



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

Appeal Case no: AR331/2023

In the matter between:

**BODY CORPORATE OF GREEN MEADOW
COUNTRY ESTATE**

APPELLANT

and

ETHEKWINI MUNICIPLITY

RESPONDENT

JUDGMENT

Olsen J (Steyn J & Bramdhew AJ concurring):

[1] The appellant is the body corporate of a residential sectional title scheme known as Green Meadow Country Estate. It launched an application against the respondent, the Ethekwini Municipality, for orders:

- (a) crediting its water account with a sum of R694 008.04;
- (b) directing the respondent in future to charge the appellant for water under a tariff structure based on the average use of water per household on the estate;

(c) directing that the applicant's water account should be credited with an amount based on the proposition that each of the households in the scheme was entitled to six kilolitres of water per month without charge, a benefit which had to the date of the application been denied by the respondent.

[2] The application was dismissed. This appeal against the dismissal of the application lies with the leave of the court *a quo* (Mathenjwa AJ).

[3] The founding papers reveal very little about the nature and circumstances of the residential estate. We know no more that this.

(a) There are 90 residential units.

(b) In 2019 the appellant opened an account with the respondent for the supply of water to the estate to be measured at a single bulk meter through which all water eventually reaching the residential units would pass. (Nothing in the founding papers is said about the contract concluded at the time between the respondent and appellant; if it was in writing the document has not been produced.)

(c) By the time the application was launched in November 2020 the appellant's arrears on its water account amounted to about R500 000.00.

[4] The respondent's charging regime for a domestic or residential water supply has its complexities. But the essential feature of it, which would distinguish it from for instance a supply of water for commercial purposes, is the application of a sliding scale tariff. The tariff is structured on a per household basis. The first 200 litres of water supplied to a household per day are charged at the lowest tariff (R23.42 per kilolitre at

the time the application was launched). Consumption in excess of 1500 litres per day is charged at the highest tariff which at the time was about 270% of the lowest tariff. Three other intermediate tariffs were applied to water consumption between 200 and 1500 litres per day.

[5] Although the subject was not debated in the papers before the court, it does seem clear that the use of a sliding tariff is aimed at discouraging the excessive use of water for domestic purposes. A single tariff calculated to provide the same overall return to the municipality for its supplies of domestic water would not have the same effect.

[6] Much of the founding affidavit is taken up with the contention that each of the households in Green Meadow Country Estate is entitled to six kilolitres of water per month without payment. We say no more about that as the contention was abandoned before the court a quo and has not been resurrected in any form.

[7] The second of the two contentions advanced in the founding papers was not stated with clarity at all. However it seems to be this : “the tariff that has been used to charge Green Meadow has been based on the total consumption of water spread across 90 households as opposed to the average usage of each household”. Later in the same affidavit it is contended that a schedule attached to the affidavit tabulates “what the applicant ought to have been charged had the respondent billed it in accordance with the prevailing legislation, and in accordance with the applicable tariff...”. The founding affidavit does not identify the “prevailing legislation” and neither does it identify the “applicable tariff”. It is in essence devoid of any reference to any

law which may justify the contention that the tariff upon which the appellant (i.e. the Body Corporate) is charged is not one sanctioned by law.

[8] There is no reason to say anything more about the second of the two grounds upon which a case was sought to be made out in the founding papers. It is recorded in the judgment that at the hearing the appellant abandoned its second ground of objection to what it was charged. It raised instead a new contention, namely that the appellant ought to have been charged for all water passing through its bulk meter at the flat rate applicable to commercial premises. That contention was not raised in the founding papers, nor indeed in the appellants replying affidavit. It was something new for which no factual foundation had been laid at all. It was not the case the respondent was called upon to meet. On that basis the court *a quo* dismissed the application.

[9] In the application for leave to appeal the appellant for the first time referred to certain provisions of the respondent's Water and Sanitation Policy which, it argued, illustrated the point that the appellant should not be regarded as a domestic consumer, and should be regarded as a commercial consumer. In his judgment on the application for leave to appeal the learned Acting Judge considered those arguments and rejected them. I have no hesitation in recording my view that his decision in that regard was correct. He recorded that he was not persuaded that there was "any merit in the grounds of appeal and submissions advanced in support thereof". He nevertheless granted leave to appeal, as I understand it upon the basis that as specific provisions of the policy had now been identified, the dispute became one of interpretation of them, a matter upon which an appeal court may differ with him. In my respectful view the learned Judge erred in that regard. Nothing had in fact changed in the case. The

respondent was never called upon to meet a case that its policy ordained that the appellant should be regarded as a commercial user of water. There are still no facts before the court which could possibly support such a conclusion. The application had been properly dismissed.

[10] Nothing said in argument before us contradicts what has been said thus far in this judgment. Counsel who appeared for the appellant suggested (and I put it no higher) that perhaps we could express our views on how the water consumed on the sectional title development might properly be priced, and leave it to the parties to take the matter on from there, perhaps with the assistance of some sort of declaratory order. It is not the role of a court to furnish opinions. That is certainly not the role of an appeal court. Our role is to determine whether the judgment of the court *a quo* was correct. In this case it undoubtedly was.

[11] Nevertheless one or two observations may not go amiss.

[12] No case was sought to be made that the respondent's charging regime for domestic water is unconstitutional.

[13] The respondent charges the appellant as a single user of a domestic water supply. In the result, the application of the sliding tariff for domestic water brings about that most of the water, almost all of it in fact, which passes through the single bulk meter is charged at the highest rate on the sliding scale. On the face of it that is unfair on the owners of each of the 90 sectional title units. If they each had their own meters, and accordingly their own water accounts with the respondent, they would each get

their full quota of water at the various lower tariffs on the sliding scale. But the solution which appears to have been offered in the second abandoned ground for relief set out in the founding papers is not only unsupported by a reference to any law, nor indeed to the policy, but is also unlikely itself to be fair. We do not know whether each of the dwellings constituting each unit is exactly the same as all the others. That seems unlikely. Larger ones are likely to consume more water than smaller ones. A solution which involves the respondent billing the appellant on the basis that quantities of water allowed at each of the lower tariff levels will be multiplied by 90 would be an arbitrary solution for that reason, and also for the reason that it would benefit those units at which more water is consumed than others.

[14] The respondent's water policy in effect proposes an alternative solution as it allows for the installation of individual meters for each unit at the roadside. However the applicant would have to meet the bill for the installations, whereafter the respondent would be obliged to read those meters and charge accordingly; ie there would be 90 accounts.

[15] The following order is made.

The appeal is dismissed with costs.



Olsen J


Steyn J


Bramdhew AJ

Case Information:

Judgment reserved:
Judgment delivered:

8 November 2024
29 November 2024

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