

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER : 2019/24664

DELETE WHICHEVER IS NOT APPLICABLE

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

11/11/2022

DATE

[Signature]

SIGNATURE

In the matter between:

MALAKITE BODY CORPORATE

1st Applicant

GREENSTONE CREST BODY CORPORATE

2nd Applicant

and

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

1st Respondent

CITY POWER JOHANNESBURG SOC LTD

2nd Respondent

J U D G M E N T

VAN DER BERG AJ

- [1] The first and second applicants are bodies corporate of two residential estates respectively, the one consisting of 291 residential units and the other consisting of 620 residential units. In the estates there are so-called lifestyle centres which *inter alia* comprise of gyms and restaurants.
- [2] The first respondent is the City of Johannesburg Metropolitan Municipality (*"the City"*), and the second respondent is described in the papers as the entity mandated to provide electricity to residents falling within the jurisdiction of the City.
- [3] In prayer 2 of the applicants' amended notice of motion they seek the following order:
- "That the first and second respondents are hereby directed to align and rectify the records and billing to reflect the first and second applicants situated at [the property descriptions of the two estates] as being Residential for the purpose of valuation and billing of electricity and municipal services."*
- [4] The relevant legislation imposes different tariffs for domestic use and non-domestic use in respect of electricity. Where premises contain both domestic and non-domestic use, the legislation provides that a non-domestic/business/commercial tariff is imposed, unless the user installs a split meter. The split supply connection will then allow for the separate measuring of domestic and non-domestic uses.

[5] Two issues arise in this application:

1. Whether the lifestyle centres (which include the restaurants and gyms) resort under domestic usage for electricity billing as contended by the applicants.
2. Whether the City has made a binding decision that the estates should be billed on a domestic/residential tariff.

[6] It is necessary to first set out the litigation history and the legislative framework before these issues are dealt with.

LITIGATION HISTORY

[7] On 12 July 2019 the applicants issued an application (the “*original application*” issued in terms of “*the original notice of motion*”). The respondents initially opposed the application, but then decided not to persist with their opposition and did not file an answering affidavit. The matter was eventually enrolled for hearing on the unopposed roll on 19 October 2021.

[8] On 13 October 2021, the applicants delivered a supplementary founding affidavit with a new notice of motion attached thereto. This is not the correct way of amending a notice of motion and the City delivered a notice in terms of rule 30(1). On 19 October 2021 the applicants delivered a notice in terms of rule 28 to amend its notice of motion. The amendment was eventually effected in terms of rule 28 (being the amended notice of motion). The matter was

removed from the unopposed roll and costs were reserved. Thereafter the matter continued on an opposed basis and answering and replying affidavits were exchanged.

[9] In the original notice of motion the first applicant sought interdictory relief against the respondents to restrain them from disconnecting the municipal services supplied to the applicants' respective premises *"pending the finalisation and implementation of the split meter application submitted to the respondents on 13 March 2019"*. The second applicant sought an identical prayer, except that the date when its split meter application was submitted was 30 October 2018.

[10] In the founding affidavit attached to the original notice of motion it was alleged that agreements had been concluded between the applicants and the respondents. The respondents in their answering affidavit (filed only after the filing of the supplementary founding affidavit) denied the agreements. The alleged agreements and their terms are no longer relevant to the application. The founding affidavit further alleged that the respondents from time to time threatened to discontinue their services. This issue is also no longer relevant.

[11] In the amended notice of motion the applicants made an about turn. The case now advanced is that the applicants do not have to apply for a split meter, as they are entitled to be billed on a domestic tariff. In the supplementary founding affidavit it is stated that the applicants intend to withdraw both applications for split meters. The applicants allege in their supplementary founding affidavit that an email sent by a representative of the City in 2019

constitutes a binding “decision” by the City to bill the estates as domestic units for electricity use.

STATUTORY FRAMEWORK

[12] Municipalities are empowered to set their own municipal electricity tariffs in terms of the Local Government: Municipal Finance Management Act No. 56 of 2003 (*“the MFMA”*) and the Local Government Municipal Systems Act No. 32 of 2000 (*“the Systems Act”*).

By-Laws

[13] Section 75A of the Systems Act provides:

“(1) A municipality may-

(a) levy and recover fees, charges or tariffs in respect of any function or service of the municipality; and

(b) recover collection charges and interest on any outstanding amount.

(2) The fees, charges or tariffs referred to in subsection (1) are levied by a municipality by resolution passed by the municipal council with a supporting vote of a majority of its members.”

[14] Section 11(3) of the Systems Act provides in part:

“(3) A municipality exercises its legislative or executive authority by-

...

(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;*

...

- (m) *passing by-laws and taking decisions on any of the abovementioned matters."*

[15] The City of Johannesburg Electricity By-laws (*"the By-Laws"*) were promulgated in 2000 in accordance with section 11(3)(m) of the Systems Act.

[16] Section 4 of the By-Laws provides that the charge determined by council shall be payable for electricity consumption.

[17] Section 5(9) of the By-Laws reads: *"The owner shall be responsible for all costs of alterations to provide meters to register communal loads."* Section 5(10) of the By-Laws provides:

"Communal loads for both domestic and non-domestic uses which cannot be separated shall be metered at the appropriate non-domestic charges as determined by council from time to time." [Own emphasis.]

Tariff Policy

[18] Section 74(1) of the Systems Act reads:

(1) A municipal council must adopt and implement a tariff policy on the levying of fees for municipal services provided by the municipality itself or by way of service delivery agreements, and which complies with the provisions of this Act, the Municipal Finance Management Act and any other applicable legislation.

- [19] Section 74(2) sets out the principles which must be reflected in the policy tariff. Section 74(3) then provides:

“A tariff policy 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.”

- [20] The City’s council duly approved a tariff policy (“*the tariff policy*”) which was attached to respondents’ supplementary answering affidavit.

- [21] In section 6.1 of the tariff policy the domestic tariff for electricity is defined as follows:

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

- [22] In section 6.1 of the tariff policy the business tariff for electricity is defined as follows:

“This tariff is applicable to supplies not exceeding capacity of 100kVA

applicable for business purposes, industrial purposes, nursing homes, 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 a commercial nature and premises used for public worship and religious purposes.” (Emphasis added)

DOMESTIC OR BUSINESS?

[23] The aforesaid statutory framework is not contentious. The question is whether the applicants have proved that the lifestyle centres (which include restaurants and gyms) fall within the definition of “domestic tariff”. If not, both estates are to be billed on a non-domestic basis.

[24] The restaurants and gyms clearly are not “*private houses, dwelling units, flats, boarding houses, hostels*” or any of the items referred to in the definition of a domestic tariff in the tariff policy. The lifestyle centres are not residential components of the properties. Nobody resides at the lifestyle centres. It was argued on behalf of the applicants that the restaurants and gyms are “*ancillary*” to the residences. In my view the gyms and restaurants cannot be seen as ancillary for residential purposes. As pointed out in the respondents’ heads of argument, a “restaurant is not a kitchen.”

[25] The applicants allege that the equipment in the kitchen and the gym belong to the body corporates. They also rely on the fact that the restaurants and gyms are only open to residents of the estates. To my mind, this does not elevate the restaurants or gyms to residences, nor does it mean they are not used for

“business purposes”.

[26] The applicants do not allege that the use of the gyms or the buying of food at the restaurants is free. The averment in the respondents' supplementary affidavit that the residents must pay for these services is undisputed.

[27] There is also no proof that the restaurants and the gyms do not make a profit. Reliance was placed in argument on paragraph 12.6 of the applicants' replying affidavit for the submission that these entities do not make a profit. However, paragraph 12.6 does not say that. The paragraph reads:

“It cannot be argued that body corporates operate on a budget and do not enjoy ‘profits’ from the levies paid by the owners.”

The rest of the paragraph refers to screenshots of the second applicant's electricity account, what it consumed, how much it would be charged if it was to be billed on residential tariff etc. Nowhere is it stated that the gyms and restaurants do not make a profit.

[28] The applicants have not discharged their onus to prove (a) that the lifestyle centres fall within the definition of “domestic use” or (b) that the lifestyle units are not used for a *“business purpose”*.

Zoning of Property

[29] The applicants submit that their electricity should be billed on a residential tariff because the properties are zoned residential 3 and that the lifestyle centres' usage is ancillary to the zoning of residential 3.

[30] The zoning of a property has an impact on the assessment of rates payable by owners within a sectional title scheme. The billing of rates is governed by different legislation, namely the Municipal Property Rates Act 6 of 2004. Assessment rates are based on the valuation of the property and its zoning; electricity services are based on actual consumption.

[31] There is nothing in the electricity by-laws or tariff policy to suggest that any determination made in respect of the zoning of the property has any bearing on the definitions of domestic tariff and business tariff in the tariff policy.

DID THE CITY MAKE A DECISION?

[32] In the supplementary founding affidavit the applicants refer to two emails which form part of the same email string. The first email written by a representative of the City on 17 May 2019 reads:

"Morning Mam

In the beginning of March we had a meeting with Balwin Properties relating to the ancillary uses (clubhouse, gym, laundromat, restaurant etc) on the properties that they developed as Sectional Title Residential. The zoning of these properties are Residential and Special for Residential respectively.

The opinion of the investigating officer from Buya Mtheto was that these ancillary uses should be valued and rated as Business and Commercial.

During the meeting it was confirmed that the ancillary use developments where for the sole benefit I use of the residents of the developments and that the operators of ancillaries do so rent free.

*Further to the above, Balwin furnished our dep with all relevant zoning information indicating that ancillary uses as indicated above are included in the existing **zonings**.*

We will notify Balwin Properties that if any changes to the ancillary uses are affected that the onus is on them to notify the city of such future changes.

Based on the information at hand the valuation dep is satisfied that the value of ancillary uses are included in that of the units and should not be valued

separately and that the category of the "mother stand" should remain at Sectional Title Residential." [Emphasis in the email.]

- [33] The second email was sent by Mr Lefuno Mashau (an employee of the City) on 20 May 2019 which reads as follows:

"Dear Thami

Below email has reference. Based on the findings of the valuation unit, there is a need for City Power to align the electrify billing to the process as outlined. The "lifestyle" facilities provided by Balwin Properties within their developments having been valued as part of the schemes and are therefore seen as residential for the purpose of valuation. Electricity billing in this developments needs to be corrected to residential in order to achieve the alignment. "

- [34] The applicants' contention is that the last email constitutes a decision by the respondents' valuation department that the lifestyle centres should be billed on a residential basis. The respondents deny that this email was a decision of the City.

[35] The email string is attached as an annexure to the supplementary founding affidavit. Attached as part of the same annexure is a letter from Balwin Properties ("*Balwin*") dated 1 April 2019 addressed to the City. (Balwin was the developer who owned the two estates before they were transferred to the first and second applicants.) The supplementary founding affidavit does give any background or context to the Baldwin letter.^{1 2}

[36] Mr Mashau is also the deponent to the answering affidavit. He says that the email was merely a suggestion to his colleagues and did not constitute a "*decision*". There is nothing to gainsay this version and it cannot be rejected on the papers. The *Plascon-Evans* rule applies and I must accept the respondents' version on this issue.

[37] The applicants can also not refute Mr Mashau's statement that he did not have the authority to have made such a decision. In fact, the tariff policy and the by-laws do not grant authority to any individual to make such a decision. A

¹ See *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324G:

"(I)t is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."

² The letter raises many questions: 1. It is not stated whether Balwin wrote this letter on behalf of the applicants (as it may have been a developer to many similar estates) and whether it was mandated to do so. 2. The Balwin letter does not even refer to electricity tariffs. 3. It appears from the email string that Balwin became aware of the City's "*decision*" on 21 May 2019 when it was forwarded to one of its representatives. If this was indeed a "*decision*" one would have expected Balwin to have informed the applicants long before September 2021. 4. The two emails are introduced in the supplementary affidavit as follows: "*On or about 21 September 2021 the Applicants' Attorneys received telephonic permission from Balwin Properties to present certain email correspondence to the Court.*" It is not explained why "*permission*" would be required if the email constituted a binding decision.

decision of this nature would also have been *ultra vires*. The applicants did not raise an estoppel against the respondents' denial of authority.

CONDONATION AND PROPOSAL

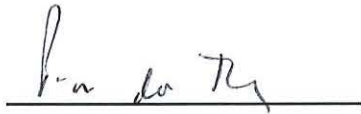
- [38] There are applications for condonation and leave for the filing of the supplementary founding affidavit, for the late filing of a supplementary answering affidavit (which mainly deals with the tariff policy) and the late filing of the replying affidavit. No party suffered any prejudice, and all the allegations were properly debated. All these applications are granted in so far as is necessary, and costs are to be costs in the cause. The respondents' answering affidavit is in response to the applicants' supplementary affidavit and was therefore not filed out of time and no condonation is required.
- [39] The respondents are however entitled to the reserved costs of 19 October 2021.
- [40] The City attached to its answering affidavit a proposed draft order to provide for the implementation of a split meter, and for the City to re-read and re-bill the applicants since 2016 and 2015 respectively and charge electricity already consumed on a residential tariff. The applicants did not accept the proposal but did not object to its inclusion in the record. The proposal or tender has no bearing on any of the issues or on costs and nothing further needs to be said about it.

ORDER

[41] The application stands to be dismissed. There is no reason why costs should not follow the result. The respondents seek costs on the attorney and client scale, but this is not warranted.

[42] Accordingly the following order is made:

The application is dismissed with costs, such costs to include the wasted costs of 19 October 2021.

A handwritten signature in dark ink, appearing to read 'Van der Berg', is written over a horizontal line.

VAN DER BERG AJ

APPEARANCES

For the applicants:

Adv B D Stevens
Instructed by:
Jurgens Bekker Attorneys

For the respondents:

Adv S Jackson
Instructed by:
Moodie & Robertson

Date of hearing: 20 October 2022

Date of judgment: 11 November 2022