

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 59/00

STEPHANUS JOHANNES MARTINUS DE BEER N.O.

Appellant

versus

THE NORTH CENTRAL LOCAL COUNCIL AND THE
SOUTH CENTRAL LOCAL COUNCIL

First Respondent

L G VAN TONDER N.O.

Second Respondent

ZAMEER KHAN

Third Respondent

UMHLATUZANA CIVIC ASSOCIATION

Amicus Curiae

Heard on : 3 May 2001

Decided on : 26 September 2001

JUDGMENT

YACOOB J:

Introduction

[1] Section 34 of our Constitution promises a fair hearing to anyone involved in a justiciable dispute that can be resolved by the application of law.¹ This appeal against an order of the

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Section 34 of the Constitution provides:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

Durban and Coast High Court (the High Court) is about that right. It requires us to evaluate a municipal rate collection procedure permitted in the Greater Durban Metropolitan Area by section 105 of the Durban Extended Powers Consolidated Ordinance No. 18 of 1976 (Natal) (the Ordinance). This procedure is referred to as “the section 105 procedure”.

[2] The appellant, Mr De Beer, is the liquidator of a partnership that owned immovable property in Clairwood, Durban. Because rates on that property remained unpaid, the first respondent, the North Central Local Council and the South Central Local Council (the Council) availed itself of the section 105 procedure. It sent the prescribed notices and obtained an order in the High Court pursuant to section 105(9) of the Ordinance. That order authorised the sale in execution of the partnership property² which was later sold to the third respondent, Mr Khan. The appellant, who had received none of the notices, brought an action in the High Court to have section 105(9) of the Ordinance declared unconstitutional on the basis that it fails to afford a fair hearing and infringes the right of access to the courts guaranteed by section 34. An order dismissing this action is the subject of this appeal.

[3] The Sheriff of the High Court who conducted the sale was joined in the High Court as the

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The application before the High Court was one that has been referred to as a bulk application in which the Council sought an order for the sale of a number of properties on which rates were owing. The partnership property was one of these.

second respondent but took no part in the proceedings. The third respondent defended the action in the High Court and appeared personally before us to oppose the appeal. The Umhlatuzana Civic Association, a voluntary community organisation, was admitted as an *amicus curiae* and presented written and oral argument challenging the constitutionality of section 105(9). It contended that the section 105(9) hearing was not fair but, as will be apparent later, brought a somewhat different perspective to bear on the argument. The Legal Resources Centre represented the *amicus*.

The Section 105 Procedure: The Judgment of the High Court

[4] Although the appellant claims an order that section 105(9) of the Ordinance is unconstitutional, the fairness issue raised in relation to the hearing cannot be examined by looking at section 105(9) in isolation. The notice provisions in the section as well as section 105(9) must be described, interpreted and evaluated as a whole. Section 105 to the extent relevant provides:

“Recovery of rates.—(1) . . .

(2) The City Treasurer shall be the collector of rates and shall have power under the title of the City Treasurer of the City of Durban to sue for and recover all rates which are due and payable to the Council.

(3) After the first publication of the notification referred to in section 166 of Ordinance No. 25 of 1974 the collector shall give notice to the owner of every rateable property in the City, which notice shall state the amount of rates owing in respect thereof and the final date for payment and shall set out the number and description of the property and the value thereof as shown in the valuation roll.

(4) If the owner of any property fails to pay the rates or any part

thereof owing in respect of such property on or before the final date for payment—

- (a) the collector shall give such owner notice calling upon him to pay such rates and any penalty accrued or to accrue thereon, which notice shall state the capital amount of the rates owing, the rate number of the property in the valuation roll then current and shall contain the notification provided in subsection (8);

(b) . . .

(5) (i) The notice which the collector is required to give in terms of subsection (3) or subsection (4) (a) shall be given—

- (a) by posting the same to an address notified in terms of subsection (6), the notification of which took effect before the first day of November in the financial year in respect of which rates were assessed; or
- (b) if paragraph (a) does not apply, by posting the same to the address of the property shown in the valuation roll; or
- (c) if paragraph (a) does not apply and no address is shown in the valuation roll; by affixing on the notice board of the City Hall for a period of at least 30 days a schedule containing the name of the owner as shown in the said roll and the particulars required by subsection (3) or paragraph (a) of subsection (4), whichever is applicable;

provided that any notice required to be given in terms of subsection (4) (a) shall, if posted in terms of paragraph (a) or (b) of this subsection, be posted by prepaid registered post; provided, further, that any notice given in terms of subsection (3) shall if given by the method set out in paragraph (c) hereof, be affixed at least fifteen days before the final date of payment.

(ii) Any notice referred to in paragraph (i) shall be deemed to be given to the owner if given in the manner there set forth:

- (a) To the person registered as the owner of the property.
 - (b) where more than one person is so registered—
 - (i) If the person so registered have notified the collector, in accordance *mutatis mutandis* with the provisions of subsection (6), which shall apply to any such notification, of the name of the person to whom any such notice is to be given, then to the person whose name is so notified.
 - (ii) If there is no notification in effect in terms of subparagraph (i), to any one of the persons so registered.
- (6) (a) Any owner of rateable property with the City may notify the collector of an address within the Republic to which notices in respect of the property may be sent.
- (b) Any address so notified may be amended by a notification of amendment. When such notification of amendment takes effect the amended address shall be deemed for all purposes to have been notified in terms of paragraph (a) to the exclusion of any address previously notified.
- (c) . . .
- (7) If any rates or penalties in respect thereof or any part of such rates or penalties shall remain unpaid after the final date for the payment thereof, such rates and penalties, together with collection charges in respect thereof, may be recovered in the manner set forth in this section.
- (8) (a) (i) The collector shall cause to be inserted in the notice provided for by subsection (4) (a) a notification that if the arrears of rates in respect of the financial year specified in the notification together with all penalties and collection charges up to the date of payment are not paid within six months of the relevant date as defined in

paragraphs (b) and (c), application will be made to Court for an order for the sale of the property and the application of the proceeds thereof all as provided in this section.

- (ii) If payment is not made in the period set forth in sub-paragraph (i) the collector shall cause a further notification to be despatched by registered post that the said application to Court is to be made.

(b) Subject to the provisions of paragraph (c), the relevant date shall be—

- (i) in respect of rates the final date for the payment of which is fixed in terms of section 166 of Ordinance No. 25 of 1974 and section 103 (2) (a) of this Ordinance, the last day of the second complete calendar month succeeding the month in which the final date falls;
- (ii) in respect of rates the final date for the payment of which is fixed in terms of section 103 (2) (b) of this Ordinance where the final date falls between the 1st May of the preceding financial year and the 30th April of the current financial year, the 30th June;
- (iii) in respect of rates in respect of which there is an agreement in terms of subsection 167 (2) of Ordinance No. 25 of 1974, the 30th June.

(c) . . .

(9) If, after giving of a notification in terms of subsection (4) (a) read with subsection (8), such rates, penalties and charges are not paid within the period therein stated, a Court of competent jurisdiction, upon the application of the Council showing the amount of rates and penalties then

in arrear and that the notices provided for in subsection (3) and subsection (4) (a) and subsection (8) have been given, may summarily order any such rateable property or so much thereof as may be sufficient to satisfy the amounts set forth in paragraphs (a), (b), (c), (d), (e) and (f) of this subsection to be sold by public auction and the proceeds thereof to be paid into Court, and direct payment to the Council of:

- (a) all such rates and the penalties accrued in respect thereof at the date of such sale;
- (b) all collection charges in terms of subsection (11);
- (c) the cost of obtaining the said order and all expenses of such sale;
- (d) any amount payable in terms of section 175 (5) of Ordinance No. 25 of 1974;
- (e) any amount payable in terms of any tariff framed under section 241 (4) or 243 (1) of Ordinance No. 25 of 1974 and any other amount referred to in section 175 (3) of Ordinance No. 25 of 1974;
- (f) any balance (including interest) of the cost of any works carried out by the Council in terms of section 251 of Ordinance No. 25 of 1974 as modified by section 124 of this Ordinance, whether or not the same has become payable in terms thereof; provided that the amounts owing in terms of paragraphs (a), (b), (c), (d) and (e) hereof shall be paid in full before any payment is made under this paragraph;

as a prior charge in preference to any mortgage, security or claim whatsoever (if any) affecting the property and the Council shall thereupon have the right to have the property or any part thereof as the case may be sold in accordance with the Court's order without the necessity of issuing a writ or other process of Court for that purpose; provided that in all other respects any such sale shall be deemed to be a sale of immovable property

in execution of the judgment of such Court, save that it shall not be necessary to notify or consult the owner with regard to the sale or conditions of the sale.

(10) (a) If before the sale of any such rateable property in terms of any order in terms of subsection (9) there is produced to the Deputy Sheriff or other person charged with the sale thereof the certificate of the collector that all amounts referred to in paragraphs (a), (b), (c), (d), (e) and (f) as estimated with regard to the amount referred to in paragraph (c) by the collector payable in respect thereof have been paid, the said property shall be withdrawn from the sale.

(b) Notwithstanding that all the said amounts may have been paid before the said sale the Council shall not be liable to any person whatsoever for any loss or damage suffered by such person by reason of the sale of any such property in respect of which no such certificate has been so produced to the said Deputy Sheriff or other person.

(c) If any property is sold pursuant to an order referred to in subsection (9) notwithstanding that all amounts referred to in paragraph (a) have in fact been paid:

(i) (aa) If the collector within three months of the sale is satisfied that the said amounts had been paid at the date of the sale he shall, if transfer of the property to the purchaser has not been registered, declare that the sale is null and void.

(bb) The said declaration shall be by written notice signed by the collector and a copy of the said notice shall be posted by registered post to the owner and to the purchaser and shall be transmitted forthwith to the Registrar of Deeds.

(cc) On the signature of the said notice by the collector the said sale shall be null and void and in that event the purchase price shall be refunded to the

purchaser.

(dd) The owner shall be liable for all the expenses of the sale and all expenses incurred pursuant to the sale save any expenses incurred after the production (if any) of the certificate referred to in paragraph (a) to the person there referred to.

(ii) If no such notice is so signed by the collector in accordance with sub-paragraph (i) the sale shall be of full force and effect.

(11) In addition to any rates and penalties in respect of any property, collection charges shall accrue as follows, namely: on the relevant date set forth in subsection (8) an amount representing fifteen per centum of the capital amount of the rates then in arrear; and on the grant of an order of court in terms of subsection (9) a further amount representing fifteen per centum of the capital amount of the rates then in arrear. The said charges shall be payable to the collector and the said amount or such of them as may be applicable may be recovered by him in any proceedings for the recovery of rates.

(12) Nothing herein contained shall prevent the collector from taking proceedings for the recovery of any rates, penalties or charges by way of action or any other competent procedure in any court of competent jurisdiction.

(13) . . .

(14) . . .”

[5] The Ordinance obliges the Council to send three notices before the court hearing.³ The first of these (the first notice) must state the amount of rates owing on the immovable property in

³ The hearing is provided for in section 105(9).

question, its description and value as shown on the valuation roll, as well as the final date for payment of the amount owing.⁴ If a balance remains owing on the final date, the owner must be given a second notice (the second notice) calling for payment of the balance and any penalty already accrued or to accrue. The notice must also inform the owner that if all outstanding rates for a specified financial year together with penalties and collection charges up to the date of payment are not paid within six months of a specified date, an application will be made to court for an order for the sale of the property and for the proceeds of the sale to be used to discharge the obligations of the property owner to the Council.⁵ It will have been noted that the nature of the order to be applied for must be reasonably explained in the second notice and that this must be done more than six months before the application to court. If all amounts owing are not paid when the six months specified in the second notice expires, the Ordinance requires a further notice (the third notice) to the effect “that the said application to court is to be made.”⁶

⁴ Section 105(3).

⁵ Section 105(4)(a) read with subsection 8(a)(i) further read with paragraphs (a) to (e) of subsection 9.

⁶ Section 105(8)(a)(ii).

[6] The first notice must be “given” in one of two ways. The first is by way of “posting” either to an address specified by the owner⁷ or if no address is specified, to the address of the property shown in the valuation roll.⁸ The second way in which notice must be given is one applicable absent an address specified by the owner or shown on the valuation roll. In these circumstances a schedule must be fixed on the notice board of the city hall at least fifteen days before the final date for payment for a period of at least thirty days. This notice must contain the name of each defaulting owner as contained in the valuation roll as well as the particulars required in the first notice.⁹ The second notice must be given in the same way as the first except that if posted this must be done by pre-paid registered post and the particulars displayed at the city hall must be those required for the second notice.¹⁰ The first and second notices are deemed to be given to the owner if the provisions relating to posting or display are complied with.¹¹ The third notice must be “despatched by registered post”.¹² Although the word “pre-paid” is not used I have no doubt that the third notice must also be despatched by pre-paid registered post.¹³

[7] Section 105(9) is to the effect that “upon the application of the Council showing” that the

⁷ Section 105(5)(i)(a) read with subsection 6.

⁸ Section 105(5)(i)(b).

⁹ Section 105(5)(c).

¹⁰ Section 105(5).

¹¹ Section 105(5)(ii).

¹² Section 105(8)(a)(ii).

¹³ There appears to be no provision for displaying the third notice at the city hall. No point was made of this and I do not consider it.

notices “have been given”, a Court “may summarily order any such rateable property . . . to be sold by public auction”, payment of the proceeds of the sale into court and payment to the Council out of those proceeds of outstanding rates, related charges and other money owing to it.

[8] The appellant attacked section 105(9) both in the High Court and in this Court on the basis that the section 105 procedure requires an order to be made against a person without that person necessarily having received a fair hearing. I will refer to the person in this category as “the affected person”. Two grounds were advanced. The first was that the section 105 procedure dispenses with service as ordinarily required by the Rules of Court of any notice of proceedings pursuant to which the order for the sale of property may be granted. Secondly, the procedure permits an order for the sale in execution of immovable property without any prior sale of movables being required and without any writ of execution being served on the owner before the sale of that property. The Rules of the High Court concerned with execution permit a sale in execution of immovable property only after execution against movable property fails to yield enough to satisfy the debt and allows a sale of immovable property only after service of the writ of execution in respect of immovable property upon the owner.¹⁴

[9] The judgment of the High Court points out that service in terms of the Rules of the High Court does not necessarily ensure that court proceedings come to the attention of any person sued. It refers to the evidence of the difficulties attendant upon the use of the ordinary court procedure for rate collection and of the effectiveness and workability of the section 105 procedure. The judgment emphasises that a property owner knows that rates are payable on

¹⁴ Rules 45(1) and 46(3) of the Rules of the High Court.

property and rejects the proposition that “section 105 of the Ordinance deprives any person of the right to a fair hearing in open court.”¹⁵ Section 105(9) was accordingly held to be consistent with the Constitution and the application was dismissed. Hence the appeal.

The Section 34 Fair Hearing Right

[10] The primary submission in this case is that section 105(9) infringes the fair hearing requirement of section 34 because its provisions concerning notice of the hearing to affected people are deficient. It is accordingly not necessary to determine the scope of the whole of section 34. We are concerned with the scope of the fair hearing component of that right in a court of law. This may simply be referred to as “the section 34 fair hearing right”. Three questions concerning the fair hearing right before a court require attention. Firstly, what section 34 requires as to the kind of notice that must be given to an affected person; secondly, what the section requires of the hearing itself in so far as it concerns notice for a hearing before a court to be fair; thirdly, whether the nature of the order that can be made pursuant to the hearing implicates the fair hearing right.

¹⁵ *De Beer NO v The North Central Local Council and the South Central Local Council and Others* (D) Case No 8959/99, 28 July 2000, unreported at 16.

[11] This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution.¹⁶ The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair.¹⁷ It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of courts make provision for this. They are not, however, an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does, it meets the notice requirements of section 34.¹⁸

[12] In the course of their argument, the parties used the Rules of the High Courts as a benchmark of fairness and to engage in a comparative analysis of those rules on the one hand and the section 105(9) procedure on the other. In line with this approach the parties who attacked the

¹⁶ *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 31; *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at paras 11, 16, 19 and 22; *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others*; *Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC); 2000 (8) BCLR 876 (CC) at paras 5-6; *Metcash Trading Ltd v Commissioner, South African Revenue Service, and Another* 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) at para 50.

¹⁷ See below n 26.

¹⁸ *S v Dzukuda and Others*; *S v Tshilo* 2000(4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at paras 14-16.

section contended for unfairness by relying on a number of respects in which the section 105 procedure is allegedly less effective in conveying notice of the proceedings than the High Court Rules. In the same vein, an important link in the Council's support of the section 105 procedure was that it was not materially different from the Rules of the High Court. This underlying approach is incorrect. What has to be considered is whether section 105, correctly interpreted consistently with the Constitution, infringes the fairness requirement of section 34.

[13] For purposes of the issue in this case a fair hearing requires that the provisions as to notice must be reasonable in all the circumstances. Due regard must be had to the purpose for which notice is given, namely to bring relevant information about the hearing to the attention of anyone affected by it. It is undesirable if not impossible to try to determine the requirements of reasonableness in the abstract. The reasonableness of notice provisions in any law must in the case of each provision be assessed on its own merits.

[14] The hearing itself must also be fair. It can be fair in relation to notice only if the court has a discretion not to grant the order or to require further notice to be given if fairness demands that it be done. The court must, in addition, have the power to investigate whether it is reasonably possible to bring the notice to the attention of the affected person if it is clear that fairness requires an investigation of that kind.

[15] It must be emphasised that the section 34 fair hearing requirement is concerned with the fairness in substance of notice provisions applicable to the hearing and of the procedure at the hearing itself. The nature of the order that could be made and the gravity of its consequences

may well be circumstances relevant to an assessment of the fairness of the notice provisions and the hearing that ensues. The section 34 fair hearing right is, however, not concerned with the fairness or otherwise of the substantive law applicable to either the dispute or the relief that may be granted. This has relevance to the contention that the ensuing order authorising the sale of immovable property without more, affects the fairness of the hearing.

Does the Section 105 Procedure Afford a Fair Hearing?

[16] The aim of the notice provisions is to bring the claim and later the hearing to the attention of the people affected. In the case of *Tooze and another v City Council of Durban and others*¹⁹ it was held that the notice provisions do not oblige the Council to bring the notice to the personal attention of the affected property owner and that the Council is obliged merely to post the first notice by pre-paid post, and the second and third notice by pre-paid registered post.²⁰ The Judge relied in that judgment on the deeming provision contained in section 105(5)(ii) of the Ordinance. I agree. The question whether section 105 is inconsistent with section 34 of the Constitution must be determined.

[17] The third notice²¹ must be to the effect that “the said application to Court is to be made.” An issue raised is whether this formulation requires the Council to say in the notice merely that an application is to be made or whether the notice must also state the time, date and place of the hearing as well as the nature of the application and the order sought. The *Tooze* judgment

¹⁹ [1996] 3 All SA 229 (D).

²⁰ Id at 245D-47G.

²¹ Section 105(8)(a)(ii) of the Ordinance.

concluded that the Council is required to say in the notice when and where the application is to be heard and to particularise the nature of the application and the order sought. This conclusion too, is unassailable.

[18] The circumstances relevant to a decision whether section 105 is inconsistent with section 34 of the Constitution must now be traversed. These circumstances provide the context in which the reasonableness of the notice falls to be assessed. The subject matter of the debt is rates on immovable property which are outstanding and which a municipality is constitutionally entitled to impose.²² The money must be raised as speedily as possible because the Council uses it to fulfil its constitutional obligations in relation to the delivery of services.²³ There is a special relationship between a municipal council and each ratepayer in that the ratepayer is obliged to pay rates and that the Municipal Council has the right to collect them and the obligation to use the proceeds for the delivery of services. The claims are based neither on contract nor delict and it is unreasonable to expect the Council to obtain more detail than is required by the Ordinance in relation to each ratepayer to enable more effective service to be given.

[19] The section 105 procedure is a tax collection mechanism. The amount of rates payable

²² Section 229(1)(a) of the Constitution.

²³ Section 152(1)(b) read with sections 153 and 156 of the Constitution.

has its basis in the value of the property as reflected on the valuation roll. Ratepayers have the right to object to the valuation of the property. However, once the value has been determined and the objection procedure has run its course, the determination of the precise amount of the rate liability is a matter of mechanical calculation based on the proportion of the value of the property payable as rates. By the time the notice procedure comes into play, therefore, the ratepayer cannot challenge the correctness of the amount of rates payable. The section 105 procedure is concerned with the collection of tax the property owner is obliged to pay.

[20] In this context, the provisions relating to the posting of the notices and those that authorise notices to be fixed to a notice board at the city hall must be evaluated separately. The constitutionality of the procedure that authorises these notices to be posted will be investigated first. There is no evidence of any significant unreliability of the post office nor of any indication that delivery of notices sent by registered post is hampered by an unacceptable degree of post office inefficiency. The notice provisions that require posting are reasonably capable of bringing the hearing to the attention of the person affected. It is probable that the person affected will in the ordinary course become aware of the possibility of a hearing by the time all three notices have been duly posted.

[21] It is reasonable that the ratepayer be permitted to select an address to which the notices must be posted if she so chooses. In default of a specified address being chosen, it is both fair and reasonable to post the notices to the address of the property shown on the valuation roll. The judge placed some reliance on the proposition that property owners ought to know that they owe rates. Owners of immovable property ought to be aware of the source and the precise nature of

their obligations to a municipal council. They benefit from the services provided by the Council.

They need only be told of the amount of rates payable. Owners, the beneficiaries of municipal services essential for the collective good of all within the area of that municipality, have certain obligations. One of these is to take reasonable steps to apprise themselves of the content of their obligations. This civic responsibility is fully consistent with our constitutional norms. There is a possibility that some ratepayers will not be aware of their rate liability despite the exercise of due diligence. This possibility is appropriately addressed by the discretion of a court at the hearing. This issue is discussed later.

[22] The provisions that require notice to be affixed at the city hall are of another order altogether. They are concerned with extraordinary circumstances, and apply when two requirements are present: there must be no property address on the valuation roll and the property owner must have failed to use the opportunity to furnish an address to which notices can be posted. It is too much to expect of a municipal council to expend resources to trace the property owner concerned or to make arrangements for effective delivery of a notice to a property for which there is no address in the valuation roll. The provision caters for circumstances in which it is not reasonably possible to give notice in a way that can reasonably be expected to reach the ratepayer. This notice provision, aimed as it is to cover extraordinary circumstances, is reasonable provided that a court is not obliged to grant an order at the hearing on mere proof of compliance with the notice provisions of section 105, regardless of circumstances that otherwise render the hearing unfair and the subsequent grant of an order unjust. That issue is now discussed.

[23] It concerns the question whether the court hearing a section 105(9)²⁴ application has any power to consider the efficacy of the notice given. The subsection, in its terms, is to the effect that “upon the application of the Council showing” that the notices “have been given”, a court “may summarily order any such rateable property . . . to be sold by public auction” Some of the submissions tended to support the conclusion in the *Tooze* judgment that, once the Council had established that the relevant notices had been posted or, if the notice provisions so authorised, had been affixed at the city hall, a court hearing the application had no discretion but to grant the section 105(9) order.²⁵ The judge’s conclusion was based on his view that the use of the word “may” in the subsection is not decisive and that the carefully described notice provisions and the circumstances in which the order was to be granted left no discretion. He emphasised that the section left no room for any other order to be made by a court.

²⁴ Set out in full in para 4 above.

²⁵ Above n 19 at 255e-57e.

[24] I do not agree. The fact that the nature of a court's discretion and the way in which it is to be exercised is not fully particularised in a statute does not necessarily mean that the discretion has been excluded. This Court has accepted the well-recognised principle of constitutional construction that where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained.²⁶ It is reasonably possible to interpret the subsection in a way that enables a court to exercise a discretion. The subsection, literally at least, permits the court to grant an order rather than obliges it to do so. The aim of the notice provisions is to bring the fact of the rate arrears and later the hearing to the attention of the affected property owner. We must bear this overall purpose in mind in determining whether the court has a discretion and must moreover interpret the provision in a way that is consistent with that purpose. I conclude that a court does have a discretion not to grant an order if the way in which the notice was given renders the

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Bernstein and Others v Bester NO and Others 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 59 and the authorities referred to in n 87 thereof; *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at paras 8-9 and 18; *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85; and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others; In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-6.

hearing unfair in the particular circumstances of the case.

[25] It is a trite proposition that an applicant is obliged to make full disclosure of all relevant facts in any *ex parte* application. A party in the position of the Council in a section 105(9) application must make a full disclosure of every factor that points away from the conclusion that the hearing has come to the attention of an affected person. A court must have due regard to all these factors in deciding whether to exercise that discretion. It must be emphasised that in doing so the court will be performing the fundamental duty of ensuring that the hearing is fair and giving effect to a crucial constitutional norm. Factors relevant to the exercise of this discretion cannot be the subject of an exhaustive list but include the following: whether the address to which the notice was posted was provided by the property owner or whether it is the address of the property on the valuation roll; whether there is any specific evidence in the case in question that makes it unsafe to accept that the posted letter would have reached the address for which it was intended; whether the amount of the outstanding rates represents one year's rates together with penalties and interest or whether it represents a much lower amount, whether the registered letters had been returned unclaimed; whether the property is situated in an area in which post is normally delivered; whether the property is situated in an area which could be said to be owned by poor illiterate people and whether the history of rate payments in respect of that property points away from notice having come to the attention of the property owner.

[26] A court accordingly has the duty to consider whether the hearing is unfair because of the way in which the notice was in fact given in the particular circumstances of the case. The judicial officer also has the power, in these circumstances, to investigate whether more effective

service is reasonably possible. If it is, the power to order more effective service is not excluded by the Ordinance. It is, in the final analysis, this judicial control that renders the section 105(9) hearing fair in the context of the notice provisions that must precede the hearing.

[27] It was contended that the hearing is rendered unfair because an order for the sale in execution of immovable property by public auction may emanate from it without any requirement that movables must first be sold in execution and without the need to serve a notice of the sale in execution of immovable property on the debtor. The obligation to pay rates is a charge on immovable property and an order that the immovable property on which rates remain owing beyond their due date be sold for payment of rates, penalties and other money owing to the Council does not make the hearing procedurally unfair. The second and third notices are required to inform the person affected of the fact that an order for the sale of immovable property will be sought. In the circumstances the consequences of the order do not render the hearing unfair. They relate to the substantive character of the court's order and not to procedural fairness.

[28] There is a related submission of those contending for unconstitutionality which need not be dealt with in detail because it is based on the extent to which the execution procedure deviates from Rule 45 of the Rules of the High Court. It is based principally on the fact that the Sheriff is not obliged to consult with the owner of the property to determine the conditions of the sale. Although it would be fairer for this to be done, the omission of consultation does not impact on the fairness of the hearing in which justiciable disputes can be resolved by the operation of law.

Other Arguments Advanced by the Amicus

[29] The *amicus* placed considerable reliance on the fact that most of the property sold pursuant to section 105(9) orders were of comparatively small value, that amounts owing on the properties sold were mainly comparatively small and that most sales in execution fetched prices but a fraction of their rateable value. The contention was that these circumstances rendered the hearing unfair. None of these consequences can be attributed to the fairness of the hearing. The consequences pointed to are cause for concern in a broad sense but they raise a substantive matter and can bear no relation to the determination of this appeal, which turns on the procedural fairness of the hearing.

[30] The *amicus* also contended that the words “summarily order” in section 105(9) did not justify a departure from the Uniform Rules of the High Court which require service of all applications in accordance with the provisions of such rules. This contention was not raised in the High Court and is inconsistent with the practice of the Natal courts over a long period of time.²⁷ No constitutional reason for departing from the meaning given to the section by the Natal courts was advanced by the *amicus* other than the contention that the section infringed the section 34 fair hearing right. I have dealt with that contention and held that the section, properly construed in the light of the provisions of the Constitution, does not infringe section 34. In the

²⁷ *In Re Pennington Health Committee* 1980 (4) SA 243 (N); *Germishuizen v Kingsburgh Town Council and Others* 1993 (1) SA 757 (D) at 759H-I; *Tooze* (above n 19) at 243a-d.

circumstances this contention must be dismissed.

[31] The final point made on behalf of the *amicus* is that section 105(9) is inconsistent with the Constitution because the section is part of an Ordinance. Reliance is placed on section 171 of the Constitution which provides that all courts function in terms of national legislation and that their rules and procedures must be provided for in terms of national legislation. The submission is that the Ordinance purports to determine how courts should function and to provide for the rules and procedures of the courts. The appellant's only cause of action was that the section 105 rate collection procedure was inconsistent with section 34 of the Constitution. He also relied on the right to property conferred by section 25 of the Constitution but took that no further after the trial had begun. The issue between the appellant and the respondents in the appeal was likewise limited to that cause of action. The section 171 argument raises a whole new cause of action which affects the interests of other parties who will need to be joined in the proceedings including the Minister of Justice, the national minister and the member of the executive council in the province responsible for local government. This cause of action was not referred to in the application to be allowed to be admitted into the case as an *amicus*. An *amicus* is not entitled to raise a new cause of action. If an *amicus* wishes to raise a new cause of action in an appeal, that should be referred to in the rule 9 application, and permission to do so should be sought. The President of the Court can then deal with the matter in terms of rule 9(3) and consider whether or not it would be appropriate to permit such an issue to be raised in the appeal. Such permission is unlikely to be given if it would involve the joining of additional parties to the litigation, or if there is a likelihood that one or more of the parties would be prejudiced. I do not consider it

appropriate in the circumstances of the present case to permit the *amicus* to rely on the new cause of action, raised for the first time in oral argument. The cause of action raises matters of importance that, as far as I am aware, have not previously been considered by any court in this country. Moreover, if the issue raised were to be dealt with by this Court in the present matter, a number of additional parties would have to be joined as parties to the appeal. I refrain from expressing any opinion on the merits of the argument and decline to deal with it.

[32] The appeal must be dismissed.

Costs

[33] A matter of considerable public importance has been aired before us in this appeal. In the circumstances it is not fair that the appellant should pay the costs of this appeal despite the fact that he has not succeeded. There will be no order as to costs.

The Order

[34] The appeal is dismissed. There is no order as to costs.

Chaskalson P, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Madlanga AJ and Somyalo AJ concur in the judgment of Yacoob J.

For the appellant: LB Broster SC and AA Gabriel instructed by Cox Yeats Attorneys, Durban.

For the respondents: PJ Olsen SC and GD Goddard instructed by Shepstone & Wylie Attorneys, Durban.

For the third respondent: The third respondent appeared in person.

For the *amicus curiae*: GM Budlender and AM Stewart instructed by the Legal Resources Centre, Durban.