and (b) if they were, whether the SCA had any residual power to decide the various challenges.

(a) *Challenges to the Resolutions:*

The appellants challenged the resolutions on a series of grounds. At the hearing in the SCA, the parties were agreed that the resolutions relating to the rates, levies and subsidies were “administrative actions” as contemplated in section 24 of the interim Constitution. In this Court,

however, the respondents argued that they were legislative and not administrative actions.

The Court accepted this argument. Nonetheless the justices were agreed that all legislation must comply with the Constitution. An important principle of our Constitution is the rule of law, which means at very least that any exercise of power by an organ of state must fall within the limits of the power conferred on that body. Courts, including the Constitutional Court, may thus review and set aside legislative action which does not comply with this principle of “legality”.

#### *First Challenge:*

The appellants argued that the resolution increasing property rates within the EMS was unlawful since these additional funds were necessary, not for the EMS’s own purposes, but rather for the payment of a levy to the TMC. This challenge was unanimously rejected by the Court.

The justices noted that the process of drawing up a budget involves making considered estimates as to items of expenditure which are likely to be incurred during the relevant financial year. In the ordinary course of events, certain contingent liabilities will not materialise, or will place a lesser or greater drain on resources than originally anticipated. Such outcomes cannot be said to entitle ratepayers to challenge the validity of the budget itself.

In the present case, the EMS had drafted and approved its budget on the basis that it would be required to pay a levy to the TMC in that financial year. There was no suggestion that this assumption was made unreasonably or in bad faith. Therefore, even if the TMC levy was unlawful, the fact that the EMS provided in its budget for such expenditure did not undermine the validity of the property rates imposed by the EMS.

#### *Second Challenge:*

The appellants contended that the resolution of the TMC imposing a levy on the EMS and NMS was unlawful because the levy was not equitable and was not based on the gross or rates income of the substructures. The Court was evenly divided on this question.

In a joint judgment of President Chaskalson and Justices Goldstone and O’Regan (concurring in by Justices Ackermann and Madala), it was held that the levy was not sufficiently closely linked to either gross or rates income for it to have been “based on” such income. Indeed the evidence indicated that the levy was based on the surpluses generated in the EMS and NMS. Hence they concluded that the TMC levy was unlawful. This finding rendered it unnecessary for these justices to express any opinion on the appellants’ third challenge.

In a separate judgment concurred in by Deputy President Langa and Justices Mokgoro, Sachs and Yacoob, Justice Kriegler found that it was not necessary that the levy be based exclusively on gross income. It was sufficient that the levy be related to gross income. Justice Kriegler held that the levy was directly related to the EMS’s gross income and thus that this challenge should fail.

#### *Third Challenge:*

The appellants contended that the levy was unlawful on the basis that it was not necessary for the TMC to exercise its powers and perform its functions and that it was not based on a uniform structure for the TMC’s area of jurisdiction. As already indicated, only Justice Kriegler’s finding

in relation to the second challenge rendered it necessary to consider this third attack. In Justice Kriegler's view, the interdependence of the TMC and its substructures, and the TMC's constitutional duty to provide for the well-being of all persons within its area of jurisdiction, entailed that it had the power to impose a levy on one substructure for the purpose, not only of balancing its own budget, but also of making a grant to subsidise another substructure's deficit.

Furthermore, given the co-operation between the TMC and its substructures in financing each body's expenditure, and in particular the decisions to standardise property rates and service tariffs across the greater Johannesburg region, the levy was based on a uniform structure for the TMC's area of jurisdiction. Hence, in Justice Kriegler's view, the TMC levy was lawful.

#### *Fourth Challenge:*

Finally, the appellants claimed that there were certain procedural irregularities in the manner in which the TMC and EMS budgets were prepared and approved. The Court found that the required procedures had in fact been followed and unanimously dismissed this challenge.

#### *(b) Jurisdiction of the Supreme Court of Appeal:*

In relation to the second of the questions referred by the SCA, the justices were agreed that the SCA did not have jurisdiction under the interim Constitution to decide any matter which the Constitutional Court was empowered to decide.

In the opinion of the Constitutional Court, this scheme was undesirable. It introduced uncertainty as to which court should hear particular cases and deprived the Court of the views of the SCA on constitutional issues. The 1996 Constitution removed this jurisdictional bar by allowing the SCA to hear constitutional cases. In future cases falling under the interim Constitution, therefore, it would be in the interests of justice for the SCA to exercise the jurisdiction conferred on it by the 1996 Constitution. It should however decide the case in terms of the law in force at the time that the relevant cause of action arose.

#### Conclusion:

- ☐ The justices were unanimously agreed:
  - that the SCA did not have power under the interim Constitution to hear constitutional matters but that, in future matters brought in terms of the interim Constitution, the SCA should exercise its jurisdiction under the 1996 Constitution;
  - that the resolutions of the TMC and EMS did not amount to "administrative actions" for purposes of section 24 of the interim Constitution but had, nonetheless, to comply with the constitutional principle of "legality";
  - that the property rates imposed by the EMS on its ratepayers were lawful; and
  - that the procedural requirements relating to the presentation and approval of the TMC and EMS budgets had been fulfilled.
- ☐ The justices were evenly divided, however, on the lawfulness of the TMC levy imposed on the EMS. Since there was no clear majority in favour of reversing Goldstein J's finding in the High Court, the appeal on this issue also had to fail.

Accordingly the entire appeal was dismissed with costs.

14 October 1998.