



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case NO: A2023-050651

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|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: NO |

15 APRIL 2024

DATE

SIGNATURE

In the matter between:

MALAKITE BODY CORPORATE

First Appellant

GREENSTONE CREST BODY CORPORATE

Second Appellant

and

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

First Respondent

CITY POWER JOHANNESBURG SOC LTD

Second Respondent

ORDER

On appeal from the from the High Court of South Africa, Gauteng Division, Johannesburg (Van Der Berg AJ sitting as court of first instance):

The appeal is dismissed with costs which include the costs of two counsel where so employed.

JUDGMENT

WINDELL J:

Introduction

[1] This is an appeal against the order and judgment of Van Der Berg AJ, dismissing the appellants' application for an order directing the respondents, City of Johannesburg Metropolitan Municipality (the Municipality) and City Power Johannesburg SOC Ltd, to align and rectify their billing records to reflect the appellants' properties as residential properties for the purpose of valuation and billing of electricity and municipal services, along with an interdict restraining the respondents from disconnecting municipal services pending compliance.

[2] The thrust of the appellants' appeal is that the court a quo erred in its interpretation and application of the relevant legislation, policies, and tariff determinations in classifying the appellants as 'mixed domestic and non-domestic loads' (which is subject to commercial/business property electricity tariffs in terms of section 5(10) of the City of Johannesburg Electricity By-laws (the 'By-laws')),¹ due to the presence of a restaurant and gym (Lifestyle Centres) within the estates. In particular, the appellants are contesting the court a quo's determination that their Lifestyle Centres cannot be classified as 'ancillary' for residential use and, as such, be subject to domestic property electricity tariffs.

Background

[3] The appellants, Malakite Body Corporate and Greenstone Crest Body Corporate, are residential estates containing 291 and 620 dwelling units respectively. The estates are zoned as 'Residential 3' which allows for ancillary uses such as taverns and recreation clubs in the estates without the requirement for a unique zoning. It is common cause between the parties that within the two residential estates, there are 1 or 2 units that are used as Lifestyle Centres.

¹ Provincial Gazettes No 16 Notice No 1610 of 1999.

[4] The appellants are sectional title schemes. Individual charges such as rates and refuse are billed directly to the specific section of the sectional title and electricity is billed on one account to the sectional title scheme. The determination of how the sectional title scheme invoices its members is an internal matter and has nothing to do with the respondents.

[5] At the heart of the parties' acrimony is the respondents' decision to charge the owners of the residential dwellings within the estates a commercial property tariff for electricity. The rationale for billing the appellants on a commercial/business tariff, is that the estates fall under 'mixed domestic and non-domestic loads' due to the presence of the Lifestyles Centres within the estates.

[6] In the court a quo the appellants submitted that their sole purpose is to provide housing to homeowners. They argued that the Lifestyle Centres are ancillary to the estates' primary residential purpose and therefore do not warrant a commercial tariff. The appellants derive no commercial benefit from these facilities and public access to the gym and restaurant is restricted to residents only. Furthermore, the gym equipment is owned outright, and no rental income is derived from the restaurant.

[7] The respondents contended that in terms of the Local Government: Municipal Finance Management Act² (the MFMA) and the Local Government Municipal Systems Act³ (the Systems Act) together with their prevailing rates policy, a municipality may levy rates on a property based on its use. The relevant legislation imposes different tariffs for domestic use and non-domestic use in respect of electricity. It was argued that since the gym and restaurant are not residential, the estates contain both domestic and non-domestic use. In such cases the legislation provides that a non-domestic/business/commercial tariff is imposed unless the consumer (in this instance the Body Corporates) installs a 'split meter'. The split supply connection will then allow for the separate measuring of domestic and non-domestic uses and the respondents will then bill accordingly, as the tariffs differ. The respondents' position is that they are lawfully entitled, in terms of its by-laws and electricity tariffs, to levy electricity charges on the appellants' accounts on the non-residential tariff, until such time that the appellants either stop operating the lifestyle centres or apply and pay for a split meter

² 56 of 2003.

³ 32 of 2000.

electricity supply. They further asserted that the appellants were fully cognizant of this fact, as evidenced by the initial relief sought.

[8] The respondents appended a proposed draft order to the answering affidavit, which outlined measures to implement a split meter and require the Municipality to re-read and re-bill the appellants for electricity consumed since 2016 and 2015, respectively, on a residential tariff, in addition to charging for electricity already consumed. Although the appellants declined the proposal, they did not raise any objections to its inclusion in the record.

[9] The court a quo dismissed the application. It found that the Lifestyle Centres cannot be viewed as ancillary to the appellants' purpose and should be classified as domestic and non-domestic per the respondents' 2015/2016 tariff. Effectively, each homeowner within the estates must pay for electricity on a commercial or business tariff instead of a residential tariff, unless a split meter is installed.

[10] Although the appellants also argued that the respondents' tariff policy is unfair and discriminatory, the court a quo was not called upon to review the Municipality's policies and tariffs and to determine whether same is fair. The only issue that this appeal thus turns on is a determination of whether the appellants, as residential sectional title schemes with supplementary Lifestyle Centre amenities, should be billed at residential or commercial tariff rates for electricity based on the applicable policies, by-laws and the nature of the facilities in question.

Applicable legislation

[11] As required by section 74 of the Systems Act, a municipal council must adopt and implement tariff policy on the levying of fees for municipal services provided by the municipality. In accordance with section 74(3) of the Systems Act, tariff policies may differentiate between the different categories of users, debtors, service providers, services, service standards, geographical areas, and other matters as long as the differentiation does not amount to unfair discrimination. In accordance with the Electricity Regulation Act⁴ (ERA), the National Energy Regulator of South Africa (NERSA) possesses broad authority to oversee the pricing and tariffs imposed by

⁴ 4 of 2006.

licensees in the electricity sector. The Municipality as a licensee in terms of ERA therefore imposes electricity tariffs which are approved by NERSA.

[12] Section 11(3) of the Systems Act⁵ and section 156 (2) of the Constitution empowers municipalities to establish and enforce by-laws 'for the effective administration of the matters which it has the right to administer'.⁶ In 2000 the Municipality enacted by-laws in adherence with the aforementioned provisions and in accordance with section 11(3)(m) of the Systems Act.

[13] Section 11 (10) of the By-Laws states that 'Communal loads for both domestic and non-domestic use which cannot be separated shall be metered at the appropriate non-domestic charge as determined by council from time to time.' Section 11(9) provides that the 'owner shall be responsible for all costs of alterations to provide meters to register communal loads.'

[14] In terms of the Municipality's 'tariff policy',⁷ domestic and business tariffs for electricity are defined as follows:

'Domestic tariffs: 'The tariff is applicable to private houses, dwelling units, flats, boarding houses, hostels, residences or homes run by charitable institutions, premises for public worship including halls or other buildings used in religious purposes, prisons and caravan parks. There are, however, certain rules applicable which may change the status of these consumers.

Business tariff: The tariff is applicable to supplies not exceeding capacity of 100kVA. Applicable for business purposes, industrial purposes, nursing homes and clinics, hospitals, hotels, recreation halls and clubs, educational institutions, (including schools and registered creches), supporting facilities, bed and breakfast houses, **mixed domestic and non-domestic loads**, welfare organisations of commercial nature and premises used for public worship and religious purposes.' (Emphasis added)

⁵ Section 156 (2) of the Constitution states: Powers and functions of municipalities 156. (1) A municipality has executive authority in respect of, and has the right to administer— (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and (b) any other matter assigned to it by national or provincial legislation.

⁶ Section 11(3)(m) of the Systems Act 32 of 2000 provides that a municipality exercises its executive authority by inter alia: (e) Implementing applicable national and provincial legislation and its by- laws ... (i) imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees including setting and implementing tariffs, rates and taxes and debt collection policies and ... (m) passing by-laws and taking decisions on any of the abovementioned matters.

⁷ As approved by the City Council in September 2008.

[15] Although the tariff policy does not state what the rules are that may change the status of domestic consumers, paragraph 1.2 of the Municipality's 2020/2021 electricity tariff states that the domestic tariff 'is not applicable to properties owned as residential but used for business purposes.' Further, paragraph 1.5 of the same tariff reads: 'Mixed use reseller customers will not qualify for residential tariffs unless split metering is implemented to isolate metering of supplies to residential end customers in which case end supply to the residential customers will qualify for the residential reseller tariff'.

Application to adduce evidence.

[16] The appellants applied to present additional evidence that would refute the notion that the Lifestyle Centres are operated for profit. The test for the hearing of further evidence on appeal is well established. The requirements are: (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial; (b) There should be a prima facie likelihood of the truth of the evidence; and (c) The evidence should be materially relevant to the outcome of the trial.⁸

[17] Electricity is a service. The tariff for such service is determined in accordance with the usage for such service. The respondents charge the appellants in terms of the tariffs, which are not subject to dispute. Whether the appellants administer the Lifestyle Centres for profit or have entered into internal commercial arrangements with service providers or individuals who use the premises for commercial purposes has no bearing on the dispute. The allegation that it is not the Body Corporate that runs the restaurant does therefore not assist the appellants or take the matter further.

[18] The appellants further make the bald allegation that the meals sold at the restaurant are not overly expensive. The fact that patrons ultimately pay the restaurant for their meals and beverages is not a point of contention among the respondents. Once more, this issue fails to advance the dispute.

[19] In terms of section 19 of the Superior Courts Act,⁹ a court is afforded powers, on hearing an appeal, to receive further evidence. In the interests of finality, such

⁸ *S v de Jager* 1965 (2) SA 612 (A) at 613C-D; *S v Ndweni & others* 1999 (4) SA 877 (SCA) at 880D. See also *S v Liesching and Others* 2019 (4) SA 219 (CC) at 63 B-D.

⁹ 10 of 2013.

powers must be exercised sparingly and in exceptional circumstances.¹⁰ Considering the aforementioned factors, it is evident that the appellants have not made out a satisfactory case to adduce further evidence. The application is accordingly refused.

Conclusion

[20] The appellants submit that they satisfy the definition of Domestic Tariff under the respondents' Tariff Determination Policy for electricity, as the Lifestyle Centres within their residential estates are ancillary to the main purpose of providing housing to homeowners. The Merriam-Webster dictionary describe 'ancillary' as the notion of providing aid or support in a way that supplements something else. In particular, the word often describes something that is in a position of secondary importance. The appellants contend that the Lifestyle Centres are of secondary importance as the facilities are provided solely for the benefit of the resident homeowners, and the appellants do not operate them as commercial ventures or derive any commercial benefit from them. They argue that the respondents' classification of the appellants as mixed domestic and non-domestic loads subject to a Business Tariff is therefore incorrect.

[21] The appellants' argument is not persuasive. Firstly, the tariff policy, the By-Laws and the applicable electricity tariffs have been approved by the Municipality's council as part of the city's executive and legislative powers. Neither the policy, By-laws nor tariffs have been challenged by the appellants.

[22] Secondly, there can be no dispute that the restaurant is a business. It sells food to residents and their guests at a profit. The fact that a business is located in an estate surrounded by residential dwelling units does not make it ancillary to the residential use. It is merely convenient for the residents of the dwelling units to have a restaurant in the estate. It does not change the status of the restaurant from non-domestic to domestic. To have a restaurant in an estate is clearly a 'perk', but at the end of the day the restaurant is commercial in nature and non-domestic. It is not merely 'ancillary' to the residential units.

¹⁰ *Koch NO and Another v Ad Hoc Central Authority, South Africa and Another* 2022 (6) SA 323 (SCA) para [25]

[23] Thirdly, the Lifestyle centres within the estates do not serve as residential components, as they are not intended for habitation. The tariff applied is determined by the nature of the service availed. For instance, if a property designated for residential use is utilized for commercial purposes, such as operating a law practice, the appropriate commercial tariff would be applied due to the electricity consumption associated with activities like operating photocopy machines, computer services, printers, and other business-related equipment. Similarly, the electricity usage patterns of establishments like gyms or restaurants differ from those of residential dwellings, thereby warranting disparate tariff structures.

[24] Fourthly, the By-laws and the tariff policy are clear in their wording. Communal loads for both domestic and non-domestic use which cannot be separated shall be metered at the appropriate non-domestic charge as determined by council from time to time.' In addition, in terms of the 2020/2021 tariff, (which is in line with the By-laws), a residential tariff is not applicable to: (a) properties zoned as residential but used for business purposes (section 1.2); and (b) mixed use reseller customers (unless a split meter is installed) (section 1.5). Further the tariff specifically makes provision for mixed loads on non-residential and residential to be billed on the business tariff (section 3.1.9).

[25] The respondents are therefore justified in invoicing the appellants under a business/commercial tariff. This determination stems from the electricity consumption resulting from the operation of restaurants and gyms within the Lifestyle Centres, which aligns with the mixed-use classification outlined in the tariff policy.

[26] In the result the following order is made:

1. The appeal is dismissed with costs, which include the costs of two counsel where so employed.



L WINDELL

JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION

I agree



^ A. MAIER-FRAWLEY

JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION

I agree



A. CRUTCHFIELD

JUDGE OF THE HIGH COURT GAUTENG LOCAL DIVISION

Delivered: This judgement was prepared and authored by the Judges whose name are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 15 April 2024.

APPEARANCES

Appellants' Attorneys: Jurgens Bekker Attorneys

Counsel for Appellants: Adv G Kairinos SC

Adv B Stevens

Adv K Madlwabinga

Respondents' Attorneys: Moodie & Robertson

Counsel for Respondents: Adv S Jackson

Date of hearing: 22 November 2023

Date of judgment: 15 April 2024