



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE No: D 7917/2020

In the matter between:

**BODY CORPORATE OF GREEN MEADOW
COUNTRY ESTATE**

APPLICANT

and

THE eTHEKWINI MUNICIPALITY

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 27 January 2023(Friday) at 11:00am

ORDER

In the results, the following order is made:

- 1 The applicant is granted leave to appeal the judgment delivered on 22 August 2022 to the full court of the KwaZulu-Natal Division of the High Court.
- 2 The costs of the application for leave to appeal are to be costs in the appeal.

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL

Mathenjwa AJ

[1] This is an application for leave to appeal to the full court of this division against the judgment delivered on 22 August 2022.

[2] Section 17(1) of the Superior Courts Act 10 of 2013 provides that:

‘Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[3] The Supreme Court of Appeal had the opportunity to consider what constitutes reasonable prospect of success in *S v Smith*,¹ where Plasket AJA held that:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’ (Footnotes omitted.)

[4] The grounds for leave to appeal are to a large extent based on new issues that were not raised and ventilated at the hearing of the matter. For this reason, it is

¹ *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

appropriate to briefly state the applicant's case as presented in its founding papers and argument at the hearing of the matter. The applicant contended that it was billed on the incorrect tariff with respect to its water consumption in that the respondent had charged for the total consumption of water used by the applicant without regard to the fact that such water is being consumed by a single household. The reading on the bulk meter, so the argument went, which is owing by the applicant as a whole was being incorrectly attributed as a whole to each individual owner of the units comprising the applicant. The applicant referred to the following provisions of the policy in paragraph 5 of its heads of argument:

'5.1 clause 2.4.2 of the respondents' water policy recognises sectional title development as being representative of individual units;

5.2 clause 2.4.4 of the policy provides for the option of installation of a bulk, or individual meters;

5.3 in either unit with 5.2 above, the respondent would measure water consumption of individual units;

5.4 each unit within this development would be charged based on this metered consumption.'

[5] I pointed out in paragraph 3 of the judgment that the applicant amended its relief sought at the hearing of the matter and introduced a new ground, namely, that the respondent ought to have charged the applicant on the rate for commercial consumer instead of domestic consumer. Thus, in the context of this case and based on the narrowing down of contested issues, I handed down a brief judgment.

[6] It is appropriate to state the provisions of the policy that the applicant relied upon at the hearing of the matter:

Clause 2.4.2 of the Respondent's Water policy titled "Sectional Title Developments" provides that: 'Sectional Title developments comprises a number of units which are built within a single subdivision. The development may be divided into separate exclusive use areas for each unit with the remainder as common property. The development is administered by a Body Corporate in terms of the Sectional Title Act'. Clause 2.4.4 titled "Water to New Sectional Title Developments" provides as follows:

'(a) Developers of new sectional title developments are required to:

(i) pay for the installation of individual water connections, metered at the road boundary

or

(ii) pay for the installation of a bulk water connection, metered at the road boundary, and also pay for the installation of individual water meters located on the water pipes feeding each separate unit.

(iii) the individual meters will be installed by the municipality on private property.

(iv) the water pipes feeding each separate unit will be laid by the developer.

(b) where option (a)(ii) is chosen by a developer, the Municipality will read the individual meters and bulk meter. The Body Corporate will be charged monthly for both the municipality to undertake the reading of the individual meters and for the water consumption recorded at the bulk meter less the sum of the water consumption recorded at the individual meters. No fixed charge will be paid for the bulk meter but the Body Corporate will be billed at the tariff rate for non-domestic customers.

(c) each unit will be charged for water by the Municipality according to the level of service chosen, based on the metered consumption for each unit.

(d) in the event of non-payment of the monthly distribution charge by the Body Corporate, any water connection in the name of the Body Corporate will be disconnected and the debt will be handed over for collection. The supply to the whole complex will be disconnected after each individual customer supplied through the bulk meter has been given 14 days' notice of the intention to disconnect the water supply and the outstanding debt has not been paid.

(e) in the case of existing developments, supplied through a bulk meter, the Body Corporate may apply for the installation of separate meters to each dwelling unit, subject to payment of the prescribed charges (see also items.2.4.9).

(f) in the case of existing development supplied through bulk meters, where the account is in arrears and subject to disconnection for non-payment of the account, the Head: Water and Sanitation or authorised delegate may elect to require the installation of separate meters to each unit and the payment of the prescribed charges.'

[7] The main ground of appeal is essentially that the court erred in arriving at a conclusion that the applicant's reliance on the provisions in the respondent's policy was misplaced and that the court erred in finding that the respondent's policy did not exclude the applicant from the category of domestic users. To my mind, there is no substance on this ground. It is apparent from the wording of the respondent's water policy that clause 2.4.2 does nothing other than defining a sectional title development.

Furthermore, it is apparent that clause 2.4.4 (a)(i) to (iv) of the policy is a directive to developers of a new sectional title development, and it is common cause that the applicant is neither a developer nor a new sectional title development, therefore, to my mind clauses 2.4.4 (a)(i) to (iv) does not apply to the applicant who is an existing, and not a new, sectional title development. Further, the applicant did not refer to any clause in the respondent's policy to support the contention that it is a commercial consumer.

[8] The applicant further submits that this court ought to have found that clause 2.4.4 (c) of the policy envisaged within a sectional title development that only individual units with individual meters could be charged for water by respondent according to the level of service chosen based on a metered consumption for each unit; could be charged at a domestic tariff. The court ought to have found, the argument went, that clause 2.4.4.(b) of the policy envisaged that where a sectional title development used a bulk meter then 'no fixed charge would be paid for bulk meter but the Body Corporate would be billed at a tariff rate for non-domestic customers'.

[9] It is instructive to point out that the applicant's counsel did not make any submissions about how the clauses of the policy he referred to should be interpreted. Further, no submission was made to this court as to how the cited clauses of the policy supported the applicant's case. Therefore, the court did not consider the propositions that were put forward by counsel for the applicant, because these propositions were not advanced at the hearing of the matter. Nevertheless, in my view, these propositions are farfetched. It is common cause that the applicant is charged on a single bulk meter, therefore the provisions of clause 2.4.4 (b) is not applicable and the non-domestic rate should not apply to the applicant. The applicant correctly submits that in terms of clause 2.4.4 (e) it is allowed to apply for installation of a separate meter to each unit, but the applicant had not made such application. Based on their own submission, it's not clear how the applicants could have been charged for individual consumption of water per unit, if they opted not to apply for the installation of individual meter connection to their units.

[10] The applicant submits that the court ought to have arrived at a conclusion that the respondent's policy needed to be uniformly applied to existing and new developments; the court ought to have found that the policy requires adherence to

matters which fall within the municipal competence; it must be read to assess and achieve the objectives of the Municipality uniformly and rationally; the provision of the policy must properly be contextualised, be construed consistently with the constitution and to preserve constitutional validity. The court erred in not arriving at a conclusion that the tariff for domestic consumption only applied where all or part of the water, through a connection, is applied without the intervention of individual brake pressure tanks supplied by eThekweni Municipality.

[11] In oral argument at the hearing of this application, counsel for the applicant contended that since the court, in its judgment, did not make any reference to the respondent's policy, then the court has not interpreted the policy. He relied on the Constitutional Court judgment of *Barnard Labuschagne Inc v Commissioner, South African Revenue Services and Another*² in support of the contention that the failure by this court to interrogate and interpret the respondent's policy could be a ground of appeal. It seems to me that the relevant provision that could possibly support the counsel's contention is found in paragraph 29 of the judgment where Rogers AJ held that:

'Since all the relevant authorities were drawn to the High Court's attention, it is unacceptable that it did not discuss them and either follow them or explain why it thought they were distinguishable. In the light of the authorities to which the High Court was referred, it is difficult to fathom the court's statement, when refusing leave to appeal, that there were no conflicting judgments on rescindability.'

I have pointed out above that the counsel who represented the applicant at the hearing of this matter merely referred to certain clauses of the respondent's policy without discussing and making submissions as how these clauses support applicant's case.

[12] While I am not persuaded that there is any merit in the grounds of appeal and the submissions advanced in support thereof, I can rely on the guidance of the Supreme Court of Appeal on how I should approach an application for leave to appeal.

² *Barnard Labuschagne Inc v Commissioner, South African Revenue Services and Another* 2022 (5) SA 1 (CC).

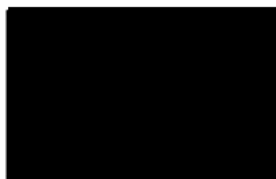
In *R v Kuzwayo*,³ in a matter for leave to appeal pertaining to a criminal case it was held explained:

‘That test must, to the best of the ability of the trial judge, be applied objectively. By that is meant that he must disabuse his mind of the fact that he himself has no reasonable doubt as to the guilt of the accused: he must ask himself whether there is a reasonable prospect that the judges of appeal will take a different view. This applies to questions both of fact and law: there is, in this respect, no distinction between a question of fact and a question of law’.

[13] I am mindful of the fact that this matter involves an interpretation of the respondent’s water policy. The Supreme Court of Appeal held that interpretation of a document is an objective process of attributing meaning to the words used in the document. (See *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.) Therefore, it is in the interest of justice that leave to appeal be granted as there is a reasonable prospect that another court may interpret the respondent’s policy differently and come to a different decision.

[14] In the results, the following order is made:

- 1 The applicant is granted leave to appeal the judgment delivered on 22 August 2022 to the full court of the KwaZulu-Natal Division of the High Court.
- 2 The costs of the application for leave to appeal are to be costs in the appeal.



MATHENJWA AJ

³ *R v Kuzwayo* 1949 (3) SA 761 (A) at 765.

Appearances:

For the Applicant: Adv. MI Veerasamy

Instructed by: Peacock, Liebenberg & Dickson Inc.
Durban

For the Respondent: Adv. N Ntuli

Instructed by: Luthuli Sithole Attorneys
Durban

Date of hearing: 6 December 2022

Date of judgment: 27 January 2023 (*electronically*)