IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case no: 2023-060881

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
SIGNATURE	DATE: 9 May 2025

In the matter between:

WATERFALL COUNTRY ESTATE (PTY) LTD	First Applicant
WATERFALL SCHOOLS (PTY) LTD	Second Applicant
WATERFALL FIELDS (PTY) LTD	Third Applicant

and

CITY OF JOHANNESBURG	First Respondent
JOHANNESBURG WATER (SOC) LTD	Second Respondent

JUDGMENT

WILSON J:

1 The applicants are a group of connected companies I will call the “Waterfall Estate”, which owns and controls a series of gated communities to the north of Johannesburg. It appears that, in the course of developing some of its properties, the Estate allowed or caused to be installed a number of water meters without the consent of the second respondent, Johannesburg Water. It is common cause between the parties that Johannesburg Water’s consent was required, and that it was not obtained. A “designated officer”, as defined in section 1 of the Water Services Bylaws promulgated by the first respondent, the City, discovered the installation of the offending meters. Acting under the section 111 of the Bylaws, that officer issued “compliance” notices purporting to levy a series of penalties for unauthorised installation of the meters. The value of those penalties – cumulatively several million rand – was then added to the municipal accounts rendered in respect of each of the relevant properties.

2 The question at the centre of this case is whether the designated officer who issued the penalties was empowered in law to do so. On the papers before me, the question is a narrow one, because the respondents rely only on section 111, and because they accept that the sums in issue were penalties under that section. They place no reliance on section 114 of the Bylaws, which, amongst other things, entitles the City to recover such costs as it may have incurred in correcting non-compliance with Bylaws by, for example, removing and replacing unlawfully installed meters. The respondents in any event concede that few if any such costs were actually incurred in this case.

3 Waterfall Estate says that section 111 does not itself authorise the imposition of penalties unless it is read with another provision that sets out what those penalties are. The Estate also contends that the notices issued in respect of each of the properties failed to set out the steps the recipient should take to avoid the imposition of penalties. This is, the Estate argues, what sections 111 (4) (c) and (d) of the bylaws require before any penalty can be imposed. The Estate seeks to avoid the penalties levied in the notices on a number of other grounds, including that the penalties have now prescribed. However, given the conclusion to which I have come on its principal complaint, I need not deal with those grounds.

4 It seems to me that the Estate is right to contend that none of the penalties was lawfully issued, because neither the City nor Johannesburg Water are able to point to any provision of the Bylaws, or indeed any other legal power, under which the designated officer was authorised to act when they issued the penalties. I am also convinced that sections 111 (4) (c) and (d) required the designated officer to set out the steps the Estate could take to avoid the imposition of penalties. It follows that section 111 only authorises the imposition of a penalty once a compliance notice has set out the steps required of a consumer to comply with the Bylaws, and those steps have not been taken. In this case, the notices at issue either did not specify any such steps, or no such steps were required. If no steps were required or specified, no penalty was authorised.

5 Before I explain why I have reached these conclusions, I must first give my reasons for dismissing an application for postponement brought on behalf of the respondents when this matter was called before me.

The postponement application

6 On the afternoon of 29 April 2025, less than 24 hours before the matter was due to be argued in my opposed motion court, the respondents brought an application to postpone the hearing, and for leave to file a supplementary affidavit. The application was advanced on the bases that the respondents' previous attorneys of record had withdrawn, apparently without the respondents' knowledge; that the facts alleged in the respondents' answering affidavit, filed on 7 November 2023, needed to be "fleshed-out" with material from Johannesburg Water's archive; and that the matter should be referred to mediation.

7 Mr. Qithi, who appeared for the respondents, accepted that he and the respondents' new attorneys had been on brief for a month prior to the hearing. That concession deprived the argument based on the withdrawal of the respondents' previous attorneys of much of its force. I find it hard to imagine how the respondents' previous attorneys could have withdrawn without the respondents' actual or constructive knowledge, but I need not consider that issue. One month is, on the

face of things, more than enough time to gather the information necessary to file a supplementary affidavit dealing with such issues as the respondents thought necessary. In these circumstances, the question that naturally arose was what had been done in the month the respondent had already been afforded to compile the affidavit.

8 The answer, it seems, is not much. The application for postponement says that it was difficult to gather all the relevant officials for a meeting, and then to obtain instructions from them. Apparently an initial consultation took two weeks to organise. The respondents' functionaries have yet to place their legal representatives in possession of the material necessary to file a supplementary affidavit. Nor, as became clear at the hearing, had they given the instructions necessary to allow Mr. Qithi to outline that material with any particularity.

9 I have some sympathy for any legal representative faced with a looming hearing on the one hand and a casual approach from their clients to the need to attend meetings and provide information on the other. However, what matters is not so much what Mr. Qithi and his attorneys did to organise a consultation, but the apparent lack of urgency or concern displayed by the respondents' officials. State organs – or indeed any corporate litigant – whose functionaries do not act promptly to instruct their legal representatives when the clock is ticking must accept the reality that a court will not simply wait until the functionaries muster the level of motivation necessary to do so. In this case, no adequate explanation was advanced for the respondents' failure to provide their legal representatives with the information necessary to "flesh-out" their answering affidavit in the month immediately preceding the hearing.

10 In any event, the postponement application provides no particularity of the nature of the further evidence to be adduced. I was told no more than that it would be archival material necessary to paint a picture of the context in which the compliance notices were issued. What difference this would make to the central issue in this case – whether the power relied upon authorised the penalties imposed – was not explained. I questioned Mr. Qithi fairly closely on whether the new material would include the identification of a power other than that set out in section 111 of

the Bylaws on which the respondents intended to rely to justify the penalties. While he did not expressly say so, Mr. Qithi's responses entailed the concession that the respondents' reliance on section 111 would not change, and there was to be no attempt to supplement the respondents' reliance on section 111 with reference to any other legislation.

11 Mr. Qithi sought to plug these substantial gaps in the respondents' case for a postponement with the submission that Waterfall Estate would suffer no prejudice from a postponement, but that the respondents would suffer substantial prejudice if a postponement was not granted. I do not think either of these propositions can be accepted. In the first place, a postponement of the nature sought, at the point where pleadings have closed, and Waterfall Estate has set out its case in detailed heads of argument, would obviously cause the Estate substantial prejudice. It can rarely be fair, in application proceedings, to allow a party to supplement its case on the facts once it has had the benefit of previewing the entirety of its opponent's case in heads of argument.

12 There are, of course, exceptions. If the facts and contentions the respondents wished to introduce were so material to their case, or to the relief sought, that the application could not fairly be decided without them, a postponement and leave to file a supplementary affidavit might have been granted. However, because the postponement application did not outline the material sought to be introduced in any detail, that case was not made out. Indeed, given that, in the respondents' own words, the material was meant to do no more than "flesh out" the case made in the answering affidavit, it seems unlikely that the new material could have been so important to the just disposition of this case that it had to be admitted.

13 That conclusion also disposes of the contention that the respondents would be prejudiced by the refusal of a postponement. It was not demonstrated that the new material sought to be introduced was such that the respondents could not proceed without it, or that it would bear on the central issue in this case: whether section 111 of the Bylaws authorises the imposition of the penalties the Estate challenges. Accordingly, there could be no significant prejudice to the respondents if the postponement application was refused.

14 I do not think that the proposition that the parties should be referred to mediation was seriously advanced. Wisely, Mr. Qithi made little of it in his oral submissions. The legal issue between the parties – whether section 111 empowers the imposition of the relevant penalties – plainly cannot be mediated. If mediation was ever in prospect, the occasion for attempting it had come and gone by the time the matter was called before me, especially taking into account the fact that the Estate had exhausted its internal remedies with the respondents without any real engagement with its complaints. While mediation is an important dispute resolution tool, it will seldom supply the grounds for a postponement once a case, such as this one, has reached the hearing stage, the pleadings have long closed, the issues between the parties are clearly defined, and those issues can only be resolved by a ruling on a point of law.

15 For all these reasons, I dismissed the postponement application with costs on the attorney and client scale. Punitive costs were appropriate because the application was so manifestly lacking in merit that it should never have been brought. The decision to do so on the eve of the hearing was ill-advised, and plainly put Waterfall Estate to legal expenses from which it should be fully indemnified. For the sake of completeness, I shall record my order on the postponement application at the end of this judgment.

The compliance notices

16 There are four compliance notices at issue in this application. Each notice corresponds to a different property owned by the Estate. None of the notices is a model of clarity, but each alleges that the relevant property has made an "unauthorised connection or reconnection to the water supply system or sewer disposal system" or that "[p]art of the water supply system or sewer disposal system belonging to the [City] had been interfered with or . . . damaged". It is common cause that the nature of such "interference" or "unauthorised connection" was the installation of a water meter in a newly developed property without the respondents' consent.

17 In each notice there follows a list of fees: first in respect of a "cut off", second for providing a new meter, and third for "estimated water consumed" apparently corresponding to the "estimated [number of] square metre[s] . . . developed" on each property. In respect of a property referred to as "Polofields" in the papers, the total "liability" alleged on the applicable notice was just over R3.3 million. In a property known as "Kikuyu" the liability was just over R4 million. In "Curro" it was just over R2 million. In "the Sheds" it was just over a million.

18 There is some ambiguity on the face of each of the notices about whether the liability alleged is a penalty or a cost the respondents seek to recover. Although the notices purport to be "issued in terms of section 111" of the Bylaws, which deals only with penalties, the body of each of the notices characterises the liability alleged as either "costs" or "consumption and penalties". The calculation of some of the liability alleged also seems to comprise of what Johannesburg Water says the cost of installing meters on each property would be. Finally, each notice rehearses section 114 of the Bylaws, which defines the scope of certain costs the City is entitled to recover from a consumer to include any costs involved in "making good . . . water services work".

19 However, it appears from the respondents' answering affidavit that the liability alleged in each of the notices could only be a penalty, and not a cost recovered. In respect of the Polofields property, the respondents say that the liability was "merely . . . a penalty" (paragraph 72) or a set of "punitive charges" (paragraph 63) and that the respondents were not put to any expense in regularising the illegal meter. The respondents in fact accepted that the meter installed, albeit without the City's consent, "complied with" the respondents' "necessary requirements" (paragraph 71). Likewise, in the "Kikuyu" property, the respondents "merely implemented a penalty" (paragraph 93). In Curro, too, the respondents confirm that there was no need to replace the offending meter, and that the liability alleged was a "penalty" (paragraph 49). The situation is the same in the Sheds (paragraphs 32 and 34). Finally, in their response *ad seriatim* to the Estate's founding affidavit, the respondents confirm that the liability alleged in each of the notices was a penalty, levied in terms of section 111 of the Bylaws, which was unilaterally added to the Estate's various accounts (paragraph 106).

20 It follows that the respondents must meet the Estate's case by identifying a power sourced in law to impose the liability alleged in each of the notices as a "penalty" rather than as a cost recovered. It appears from the answering affidavit that the respondents think that this power is conferred by section 111 of the Bylaws itself. But that cannot be. Section 111 (4) (d) requires a compliance notice to set out "any penalty that may be imposed in terms of these Bylaws" in the event that remedial steps required in terms of section 111 (4) (c) are not taken. It follows that section 111 does not empower a designated officer to impose a penalty unless they are also satisfied that remedial steps have been prescribed which the consumer has not taken within the period set out in the compliance notice itself.

21 In this case, it is common cause that no remedial steps were in fact necessary. The developers had installed meters without the respondents' consent, but the meters installed were fit for purpose, and the respondents were content to incorporate them into their systems. The only remedial steps required were those taken by the respondents to do so. It follows that there was no basis on which a penalty could lawfully have been imposed in terms of section 111 of the Bylaws.

22 If that were not enough to conclude that the charges at issue in this case are *ultra vires* (it is), then it would be necessary to point out that section 111 only authorises the imposition of penalties created elsewhere in the Bylaws. It does not create any penalties itself. Neither the compliance notices themselves, nor the respondents' answering affidavit, nor Mr. Qithi in argument before me, pointed to any power elsewhere in the Bylaws to impose the penalties set out in the notices.

Relief

23 It follows that the penalties of which Waterfall Estate complains were imposed without legal warrant, in breach of the principle of legality in section 1 (c) of the Constitution, 1996. On reaching this conclusion, I may grant any just and equitable relief. Mr. Uys, who appeared together with Mr. Vorster for the Estate, asked no more than that the penalties be declared unlawful, that the respondents be directed to expunge the penalties from the relevant accounts, and that the

respondents be interdicted and restrained from disconnecting services supplied to any of the relevant properties on the basis that the penalties were not paid. That, it seems to me, is the least that just and equitable relief would entail.

24 The respondents ought to have appreciated that the penalties had been unlawfully levied from the outset, and to have corrected the Estate's accounts at the first opportunity. Instead, the respondents insisted on pushing an application to which they must have known they had no defence to a hearing. At that hearing, when faced with the reality that their answering papers disclosed no defence to the application, the respondents brought a wholly meritless postponement application in a misguided effort to avoid the inevitable outcome. For these reasons the respondents will pay the costs of this application, including the costs of two counsel, on the scale as between attorney and client.

25 Accordingly –

1. The respondents' postponement application is dismissed with costs, including the costs of two counsel, on the scale as between attorney and client.

2. It is declared that the Notice dated 1 October 2018 titled 'By-Laws Contravention Charges', issued by the first respondent to the first applicant, and addressed to 'The S[…]-W[…] (Account no. 5[…])' and imposing a liability on the first applicant of R1 000 579.89 excluding VAT, being annexure FA 6.1 to the founding affidavit, does not comply with Section 111 of the City of Johannesburg Metropolitan Municipality Water Services By-Laws, is *ultra vires* and of no force or effect.

3. It is declared that the undated Notice titled 'By-Laws Contravention Charges', issued by the first respondent to the second applicant, and addressed to 'Curro School Waterfall' and imposing on the second applicant a liability of R2 091 624.23 excluding VAT, received by the second applicant in or around May 2018, being annexure FA8.1 to the founding affidavit, does not comply with Section 111 of the City of Johannesburg Metropolitan Municipality Water Services By-Laws, is *ultra vires* and of no force or effect.

4. It is declared that the undated Notice titled 'By-Laws Contravention Charges', issued by the first respondent to the third applicant, and addressed to 'S[…] 1[…]0, J[…] H[…] Ext 3 (Account 5[…])' and imposing on the third applicant a liability of R3 366 427.63 excluding VAT, received by the third applicant in or around a May 2018, being annexure FA 12.1 to the founding affidavit, does not comply with Section 111 of the City of Johannesburg Metropolitan Municipality Water Services By-Laws, is *ultra vires* and of no force or effect.

5. It is declared that the undated Notice titled 'By-Laws Contravention Charges', issued by the first respondent to the third applicant, and addressed to 'J[…] V[…] Ext 128 (Account 5[…])' and imposing on the third applicant a liability of R4 023 597.45 including VAT, received by the third applicant in or around May 2018, being annexure FA14.1 to the founding affidavit, does not comply with Section 111 of the City of Johannesburg Metropolitan Municipality Water Services By-Laws, is *ultra vires* and of no force or effect.

6. The first respondent is directed to correct the municipal accounts of the applicants in accordance with this order within 30 (thirty) days, and, in doing so, to deduct any interest or Value Added Tax levied on the amounts specified in the notices referred to in paragraphs 1 to 5 of this order.

7. The respondents are interdicted from taking any debt-recovery or remedial action in respect of any of the amounts specified in the notices referred to in paragraphs 1 to 5 of this order.

8. The respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of this application, including the costs of two counsel, on the scale as between attorney and client.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 9 May 2025.

HEARD ON:	30 April 2025
DECIDED ON:	9 May 2025
For the Applicant:	JC Uys SC H Vorster Instructed by HBG Schindlers Attorneys
For the Second and Third Respondents:	V Qithi Instructed by Jolwana Mgidlana Inc