DO DEVELOPMENTS WITH 'LIFESTYLE CENTRES' ATTRACT COMMERCIAL TARIFF RATES?

***Malakite Body Corporate and Another v City of Johannesburg Metropolitan Municipality and Another* (A2023/050651) [2024] ZAGPJHC 397 (15 April 2024)**

The argument that a gym and restaurant facility within a residential development, restricted for use by occupants and owners, is ancillary to the development's main residential purpose and that the electricity supply should be charged at a domestic tariff, is attractive but not convincing, said the court. In this matter, the court stated that tariff determination is based on the nature and usage of facilities, rather than a development's internal administration or intent. This formed the basis for the City of Johannesburg's determination of its tariff policy, by-laws, and electricity regulations. Therefore, the City validly applied a commercial tariff for the electricity supplied to the development. The development's management body did not take up the option to apply for separated tariffs for the different uses of land in the development due to its belief that this was not necessary.

Developers and management bodies of such schemes are well advised to engage with the local authority in the area of a proposed development to identify which options are available for tariff determination in such mixed-use developments. The judgment below explains the reasoning.

View the judgment here.

FACTS

The Malakite and Greenstone Crest are two sectional title schemes situated within the jurisdiction of the City of Johannesburg municipality (the 'CoJ'). They are residential estates containing respectively 291 and 620 dwelling units. Both schemes are zoned as 'Residential 3', which allows for ancillary uses (such as taverns and recreation clubs) within the scheme without the requirement for a unique zoning. In both these schemes, there are one or two units that are used as lifestyle centres with a gym and restaurant. The use of these facilities is restricted to the owners and occupants in the schemes only.

The CoJ bills individual charges - such as rates and refuse - directly to the specific section in the scheme. Electricity is billed on one account, to the scheme as a whole. (According to the CoJ, the determination of how each body corporate of these schemes invoiced its members in return, is an internal matter and not relevant to it.) The commercial property tariff is applied for the electricity supply to these schemes, due to the fact that these schemes fall under the description 'mixed domestic and non-domestic loads' (as per the CoJ's policies and By-laws) due to the presence of the lifestyles centres within the estates.

The body corporates of both schemes argue that they satisfy the definitions in the CoJ's policies and By-laws regarding electricity supply for domestic purposes, as the lifestyle centres within their residential estates are ancillary to the main purpose of providing housing to homeowners. They also do not seek to derive a commercial benefit from these facilities.

The CoJ argued that in terms of its valid 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 argued that since the gym and restaurant are not residential, the estates contain both domestic and non-domestic use. In such cases their By-laws provide that a non- domestic/business/commercial tariff is imposed unless the consumer (in this instance the relevant body corporate) installs a 'split meter'. The split supply connection will then

allow for the separate measuring of domestic and non-domestic uses and the consumer will then be billed accordingly, as the tariffs differ.

The court *a quo* dismissed the application. It found that the lifestyle centres cannot be viewed as ancillary to the schemes' purpose and should be classified as domestic and non-domestic per the CoJ's 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.

The body corporates of both schemes appealed.

HELD

Legislative background

- As required by section 74 of the Local Government Municipal Systems Act 32 of 2000 ('the Systems Act') , a municipal council must adopt and implement a 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 Act (ERA), the National Energy Regulator of South Africa (NERSA) possesses broad authority to oversee the pricing and tariffs imposed by licensees in the electricity sector. The CoJ, as a licensee in terms of ERA, therefore imposes electricity tariffs which are approved by NERSA.
- Section 11(3) of the Systems Act 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'.
- In 2000, the CoJ enacted by-laws in adherence with the aforementioned provisions It is in terms of these By-Laws that it is determined 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.'
- In terms of the Municipality's tariff policy, the definition of business tariff includes 'mixed domestic and non-domestic loads'. In addition, the CoJ's 2020/2021 electricity tariff states that '[m]ixed 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

- Electricity is a service. The tariff for such service is determined in accordance with the usage for such service. Whether the individual schemes 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 argument on behalf of the relevant body corporates of the schemes were that they satisfy the definition of Domestic Tariff under the CoJ's Tariff Determination Policy for electricity, as the lifestyle centres within their residential estates are ancillary to the main purpose of providing housing to homeowners. This is not persuasive, because:
    - Firstly, the tariff policy, the By-Laws and the applicable electricity tariffs have been approved by the CoJ's council as part of the city's executive and legislative powers. Neither the policy, By-laws nor tariffs have been challenged in this matter.
    - 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

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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.

- 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.
- 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; and (b) mixed use reseller customers (unless a split meter is installed). Further the tariff specifically makes provision for mixed loads on non-residential and residential to be billed on the business tariff.

CONCLUSION

The CoJ is therefore justified in raising invoices based on the relevant 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.

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