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# The legal instruments to raise property rates: Policy, by-laws and resolutions

## 1 Introduction

The Constitution empowers municipalities to generate revenue through the levying of property rates and the charging of service fees. The Municipal Systems Act<sup>1</sup> and the Property Rates Act<sup>2</sup> regulate these revenue raising powers by prescribing, inter alia, the use of certain legal instruments, namely policies, by-laws and resolutions. Each of these instruments performs a specific function within this statutory framework. Practice shows, however, confusion regarding the function of these revenue-raising instruments. A number of municipalities are levying rates largely based on their property rates policy, and not on a by-law, which makes their entire property rates regime suspect. The failure to properly apply these instruments may pose considerable risks for municipalities as their revenue-raising powers may be fatally flawed. This paper will examine this issue in the context of property rates, one of the main sources of municipal revenue.

In the first part of the paper a legal interpretation of the differing functions of policies, by-laws and resolutions will be outlined. In the next section the practice of municipalities with regard to the use of these instruments in the context of property rates will be examined, showing that practice in some municipalities is at odds with the legal framework. In the final section some recommendations are offered to address the problem.

## 2 Policies, by-laws and resolutions

With regard to tariffs, credit control and debt management, and rates, three financial instruments are prescribed: a policy, enforced by a by-law, with actual numbers provided by annual council resolutions. The purpose of each instrument is examined in the context of the Municipal Systems Act and the Property Rates Act. The jurisprudence relating to the distinction between policy and law is then reviewed before a general approach is proposed.

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<sup>1</sup>32 of 2000.

<sup>2</sup>6 of 2004.

## 2.1 Statutory provisions

### 2.1.1 Municipal Systems Act

Section 74(1) of the Municipal Systems Act prescribes that a council 'must adopt and implement a tariff policy on the levying of fees for municipal services'. Such a policy must then reflect a range of prescribed principles.<sup>3</sup> The principles include reference to poor households, principles of calculating tariffs, and the need to stimulate economic development through special tariffs. They also include, among others, the following policy objectives: 'the economical, efficient and effective use of resources, the recycling of waste and other appropriate environmental objectives must be encouraged'.<sup>4</sup> The articulation of these principles in a policy reflects broad objectives which typically would not be found in legislation because they would state general principles rather than binding legal rules. Given the broad ranging principles, the obligation to adopt a policy, is accompanied by the duty to 'adopt by-laws to give effect to the implementation and enforcement of its tariff policy'.<sup>5</sup> Such a by-law may differentiate between categories of users, provided it does not amount to unfair discrimination.<sup>6</sup>

A similar approach is followed with regard to credit control and debt collection. A municipality 'must adopt, maintain and implement a credit control and debt collection policy which is consistent with its rates and tariff policies'.<sup>7</sup> After setting out a set of issues that the policy must cover,<sup>8</sup> the refrain is again: a council must adopt by-laws 'to give effect to the ... policy, its implementation and enforcement'.<sup>9</sup> Again, differentiation among categories of debtors may not amount to unfair discrimination.<sup>10</sup>

The distinction between a policy and a by-law is best made in respect of a municipality's integrated development plan (IDP). An IDP is the strategic policy of the municipality, and as such is an internally binding document. The Municipal Systems Act thus provides that the IDP binds the municipality in the exercise of its executive authority.<sup>11</sup> However, once the municipality seeks to bind any other person by the provisions of the IDP, it must do so in terms of a by-law. The Act thus provides that the IDP 'binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed by a by-law'.<sup>12</sup> The intention is clear; the policy as a

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<sup>3</sup>See s 74(2) of the Municipal Systems Act.

<sup>4</sup>*Id* s 74(2)(h).

<sup>5</sup>*Id* s 75(1).

<sup>6</sup>*Id* s 75(2).

<sup>7</sup>*Id* s 96(b).

<sup>8</sup>*Id* s 97(1).

<sup>9</sup>*Id* s 98(1).

<sup>10</sup>*Id* s 98(2).

<sup>11</sup>See s 35(l)(b) of the Systems Act.

<sup>12</sup>*Id* s 35(l)(c).

legal instrument has no binding force on third parties (including residents). If the rights or interests of third parties are to be limited or infringed, then it must be done in terms of a law.

### 2.1.2 Property Rates Act

The Property Rates Act follows a similar framework. It requires that a council 'adopt a policy consistent with the Act on the levying of rates on rateable property in the municipality'.<sup>13</sup> The policy must address a number of issues. The 'policy' quality of the instrument is apparent from the requirement set for such an instrument. It must set out the 'criteria to be applied' if the municipality wants to levy different rates for different categories of properties, exempt specific categories of owners or allow rebates or reductions.<sup>14</sup> Thus, the policy need not determine the categories, only the criteria for determining the categories. Appropriately, that should be done in a by-law. The policy must further 'identify and quantify in terms of cost to the municipality and any benefit to the local community' any exemptions, rebates and reductions.<sup>15</sup> Working out the cost of policy decisions is typically of a policy document because it informs the decision eventually made – which properties are to be excluded, which owners are to receive a rebate. These provisions have been softened in the Local Government Laws Amendment Act of 2008.<sup>16</sup> The new provisions mitigate these requirements by requiring municipalities to 'provide reasons' only for exemptions, rebates and reductions without having to quantify the costs and benefits. The reference to 'reasons' is a strong indication that what is required is justification for policy decisions taken. The policy must further 'take into account' a number of social factors, such as the impact on the poor, public benefit organisations and public service infrastructure.<sup>17</sup> Furthermore, the object of the policy is 'to allow the municipality to promote local, social and economic infrastructure'.<sup>18</sup>

Following the approach adopted in the Municipal Systems Act, the Property Rates Act likewise provides that a municipality 'must adopt by-laws to give effect to the implementation of its rates policy'.<sup>19</sup> The message is clear: a firm legal base is required to give effect to the rates policy (and thereby impose financial obligations upon property owners) and to differentiate between properties and owners. But then the Act confuses the scheme, by suggesting that the focus of action is on the policy and not the by-law. Firstly, as a general statement of principle, section 3(3) reads:

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<sup>13</sup>See s 3(1) of the Property Rates Act.

<sup>14</sup>*Id* s 3(3)(b).

<sup>15</sup>*Id* s 3(3)(d).

<sup>16</sup>19 of 2008.

<sup>17</sup>See s 3(3)(f)-(h) of the Property Rates Act.

<sup>18</sup>*Id* s 3(3)(i).

<sup>19</sup>*Id* s 6(1).

- The municipality must exercise its power to levy a rate on property subject to –
- (a) section 229 and any other applicable provision of the Constitution;
  - (b) the provisions of this Act; and
  - (c) the rates policy it must adopt in terms of section 3.

Why is there no reference to the by-law that must implement the policy? If the by-law is deliberately excluded and is not intended to regulate the levying of rates, why have a by-law? The more probable answer may be that this is an oversight in the drafting.<sup>20</sup>

Secondly, the Act provides that a municipality may not grant relief in respect of the payment of a rate 'other than by way of an exemption, rebate or a reduction provided for in its rates policy and granted in terms of s 15'.<sup>21</sup> Section 15(1) provides that 'a municipality may, in terms of criteria set out in its rates policy', grant exemptions, rebates and reductions to categories of owners. It is thus not clear who determines the categories. As the policy provides the criteria only, who applies them? The council? The municipal manager? The answer surely is that such categories should be captured in the by-law as it includes some properties or owners and excludes others, affecting the rights and interests of both groups. The problem is that the Property Rates Act itself foresees that the policy may not provide the necessary details.

Thirdly, the Act requires that any amendment to the rates policy, 'must accompany the municipality's annual budget when it is tabled' in terms of the Municipal Finance Management Act (MFMA).<sup>22</sup> Moreover, the Act's framework also applies to amendments: 'community participation in amendments to a rates policy must be effected through the municipality's annual budget process in terms of sections 22 and 23 of the MFMA'.<sup>23</sup> As the adoption of the budget is a legislative act in terms of the jurisprudence of the Constitutional Court in *Fedsure*,<sup>24</sup> the question arises: is the policy part of the budget and thus imbued with the same legislative quality of the budget? Such a reading would make the need for a by-law superfluous. It is argued that this is not the case. First, the language of section 5 suggests that the policy is not an integral part of the budget, but that it merely accompanies the budget as an explanatory document. Second, the structure of the Act draws a clear distinction between the policy and by-law that is not subverted by the unclear language used in the Act.

The final step in the process is the determination of the actual rates in a resolution which must comply with the requirements of the Constitution.<sup>25</sup> Firstly,

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<sup>20</sup>This problem has also been identified by some municipalities. The KwaDukuza Local Municipality's by-law, eg, added to the list of three sources of authority, the by-law itself (KwaZulu-Natal *Provincial Gazette* no 25, 2007-10-11).

<sup>21</sup>See s 3(6)(a) of the Property Rates Act.

<sup>22</sup>*Id* s 5(1).

<sup>23</sup>*Id* s 5(2).

<sup>24</sup>*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC).

<sup>25</sup>See s 160(2)(c) of the Constitution.

the resolution must be adopted by a majority of the members of the council, and, secondly, it must be promulgated by publication in the *Provincial Gazette*.<sup>26</sup>

### 2.1.3 Municipal Finance Management Act

In contrast to the policy being coupled with a by-law, the Municipal Finance Management Act<sup>27</sup> (MFMA) provides in respect of procurement that each municipality and municipal entity 'must have and implement a supply chain management policy which gives effect to' the MFMA provisions on supply chain management.<sup>28</sup> Although such a policy must comply with an extensive framework provided in the MFMA and further prescribed in regulations,<sup>29</sup> there is no requirement that such policy be implemented in a by-law. This is in line with the function of a policy; it binds the municipality in how it procures. It is not used to impose obligations on third parties. Its aim is to secure the proper internal functioning of a council, and may thus be relied upon to ensure internal compliance. However, members of the public may expect of government that it abides by its own policy; to not do so would lead to irrational and arbitrary conduct. By this reasoning, a policy does have an external effect.

## 2.2 Jurisprudence

The legal significance of a policy as opposed to legislation has been considered by the courts in other contexts too.<sup>30</sup> In *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd*<sup>31</sup> the Supreme Court of Appeal first noted that the word 'policy' is inherently vague and may bear different meanings.<sup>32</sup> Harms JA remarked that it may not be prudent to define the word 'policy' in general or in the context of a particular Act, but continued as follows:

I prefer to begin with the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public policy should normally be reflected in such instruments. Policy determination cannot override, amend or be in conflict with laws (including subordinate legislations). Otherwise the separation between legislature and executive will disappear.<sup>33</sup>

In the instant case, the Court held that the intention of the provincial legislature was to elevate policy determinations to the level of subordinate

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<sup>26</sup>See s 14(1) and (2) of the Property Rates Act.

<sup>27</sup>56 of 2003.

<sup>28</sup>See s 111 of the MFMA.

<sup>29</sup>See s 112 of the MFMA.

<sup>30</sup>See Steytler and De Visser *Local Government Law of South Africa* (2009) (2<sup>nd</sup> update) ch 13 para 2.2.

<sup>31</sup>[2001] 4 All SA 68 (A).

<sup>32</sup>Paragraph 7.

<sup>33</sup>*Ibid.*

legislation. In *Minister of Education v Harris*<sup>34</sup> the Constitutional Court came to a different conclusion on the policy made by the Minister of Education in terms of the National Education Policy Act.<sup>35</sup> It held that the ministerial policy did 'not create obligations of law that bind provinces, or for that matter parents or independent schools'.<sup>36</sup>

From the two cases, it is apparent that the mere fact that an instrument is called a policy is not determinative of its legal consequences. Depending on the legislative intent, a policy may well be regarded as being legislative in effect. The question is thus whether the instrument called the property rates policy in the Property Rates Act was intended to have legislative effect similar to that of a by-law.

### ***2.3 The function and effect of property rates policies, by-laws and resolutions***

The approach of the Property Rates Act, following on the Systems Act, is that there is a clear distinction between a policy and a by-law and they therefore do not perform the same function. From the provision that the by-law gives effect to the rates policy there can be little doubt that it is not the legislative intent to elevate the policy to the level of subordinate legislation.

The underlying requirement of first articulating policy before publishing a by-law, stems from the new constitutional culture of justification. Before municipalities impose obligations on their residents, they articulate for public debate policy preferences through the mandatory public participatory process. With the adoption of a policy a municipality not only states its policy decisions, but, more importantly, the reasoning behind the decisions. The 2008 amendment to the Property Rates Act expresses this idea. The property rates policy must 'provide reasons' for exemptions, rebates and reductions.

This is also the practice of the national government. In many cases, the first steps towards legislation is the drafting of a White Paper, articulating the policy positions that are taken and why. The clearest example is the White Paper on Local Government of 1998, providing the policy objectives of the Municipal Structures Act<sup>37</sup> and the Municipal Systems Act that followed. The importance of this process is often evident when there is no formulated policy underpinning legislation. The Memorandum attached to a Bill is not a substitute for a proper policy document; it merely explains the provisions, often at the most rudimentary level, without advancing the policy objectives behind provisions.

Given the justification function of a rates policy, the by-law serves the function that law in general pursues – it imposes binding rules and obligations on

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<sup>34</sup>2001 11 BCLR 1157 (CC).

<sup>35</sup>Act 27 of 1996.

<sup>36</sup>Paragraph 11.

<sup>37</sup>117 of 1998.

residents. In the case of property rates, the object is to impose binding obligations to pay property taxes. Any limitation of individual rights, such as parting with money, must be founded on a firm legal basis.

Given the binding nature of a by-law on residents, a more strenuous adoption procedure is followed than in the case of a policy. The Constitution prescribes the basic requirements. First, no by-law may be passed by a council unless all the members have been given reasonable notice and the proposed by-law has been published for public comment.<sup>38</sup> Second, the decision to pass a by-law must be supported by a majority of the council members.<sup>39</sup> Third, a by-law may be enforced only after it has been published in the *Provincial Gazette* and must be accessible to the public.<sup>40</sup> The Municipal Systems Act reiterates the constitutional requirements of section 160(3)(b).<sup>41</sup>

The adoption of a policy is less demanding. Although a community participation process is prescribed for the rates policy,<sup>42</sup> there is no requirement of a reasonable notice period prior to the tabling of the policy. A key difference is that there is no need for a majority of councillors to approve the policy, only a majority of the quorate council, namely at least half of the councillors.<sup>43</sup> The adopted policy also need not be promulgated in the *Provincial Gazette* before it can be implemented.

However, if the rates policy could be regarded as falling within the meaning of 'the imposition of rates and other taxes, levies and duties', as provided in section 160(2)(c) of the Constitution, then it requires a majority of all councillors for its adoption.<sup>44</sup> It is argued that the adoption of a policy is not yet the imposition of the rates as this occurs only with the by-law and, ultimately, the adoption of the resolution. This approach is also adopted in the Property Rates Act where there is no requirement for the majority of council members to adopt the property rates policy<sup>45</sup> as this must be done in respect of the resolution. Similar to a by-law, the resolution must be adopted by a majority of council members<sup>46</sup> and then promulgated in the *Provincial Gazette*.<sup>47</sup> In terms of the *Fedsure* decision, the resolution is a legislative act which is not reviewable in terms of the administrative law. Although the resolution is not called a by-law, it constitutes a legislative act and is accordingly adopted in the same manner as a by-law.

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<sup>38</sup>See s 160(4) of the Constitution.

<sup>39</sup>*Id* s 160(3)(b).

<sup>40</sup>*Id* ss 162(1) and (3).

<sup>41</sup>See ss 12 and 13 of the Municipal Systems Act.

<sup>42</sup>See s 4 of the Property Rates Act.

<sup>43</sup>See Steytler and De Visser (2007) 3-13.

<sup>44</sup>See s 160(3)(b) of the Constitution.

<sup>45</sup>See s 3(1) of the Property Rates Act.

<sup>46</sup>*Id* s 14(1).

<sup>47</sup>*Id* s 14(2).



Given the difference between a by-law and a policy, the question remains whether the latter has any legal significance. As much as an Integrated Development Plan binds a municipality, so too does the property rates policy. It may be used by third parties against a municipality as a municipality must operate consistently with its own policies.

The failure to distinguish clearly between the functions and consequences of a policy and the by-law that implements it has important implications. If the policy is not adequately captured in the by-law, a municipality will not have an appropriate legal instrument to enforce its rates policy against third parties.

### **3 Practice**

The clear distinction made in the legislation between the functions of a policy and a by-law is not always reflected in practice. A review of rates policies and by-laws shows considerable variation between provinces but also within provinces. Rates policies are used in a variety of ways, often written as if they are by-laws. Most problematic are those by-laws that offer no firm legal basis for the rates they levy.

#### **3.1 Policies**

The main difficulty with some policies is that they do not formulate and justify policy choices. They often merely repeat what the legislation says, without making any choices.

##### *(a) Writing policy*

There are sufficient examples in practice to indicate that some councils grasped the meaning of a policy. They have articulated the general policy principles appropriate for a policy. One rates policy sets out its financing policy which states that the trading services must be self-sustainable and operated as cost centres.<sup>48</sup> Community services and other non-fee paying services are to be funded by the rates income and surpluses from the trading services.<sup>49</sup> A further example of a principle-driven policy statement is the setting out of factors that will influence a municipality to either increase or decrease the rates.<sup>50</sup>

What is uniformly missing from the policies is the empirical data upon which the policy decisions are to be made. The design of a multi-billion rand property rate scheme that has considerable economic and social effects cannot be done on the basis of 'thumb sucking' or on the basis of general principles. Municipalities can explain the economic and social information upon which they base their property rates

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<sup>48</sup> See cl 3(7) of the Swartland Local Municipality Property Rates Policy, available at <http://www.swartland.org.za/media/docs/2010/ByLaws/2010/Property%2Rates%20Policy.pdf> (accessed 2011-05-19).

<sup>49</sup> *Id* cl 3(8).

<sup>50</sup> *Id* cl 13(3).

schemes. This is in any event required by the Municipal Budget and Reporting Regulations of 2009: a municipality must have a funding and reserves policy 'which must set out the assumptions and methodology for estimating [inter alia] projected billings, collections and direct revenues [and] the provision for revenue that will not be collected'.<sup>51</sup>

*(b) Failing to write policy*

In a number of policies, there was a failure to make specific policy choices. The City of Johannesburg's rates policy of 2007 first provided that properties will be categorised in terms of a set number of categories. Each category would then attract a specific rate. However, the same policy provides that the council may decide to impose a uniform rate against the value of all properties, and then differentiate on the basis of rebates.<sup>52</sup> This choice is significant because if there is only one uniform rate, it places the City rates policy outside the reach of regulation by the Minister responsible for local government who can set the ratios between the rates applicable to different categories of property.<sup>53</sup> Why the latter choice was made should have been clearly justified in the policy.

A further example comes from the Knysna Local Municipality.<sup>54</sup> The policy first identifies a number of categories of properties, but then provides that the council may from time to time identify additional ones. The argument is that, should additional ones be identified, they must be included in the policy, stating why it is necessary.

*(c) Rewriting the Property Rates Act*

A common feature of most policies is that they often merely repeat what the Property Rates Act states. As a repetition of the Act, the policy adds no value. Neither policy choices are made nor any justifications provided. It is acknowledged, however, that it is not possible to write a comprehensive policy without referring to the Act. So how should it be done? In the Johannesburg policy, a section of the policy is devoted to the 'legislative background', which sets out the legislative framework neatly.<sup>55</sup>

*(d) Writing law*

The most common problem is that the policies are written in the same style as a

<sup>51</sup>See reg 8(1)(a) and (b) of the Local Government: Municipal Finance Management Act (56/2003): Municipal Budget and Reporting Regulations, GN 393, GG 2009-04-17.

<sup>52</sup>See cl 12 of the City of Johannesburg Property Rates Policy, 2007-01-29, implemented as from 2008-07-01. The Property Rates Policy of 2010/11 has omitted this provision (see [http://www.joburg-archive.co.za/2010/pdfs/rates\\_policy1011a.pdf](http://www.joburg-archive.co.za/2010/pdfs/rates_policy1011a.pdf) (accessed 2011-05-19)).

<sup>53</sup>See s 19(1)(b) of the Property Rates Act.

<sup>54</sup>See cl 4(p) of the Knysna Property Valuation Policy, available at <http://www.knysna.gov.za/#nogo> (accessed 2011-05-19).

<sup>55</sup>See cl 2 City of the Johannesburg Property Rates Policy 2010/2011.

law with neat sections and subsections. The drawback to this approach is that it does not seek to provide any justification for its decisions. Moreover, the policy is then easily mistaken as a substitute for the by-law itself.

### 3.2 By-laws

There are significant numbers of municipalities that get it right; their policies are neatly translated into well-formulated by-laws and contain the key ingredients necessary to enforce the rates policy against property owners. These elements are: (a) the various categories of properties in respect of which differential rates may be applied, (b) the various categories of properties and owners in terms of which exemptions, reductions, and rebates will be granted, and (c) the mechanisms of enforcement.

There are, however, a significant number of policies that are flawed on this score. First, some put the cart before the horse when the by-law comes before the policy, second, the by-law is a one liner that merely refers to the policy for content, and, third, the by-law merely restates the Property Rates Act.

#### (a) *The cart before the horse by-law*

In a number of municipalities, the order of instruments is wrong; the by-law merely authorises the adoption of a policy, it does not implement it. The City of Cape Town's Property Rates By-Law<sup>56</sup> reads:

- (1) The Municipality shall adopt and implement a rates policy consistent with the Property Rates Act on the levying of rates on rateable property in the municipality.
- (2) The Municipality shall not be entitled to levy rates other than in terms of a valid rates Policy.

The by-law further prescribes that the content of the policy must comply with sections 3, 4 and 5 of the Rates Act. For enforcement, the policy is to be enforced through its Customer Care, Credit Control and Debt Collection By-law and Policy 'and any further enforcement mechanisms stipulated in the City's rates policy'.<sup>57</sup> In the Western Cape and KwaZulu-Natal a number of municipalities have taken the same minimalist approach.<sup>58</sup>

The difficulties with this approach are the following:

- Firstly, the authority (and the duty) to adopt a by-law comes from the Property Rates Act, not the by-law.
- Secondly, the by-law cannot implement the policy as there is a policy

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<sup>56</sup>See s 3, published in the *Western Cape Provincial Gazette*, no 6444, 2007-06-29.

<sup>57</sup>See s 4(4). **Note to author: Perhaps needs to be referenced more fully?**

<sup>58</sup>See the by-laws of Kannaland Local Municipality, Mossel Bay Local Municipality and Overstrand Local Municipality. In KwaZulu-Natal, see the Umdoni Property Rates By-Law, *Provincial Gazette of KwaZulu-Natal*, 2008-07-31 no 84.

does not yet exist. Consequently, the policy, adopted in terms of the by-law is never given the force of law. A by-law cannot prospectively implement a policy, the drafting of which is not yet certain. The policy is not a type of regulation that obtains its force of law from the parent law. The Act is explicit. It is the by-law that implements the policy.

- Thirdly, there can be no enforcement mechanisms in terms of policies only. Enforcement mechanisms are those that bind and limit the rights of ratepayers. In order to have 'bite', they must be expressed in legislation.

### 3.2.2 The one-liner by-law: Incorporation by reference

Equally defective is a by-law that merely proclaims that property rates will be implemented in terms of the property rates policy. For example, the West Coast District Municipality Property Rates Policy By-Law<sup>59</sup> does not determine categories but leaves that to the rates policy. Section 7(1) reads: 'The municipality levies different rates for different categories of rateable property, as set out in the property rates policy'. The same applies to exemptions, reductions and rebates: 'the municipality will grant exemptions from, rebates on or reductions in rates, as set out in the policy'.<sup>60</sup>

The incorporation by indirect reference does not make the policy an effective legal instrument. There is no certainty about the content of the policy, and it may be changed by the council at any time. Can such a policy determine an owner's rate liability? It is argued that it cannot. If an owner is sued for payment of rates, there must (a) be a legal provision setting out the method of calculating the amount due, and (b) the actual rate adopted by resolution.

The problem is resolved if the by-law incorporates the policy as an annexure as is done in the case of the West Coast District Municipality by-law.<sup>61</sup> Sometimes the incorporation of the policy is inadequately done. The Johannesburg Property Rates By-law of 2007 reads: 'The [Rates] Policy is hereby incorporated by reference in the By-Laws. All amendments to the Policy as the Council may approve from time to time shall be deemed to be likewise incorporated'.<sup>62</sup> The difficulties with this approach are, first, that the policy is not attached to the by-law and thus does not form part of the by-law, and second, the council is thus authorised to write legislation through policy amendments but without following constitutionally prescribed legislative procedures.

<sup>59</sup>See the West Coast District Municipality Property Rates Policy By-Law in *Western Cape Provincial Gazette*, no 6376, 2006-08-18.

<sup>60</sup>*Id* s 9.

<sup>61</sup>The term 'policy' is defined as the policy contained in schedule 1 of the by-law.

<sup>62</sup>See s 2(3) Johannesburg Property Rates By-Law of 2008 (*Gauteng Provincial Gazette Extraordinary*, no 159, 2008-06-18).

### **3.2.3 Rewriting the Property Rates Act**

A municipality may want to convey to their ratepayers a comprehensive picture of the applicable rates regime. This regime includes both the definitive prescriptions of the Property Rates Act as well as its own policy choices. The question is then how to reflect the national legislation. The correct approach is to reflect the fact that an exemption or reduction is done in terms of a specific section of the Act. Ignoring any reference to the Act will be seen as assuming the powers of the national legislature which is authorised by the Constitution to provide a regulatory framework.

### **3.3 Resolution**

The final financial instrument that sets the rate (or rates) builds on the validity of the policy and the by-law. If there is no policy embodied in, and put into operation by, an appropriate by-law, then the resolution may be equally defective. An example of a problematic resolution is that of the Hibiscus Coast Local Municipality for the year 2008/09.<sup>63</sup> First, the resolution refers to 'the municipality's draft rates policy'; a resolution based on a rates policy that has not been adopted, being only in draft form, cannot provide a valid basis for the resolution. Second, key aspects of the 'draft' policy have not been operationalised in the municipality's by-law. The resolution refers to categories of properties (referred to as 'institutional' and 'special purpose') that will get a rate lower than residential. The problem is that there is no mention in the by-law of these categories. The result is that the rates burden of some owners will be eased, and that of others will not, and all on the basis of a policy that has yet to be adopted and which has not been reflected in a by-law. Third, the by-law exempts residential properties valued at R30 000 or less from paying rates, and added a further R15 000 on top of the R15 000 statutory exemption. However, the resolution increased the sum of this reduction to R85 000 and thus contradicted its own by-law.

## **4 Conclusion**

The Property Rates Act must be implemented by all municipalities levying rates by 1 July 2011.<sup>64</sup> It is no longer a question of whether the municipalities have compiled a valuation role and the necessary legal instruments but the concern is about the quality of such instruments. In this regard the confusion and lack of alignment between the three financial instruments hold considerable financial risks for municipalities. If rates are not imposed on the basis of a solid legal basis, their collection may be opposed in court for want of complying with the basic principles of the rule of law and compliance with the Property Rates Act.

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<sup>63</sup>See Municipal notice 080/2008.

<sup>64</sup>The date of 2009-07-01 in the original Act was extended by two years when a number of municipalities had not complied with the Act by the date initially proposed.

If there are no valid revenue-raising measures in place, the spectre of a section 139 intervention looms large. Section 139(5) of the Constitution provides that if a municipality does not fulfil its obligations in terms of the legislation to approve a budget or any revenue raising measures necessary to give effect to the budget, the province must intervene, taking appropriate steps that include dissolving the council.

To ensure that municipalities have the proper legal instruments at their disposal, the provinces play an important role in exercising their supervisory function. They should monitor the content and quality of the policies, by-laws and resolutions. Where they are defective, appropriate remedial measures could be suggested. Furthermore, the provinces may also develop model property rates policies, by-laws and resolutions to guide municipalities. On the same score the national department responsible for local government could also develop helpful guidelines.

The larger question is whether the statutory requirement of a policy document causes more confusion than benefit. Although ideally any law should be preceded by a policy statement to communicate the legislative intent, the distinction may have become part of an overambitious regulation of local government. There is currently undue emphasis in the legislation on the policy. Although a policy is important, the proper focus should be on the legal instruments to levy rates.

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