IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GQEBERHA)

Case No: 3251/2018

In the matter between:

ST FRANCIS BAY (WARD 12) CONCERNED RESIDENTS ASSOCIATION	**APPLICANT**
and	
KOUGA LOCAL MUNICIPALITY	**1st RESPONDENT**
ST FRANCIS BAY PROPERTY OWNERS ASSOCIATION	**2nd RESPONDENT**
ST FRANCIS BAY PROPERTY OWNERS NPC	**3rd RESPONDENT**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail. The date and time for hand-down is deemed 09H30 on 26 April 2022.

JUDGMENT

MJALI J

1. In this matter the applicant approached this Court seeking an order couched in the following terms:

   1.1 That the decision of the first respondent's Municipal Manager and/or

other officials to permit the second and/or third respondents to conduct and manage the process in terms of which the decision to declare a Special Rates Area in accordance with section 22 of the Local Government Municipal Rates Act,108 of 1996,was taken , be reviewed and set aside. Alternatively, that the failure of the first respondent's officials to conduct and manage the process in terms of which the decision to declare a Special Rates Area in accordance with section 22 of the Local Government Municipal Rates Act,108 of 1996 was taken, be reviewed and set aside.

1.2 That the decision of the first respondent's council to declare a Special Rates Area in accordance with section 22 of the Local Government Municipal Rates Act,108 of 1996 ("the Rates Act"), which decision was taken at a Council meeting on 23 May 2018, be reviewed and set aside, alternatively be declared to be unlawful and void.

1.3 That section 23 of the first respondent's Property Rates Policy, read with Part A thereof be declared unconstitutional as being in conflict with section 22 of the Rates Act.

1.4 That the first respondent pay costs of this application.

1.5 That the second and third respondents pay costs of this application jointly and severally with the first respondent only in the event of them opposing the relief sought.

2. The applicant seeks relief against the first respondent only but has cited the other respondents as it is of the view that they played a pivotal and central role in the events giving rise to the present dispute. Only the first respondent opposed this application on the grounds that it acted lawfully. Before I deal with the issues raised in this application it is essential to set out a brief background.
3. The applicant describes itself as a voluntary association with a written constitution,

comprising of a number of residents of St Francis Bay, who reside in the area referred to in the papers as the demarcated area.

4. The first respondent is a local municipality established in accordance with the Local Government Municipal Systems Act 117 of 1998. The second respondent is a voluntary association with a written constitution comprising of a number of residents of St Francis Bay and beyond, who reside in the area referred to in the papers as the greater St Francis Bay Area. The third respondent is a company, not for profit, registered in accordance with the Companies Act 71 of 2008, the object of which is to manage the Special Rate Area ("SRA") established by the first respondent, which SRA comprises of the demarcated area.
5. In its founding affidavit the applicant states that the second respondent was established a number of years ago with the object of catering for the interests of the property owners and residents of the Greater St Francis Bay as well as Cape St Francis. It states further that contrary to its main objective, the second respondent has in recent years had as its main objective been the creation of the SRA in accordance with the Rates Act. The first respondent admits that the second respondent was established with the object of catering for the interests of the property owners and residents of the Greater St Francis Bay but denies that it also represents Cape St Francis or Sea Vista and avers that those areas have their own rate payers' association. The first respondent also denies that the main focus in recent years has been the creation of the SRA and avers that the second respondent has also focused on a number of issues in line with its objective of looking after the interests of the property owners / residents in the St Francis Bay area.
6. The rationale behind the establishment of the SRA was based on the belief that it could reverse the steady deterioration of the infrastructure and the provision of services in the area which the first respondent was either unwilling or incapable to do. Initially the SRA was intended to include not only St Francis Bay but also the adjoining areas of Santareme, St Francis on Sea, Port St Francis, Otter's Landing

and The Links, all of which form one continuous urban area. In other words the Greater St Francis Bay Area. The first respondent admits not having funds to deal with the steady infrastructural deterioration in that area.

7. During 2016 the third respondent was established following a resolution that was taken in the second respondent's December 2015 AGM. From the second respondent's news' letter that was attached to the applicant's founding affidavit as "AC8", the following can be gleaned, that the third respondent was formed by a group of concerned property owners because the first respondent had no funds to maintain the deteriorating infrastructure. The third respondent was therefore established with this view in mind and "*not to wait, watch or wonder but to make things happen".*
8. On 1 June 2016 the Department of Economic Development, Environmental Affairs & Tourism (DEDEAT) issued environmental authorisation to the first respondent for the management and repairs of the spit and beach in St Francis Bay which is situated on the municipal property. The first respondent delegated that authority to the third respondent through a memorandum of understanding that was entered into by the first and third respondent on 7 October 2016. The aforesaid delegation appears in clause 2 of the memorandum of understanding which reads thus "*so as to enable the company to attend to the management and repairs as above envisaged, the Municipality authorises the company together with its appointed contractors and professional service providers to access upon the property to attend to all the necessary work and repair on the spit, revetments and beach as specifically authorized in the environmental authorisation under clause 3.3.2.5 and in the Municipality's place and stead."*
9. As to how the third respondent would be funded in order to carry out its mandate appears in "AC8" as well as in the memorandum of understanding entered into by the first and third respondents on 7 October 2016, to be generated to a large degree by donations from interested parties made to the third respondent's bank account.

Further funding was to come from the levies that would be collected by the municipality towards the financing of the repairs, restoration and maintenance of the St Francis Bay spit, revetments and the beach. The amounts collected by the Municipality through levies would be paid into the banking account of the third respondent within 30 days upon being issued with an invoice by the third respondent for the funds so received.

10. The applicant contends that the first respondent divested itself of all responsibility of maintaining/ repairing the spit and handed over that responsibility both legal and from a financial point of view to the third respondent. The first respondent denies this averment and states that it did not have the financial capability to take on the responsibility of repairing the spit in 2016. In its view the establishment of the SRA was primarily motivated by its lack of financial muscle and the conclusion of the Memorandum of Understanding was one of the ways in which it took steps to alleviate the problems associated with the deteriorating infrastructure.

11. In 2017 the second respondent requested the residents of the Greater St Francis Bay Area to vote on whether or not the SRA could be established. That proposal failed to yield a majority result and was thus shelved. Following the aforesaid failure, the geographical area of the proposed SRA was redrawn to include only the Canals and the Village. This was according to the first respondent done to make the process of collecting votes more manageable. Thereafter a vote relating to the establishment of the SRA was again called by the second respondent but before the process could be completed, it was stalled as the first respondent's By-Laws did not make provision for the establishment of the SRA.

12. On 17 December 2017 the first respondent published a notice calling for comment on its proposed new property Rates Policy and By-Law. The closing date for comments was 18 December 2017, a day after the issue of the notice. In that notice there was also an announcement of a public meeting. The purpose for the proposed new policy and By-Law appears in the aforesaid notice to be to provide for a

mechanism for the introduction of the SRAs in the Kouga region. Such Policy and By-Law were required to regulate the SRAs and that the first respondent did not have them in place. Significantly the notice mentions that because the SRAs entail the levying of an additional rate on properties in a specified area, it would need to be supported by 50% plus one of the property owners within the specified boundaries. The applicant also makes reference to a public meeting that had already been held in Newton Hall , Jeffreys Bay on 28 November 2017, the developments of which the vast majority of the affected persons were unaware. That meeting was according to the applicant, apparently advertised in the Herald on 16 November 2017.

13. On 29 December 2017 the first respondent's Draft Rates By-Law was published in the Provincial Gazette under Notice No. 210/2017. From the aforesaid Gazette it is evident that the Draft Rates By-Law was passed by the first respondent's Council on 19 December 2017 exactly a day after the public comment closed. This fact raises questions as to when it must have been sent to the Government Printer for publication. In the applicant's view, it must have been sent long before the date on which public comment closed. The first respondent denies this fact. The first respondent's Rates Policy was also passed on the same day as the Draft Rates By-Law. This Rates Policy had to be established in accordance with the provisions of the Local Government Municipal Rates Act,108 of 1996 ("the Rates Act"), and in particular sections 22 and 23 thereof.

14. There was a series of meetings ranging from December 2017 to February 2018 in respect of which, notices were circulated by the second respondent via email to the St Francis Property Owners. Importantly these were meetings that were called by the second respondent wherein it would present the revised SRA proposal in line with the revised SRA By-Law and Policy of the Kouga Municipality. In the email notice attached to the applicant's papers as "AC14", it is stated that in the event of the majority of property owners voting in favour of the proposed SRA, an

application would then be lodged with the First Respondent. In a number of meetings the first respondent's municipal manager was absent but was in attendance in the one that was held on 11 January 2018 and gave his full support for the issues on agenda. Of particular significance are the following meetings. The meeting of 20 December 2017 which was the meeting of the second respondent and was attended by 91 members and it is where the revised SRA proposal was tabled. Relevant thereto were that the original proposed additional rates levy was reduced from 50% to 25% of the monthly rates. Further the area to be covered by the SRA was also reduced to include the Village and the Canals only thus excluding a number of areas like Santareme, St Francis on Sea, Port, Otters Landing, Industrial Sites and the Links which according to the minutes of that meeting "*may be included at a later stage".*

15. There was yet another meeting on 3 January 2018. The notice of that meeting was issued by the second respondent and publicised by email to the St Francis Property Owners. On the agenda was the presentation of the revised SRA proposal in line with the Kouga Municipality's revised SRA By-Law and Policy. In this meeting the municipal manager of the first respondent was absent and the meeting was chaired by the chairman of the second respondent, Mr Wayne Furphy. It is not clear whether the 92 members of the public that attended the meeting were property owners or not.

16. On 5 January 2018 the second respondent sent an email headed "*SRA NEWSFLASH"* to the St Francis Bay Property Owners. That email served to notify the property owners that they would be required to re-vote on the revised SRA proposal which had been presented at the two public meetings held on 20 December 2017 and 3 January 2018. It was also pointed out that the votes previously cast were no longer applicable as the first respondent had revised its SRA By-Law Policy and the second respondent's SRA Proposal had also been revised. Further that the property owners could vote by means of SMS, on a website, or by

completing a form. The re-voting process had to be completed by 24 February 2018. A further meeting to be held on 11 January 2018 was announced in that email.

17. The minutes of the meeting held on 11 January 2018 record that it was attended by 44 members of the public. Further that the second respondent presented their revised RSA Proposal in line with the Kouga Municipality 's revised SRA By-Law and Policy. The municipal manager of the first respondent was present in this meeting of 11 January 2018 and he gave his full support to the revised proposal indicating to the floor that the state of the spit would certainly breach sooner than later and that emergency repair work would need to take place to ward off disaster. Further that the first respondent would have to commit to a contribution in the form of 3 million as it cannot fund this on its own. A question was raised in that meeting that many people were not aware about that meeting or about the re-vote for the levy. In answer to that question it was stated that posters had been put up on all noticeboards and in all the media. Further that, that was the third public meeting all of which were widely publicised for the purpose of informing the homeowners.
18. On 15 February 2018 the second respondent emailed a newsletter to the St Francis Bay Property Owners wherein the residents were again asked to re-vote for the SRA Proposal as the votes cast earlier do not count due to the fact that this was a new proposal for the SRA. On 23 February 2018, a day before the voting closed, the second respondent lodged an application with the first respondent for the establishment of the SRA. An issue that the applicant takes, namely, that before the voting even closed the second respondent lodged an application for the establishment of the SRA. In its view this was an irregularity warranting the review and the setting aside of the procedure employed by the first respondent in the establishment of the SRA.
19. On 8 March 2018 the first respondent published Notice no 35/2018 which headed "*Public Invitation for Objections in respect of a Proposed Special Rating Area*

Application, St Francis Bay". That notice states that in terms of the By-Law and Property Rates Policy, an application had been lodged with the first respondent on 23 February 2018 for the establishment of a SRA. Written objections were then invited by no later than 30 March 2018.

20. There were a number of objections that were received by the first respondent prior to and subsequent to the application being lodged by the second respondent. The objections were largely about the non-adherence to proper procedure in the establishment of the SRA as well as the failure to include the community in the process. The applicant contends that such objections were ignored by the first respondent. In a nutshell the applicant attacks the first respondent's actions on the basis that the manner in which the first respondent went about establishing the SRA in the demarcated area was flawed in that section 22 makes no provision for the first respondent to divest itself of all responsibility and control over the additional rate raised and pay it over to an independent company like the third respondent. It also attacks the constitutionality of the first respondent's Property Rates Policy.
21. It is its contention that the manner in which the SRA was established is at odds with the applicable legislation, the applicant relies heavily on section 22 of the Rates Act which makes provision for the establishment of a special rating area (the "SRA"). It also relies on the following legislative provisions; section 151(2) of the Constitution of the Republic of South Africa which provides that the executive and legislative authority of a municipality rests in its Municipal Council. Section 151(3) of the Constitution which makes the right of the municipality to govern the local affairs of its community subject to National and Provincial legislation as provided for in the Constitution. The Municipal Property Rates Act ("the Rates Act), number 6 of 2004 which provides in section 2 that a municipality may levy a rate on property subject to section 229 and any applicable provision of the Constitution.
22. The first respondent opposes this application on the basis that it complied with the applicable provisions in the establishment of the SRA. According to the respondent

there was publication for public participation in the Herald newspaper on 16 November 2017 as well as on its website on 30 November 2017. This according to the applicant was insufficient in that it failed to take into account the special needs people who cannot read or write as required by sections 17(3), 21(3) of the Municipal Systems Act. Such sections require the first respondent to make provision for people who cannot read or write to access to a staff member of the first respondent during office hours for assistance with the contents of the notice as well as with noting their comments and objections. In this way the applicant contends that the procedure adopted by the first respondent prior to the adoption of its Rates By-Law and Policies was in conflict with the constitution.

23. The applicant further contend that the first respondent also failed to comply with section 21A(1)(a) of the Municipal Systems Act in that it failed to display the relevant documents at the Municipality's head office as well as its satellite offices such as Jeffreys Bay, Humansdorp, St Francis Bay, Cape St Francis, Oyster Bay, Patensie, Hankey, Loerie, Thornhill as well as various smaller settlements and agricultural areas.

24. The first respondent further opposes the application on the grounds that the very section 22 read with the Rates Act as well as the Rates By-Law which was adopted by the first respondent's Council on 19 December 2017 and published in the Government Gazette on 29 December 2017, make provision for the manner in which it has exercised its discretion with regard to the establishment of the SRA. According to the first respondent, section 22(3)(d) of the Rates Act makes provision for a consultative body to assist the first respondent. The view taken by the applicant in this regard is that whilst such a provision exists, it does not envisage a system whereby the first respondent divest its powers which are to be exercised by it exclusively and pays over monies to an otherwise independent company. I will deal with these contentions in due course.

25. The first respondent also denies that there was no proper consultation with the

members of the community. It also denies not considering the objections received from some of the concerned members of the community and states that they formed part of the agenda of the meeting of the 11th of January and were discussed therein. According to the respondent such objections were not considered material enough to influence the vote in favour of the SRA.

26. The history of this matter clearly indicates that not long after the Department of Economic Development, Environmental Affairs & Tourism (DEDEAT) issued environmental authorisation to the first respondent for the management and repairs of the spit and beach in St Francis Bay which is situated on the municipal property, the first respondent concluded a Memorandum of Agreement with the third respondent. On the strength of clause 2 of that Memorandum of Agreement the third respondent was authorised to attend to all necessary work and repair on the spit revetments and beach as specifically authorized in the environmental authorisation under clause 3.3.2.5 and in the Municipality's place and stead. Funds to carry out this mandate would be generated to a large degree by donations from interested parties made to the third respondent's bank account. Further funding was to come from the levies that would be collected by the first respondent towards the financing of the repairs, restoration and maintenance of the St Francis Bay spit, revetments and the beach. The amounts collected by the Municipality (first respondent) through levies would be paid into the banking account of the third respondent within 30 days upon being issued with an invoice by the third respondent for the funds so received. The invoice would be for the funds so received by the first respondent and not for the work done by the third respondent. in other words the first respondent would then simply collect the funds and just transfer that money to the third respondent upon being issued with an invoice by the third respondent for such monies received. By doing so the first respondent contravened sections 64, 65 and 79 of the Municipal Finance Management Act number 56 of 2003 which places certain responsibilities on a municipality as well

as its accounting officer in respect of revenue management and expenditure management. Section 79 specifically prohibits delegation of any powers and responsibilities placed on accounting officers in terms of this Act to any political organisation or structure or office bearer. Section 79 only allows such delegation to a member of the Municipalities top management referred to in section 77 of this Act or to any other municipal official. There are certain requirements to be complied with before such delegation is made. Importantly such delegation is in terms of section 77(3) subject to certain limitations and conditions as the accounting officer may impose in a specific case and does not divest the accounting officer of the responsibility concerning the exercise of the delegated powers or the performance of the delegated duty.

27. In casu it is clear that through the Memorandum of Agreement signed with the third respondent, the first respondent divested its powers and responsibility of consulting with the community. The notices that were issued in respect meetings where the establishment of the SRA was discussed, were issued by the second respondent and not by the first respondent. The very proposal for the establishment of the SRA came from the second respondent and the whole process of the establishment of the SRA was driven by the second respondent. The first respondent was absent in a number of meetings and only took a passive role in some that it was present.

28. Through the aforesaid Memorandum of Agreement the first respondent also divested itself of taking control of the monies collected from rate payers in line with the legislative prescripts. This Memorandum of Agreement was therefore in direct conflict with the provisions of the Municipal Finance Management Act and also did not comply with the Municipal Public-Private Partnership Regulations as there is absolutely no evidence of the first respondent's intention to establish such a relationship with the third and second respondent. Even if there was such an intention theirs is no evidence that certain requirements associated therewith, were

adhered to, namely, notifying the National Treasury of such intention in writing, conducting a feasibility study and then entering into a procurement process for the establishment of a commercial relationship.

29. Apart from the aforesaid, the meetings that were held were fraught with difficulties such as, those already alluded to in paragraphs 15 to 21 of this judgment, ranging from notices being sent by the second respondent to the exclusion of certain members of the community from attendance as well as voting particularly when one considers that voting was to be done through emails and SMS. The poor members of the community were thus excluded.

30. Another difficulty was that the municipal manager was absent in certain meetings and such meetings were chaired by the chairman of the second respondent yet on the agenda was the presentation of the revised SRA proposal in line with the Kouga Municipality's revised SRA By-Law and Policy. The SRA proposal itself was made by the second respondent and not by the first respondent. In terms of section 22(1)(a) of the Municipal Rates Act, the determination of the SRA within the Kouga Municipality is the responsibility of the first respondent. There are certain requirements to be met before such a determination is made namely, consultation with the community on various issues including the proposed boundaries, the proposed improvement and how such improvement is to be effected. There must also be a council resolution in favour of the establishment of the SRA. Obtaining consent of the majority of the community members is essential to the establishment of the SRA and such could not be said to have been achieved in casu considering the fact that there were numerous complaints pertaining to the exclusion of certain members of the community which complaints on the respondent's own version were not considered weighty enough to stall the process. This in my view constituted yet another reason for a finding that the first respondent dismally failed to comply with the legislative requirements for the establishment of the SRA. The argument advanced by the first respondent that section 22(3)(d) coupled with By-

Laws sanctioned the procedure adopted by it in the establishment of the SRA and as such all was above board, is based on a wrong interpretation of that section and fails to assist the respondent. That section simply sanctions the establishment of a committee to act as a consultation of an advisory forum and not to usurp the functions that are in the exclusive domain of the municipality. The requirements laid down in section 22 (3) for an establishment of an SRA are couched in peremptory terms and nowhere in the relevant sections of the Act is delegation of the functions of the municipality (for the establishment of SRA) sanctioned.

31. On the constitutional challenge, the papers demonstrate clearly that no regard was had for the people who might have special needs in the community. There were no provisions were made to include them in the process of the adoption off the Rates By-Laws and the creation of the SRA. As such they were effectively excluded from the process as members of the community which process it is mandatory for them to be consulted and their views considered. In **Doctors for Life International v Speaker of the National Assembly** 2006 (12)BCLR 1399(CC) the court held

"Therefore our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy."

32. In the very same matter the court held that the phrase "*facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them".*

33. Whilst the matter of the Doctors for Life dealt with the failure of Parliament to ensure public participation, it is my view that the principles expressed therein apply squarely to the facts of this matter and that the By-Laws adopted by the first respondent pursuant to a failure to ensure proper community participation fall to declared unconstitutional and be set aside.

34. There appears to be another problem, it appears from the minutes of the special meeting that was held on 19 December 2017 that certain amendments were effected to the Rates By-Law and Policy and that it was adopted together with the amendments and eventually promulgated by publication in the provincial gazette. This was done without making the amendments public and allowing further public comment and participation. In line with the dictum in the matter of **Kouga Municipality v Bellingham and Others** 2012 (2) SA 95 (SCA), the facts of this matter lead to an inevitable conclusion that the first respondent failed to comply with the provisions of the Constitution, the Municipal Property Rates Act ("the Rates Act"), number 6 of 2004 as well as Systems Act.

35. Based on the aforesaid I am satisfied that the applicant has made out a proper case for the relief sought. In the result the following order shall issue.

35.1. That the decision of the first respondent's Municipal Manager and/or other officials to permit the second and/or third respondents to conduct and manage the process in terms of which the decision to declare a Special Rates Area in accordance with section 22 of the Local Government Municipal Rates Act,108 of 1996,was taken , be and is hereby reviewed and set aside.

35.2. That the decision of the first respondent's council to declare a Special Rates Area in accordance with section 22 of the Local Government Municipal Rates Act,108 of 1996 ("the Rates Act"), which decision was taken at a Council meeting on 23 May 2018, be and is hereby reviewed declared to be unlawful and set aside.

35.3. That section 23 of the first respondent's Property Rates Policy, read with Part A thereof be declared unconstitutional as being in conflict with section 22 of the Rates Act.

35.4. That the first respondent pay costs of this application, such costs are to include costs of the appearance of two Counsel.

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GNZ MJALI

JUDGE OF THE HIGH COURT.

On behalf of the Applicant	Adv. N.J. Mullins SC With Adv. M. P. Morgan
Instructed by Email Phone Ref	C R Knoesen Attorneys Shop 4, Bluewater Bay Centre 26 Claude Cresent, Bluewater Bay Port Elizabeth claud@crknoesenattorneys.co.za 0414841373/1356 (CRK/el/S853)
On behalf of the First Respondent	Adv. A Beyleveld SC With Adv. T. Rossi
Instructed by Email Tel Ref	McWilliams &Elliot Inc 152 Cape Road Mill Park Port Elizabeth ed@mcwilliams.co.za 041 5821250 Ed Murray/as
