REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 11550/20

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: YES
1/03/2022

In the matter between :

SAN RIDGE RENTAL PROPERTY (PTY) LTD	Applicant
and	
THE MUNICIPAL MANAGER : CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	First Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Second Respondent
JOHANNESBURG WATER (SOC)	Third Respondent

JUDGMENT

STRYDOM J :

[1] This is a review application for the setting aside of the decision by the second and/or third respondent to classify Erf [....] Erard Gardens, Ext 36 Township, held by Certificate of Consolidated Title T[....] ("the property") as a "multiple dwelling" and for the substitution with a decision by this Court that the property should be classified as "blocks of flats".

[2] It has become common cause before this court that the classification conducted by a representative or representatives of the second respondent, the City of Johannesburg Metropolitan Municipality ("the City") and/or representatives of the third respondent the Johannesburg Water (SOC) ("Johannesburg Water") constituted administrative action as contemplated in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[3] The applicant, San Ridge Rental Property (Pty) Ltd ("the applicant") owns the property. On this property there is a flat complex. The complex consists of 42 separate buildings or "blocks". Each block contains eight separate flats. In total the complex contains 470 flats. The applicant lets the flats to lessees.

[4] The City delivers sewerage and sanitation services to the property. It levies a charge from the applicant for providing it with this service. It determines the charge with reference to its tariff of charges for water and sewerage and sanitation services ("the tariff"). The tariff is adopted annually by the City's council in terms of section 75A of the Systems Act.[1]

[5] Before dealing with the merits of the matter, it should be mentioned that the applicant applied, to the extent that it was necessary, for condonation for the delay in instituting this application in terms of section 9 of PAJA.[2]

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1 Local Government : Municipal Systems Act 32 of 2000 ("the Systems Act").

2 Section 9

"(1) The period of –

(a) …

[6] The applicant became aware of the classification decision ("the decision") at the end of April 2019 and asked for reasons for such decision. Despite the request, the applicant was not provided with any reasons. In fact, the reasons for the decision are still outstanding. An internal appeal was launched by the applicant. Nothing came of this as uncertainty arose whether such internal appeal was available to the applicant. With the reasons never being provided, it was difficult to ascertain the date when the 180 day period as contemplated in section 9 would have started to run. The review application was instituted on 19 May 2020.

[7] In terms of section 7(1) of PAJA, any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date when internal remedies were concluded. As the starting date of the 180 days remained uncertain, as no reasons were provided and the internal appeal could not be persued, the court is satisfied that the applicant instituted review proceedings without unreasonable delay and in any event, before the expiration of 180 days.

[8] Before this court the condonation application was not conceded but it was not opposed during argument.

[9] Accordingly the court is satisfied that the applicant instituted the review application timeously and there is no need for an order to extend the 180 day period as envisaged in section 9 of PAJA.

[10] Turning to the review application, it became common cause as per the joint practice note between the parties as follows:

> 10.1 In the exercise of its powers and functions as an organ of state in the local sphere of government, the City provides sewerage and sanitation services ("the services") to the property.

(b) 90 days or 180 days referred to in ss 5 and 7 may be extended for a fixed period, by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of section 1 where the interests of justice so require."

10.2 The City levies charges from the applicant to provide the services to the property.

10.3 The City uses a tariff policy ("the tariff policy") to determine the amount of the charges it levies to the applicant and others.

10.4 The tariff policy distinguishes between different classes of properties and prescribes different charges that may be levied by the City in respect of the different classes.

10.5 The City adopted the tariff policy in terms of section 74 and/or 75A of the Systems Act.

10.6 The tariff policy relates to the 2019 – 2020 financial year.

10.7 The City and/or Johannesburg Water classified the property as "*multiple dwelling*" in terms of the tariff policy.

10.8 In terms of the tariff policy, the prescribed charge for the provision of the services to –

10.8.1 a "*multiple dwelling*" is R417,47 per unit, per month; and

10.8.2 "*blocks of flats*" is R250 per unit per month.

10.9 Since 2019 – 2020 financial year, the City has levied a charge of R417,47 per unit, per month, in respect of the property.

Issues requiring determination

[11] The parties further agreed that the following issues require determination:

11.1 Whether the impugned decision should be reviewed and declared invalid in terms of PAJA or the constitutional principle of legality.

11.2 In particular, whether the decision to classify the property as a "*multiple dwelling*" and not as "*blocks of flats*" or "other classes of property" was rational and/or reasonable.

11.3 If the decision is reviewed, the consequential relief that would be just and equitable in the circumstances of the case.

11.4 In particular, whether the court should grant a substitution order that the property be classified as "*blocks of flats*", alternatively, "*other classes of property*" in terms of the tariff policy.

The tariff policy

[12] The relevant definitions for purposes of this matter which are contained in the tariff policy are the following:

"1.2 'multi-dwelling' means any arrangement of premises that comprises more than one dwelling unit including semi-detached houses, simplex units, town houses and any other arrangement of residential premises, excluding a block of flats;

1.3 'flat' means a dwelling unit set aside in a single multi-story building on a single erf with a communal entrance to the building, which building comprises more than one dwelling unit and where the rates valuation does not exceed R700,000.00."

[13] The definition of "*multi-dwelling*" specifically excludes "*a block of flats*".

[14] A "block of flats" or "blocks of flats" are not defined in the tariff policy but in the tariff policy itself, reference is made in paragraph 2.2 to *blocks of flats* in the following context:

"2.2 ***Blocks of Flats***

(a) where information to the satisfaction of the Managing Director : Johannesburg Water, or his duly authorised representative, has been furnished as to the number of flats on premises : R250.00 per unit per month.

(b) Where information to the satisfaction of the Managing Director : Johannesburg Water, or his duly authorised representative, has not been furnished as to the number of flat units in a complex : for each kilometre or part thereof, of the metered or guestimated water consumption : R25.08/kl."

[15] The following is further provided for in the tariff policy in relation to multiple dwellings:

"2.3 ***Multiple Dwellings***

(a) Where two or more dwelling units have been erected on a single erf, an erf size shall be determined in respect of each dwelling house erected on such property, by dividing the area of the erf by the number of dwelling units erected thereon. The charge shall then be levied in respect of each such dwelling house in accordance with the provisions of section 2.1 above, provided that the minimum charge shall be : R416.47 per unit per month."

[16] Reference is then also made in the tariff policy to other classes of property as follows:

"2.10 ***Other classes of property***

All classes of property other than those specified in clauses 2.1 to 2.9 above. For each kilolitre or part thereof of the metered or estimated water consumption : R31.54/kl."

[17] Although the applicant argued in the alternative that if this court does not find that the correct classification of the property should be "*blocks of flats"*, then the classification should fall under "*other classes of property*". I am of the view that this

alternative is not applicable as blocks of flats, although not specifically defined, is referred to in paragraph 2.2 of the tariff policy.

[18] Considering the definitions and the reference to "*blocks of flats*" in the tariff policy, the first question for consideration should be whether the classification decision made by the City and/or Johannesburg Water was in line with its own tariff policy. "*Blocks of flats*" was specifically excluded from the definition of *"multiple-dwelling*". Consequently, if the structures owned by the applicant could be classified as "*block or blocks of flats"* then it could not be a "*multiple-dwelling*" as defined in the tariff policy.

[19] On behalf of the applicant it was argued that the property self-evidently consists of "*blocks of flats*". The City, however, classified it as a *"multi-dwelling*" and levies sewerage charges to the applicant accordingly.

[20] This conclusion was reached on the basis that the applicant was charged according to what would have been charged for a "*multiple dwelling*" and not as a result of a specific decision taken as it was never established and/or stated by the City who made the decision.

[21] Despite requests in this regard, the City failed to –

21.1 identify who made the decision and when the decision was made;

21.2 explain how the decision was made, i.e. what criteria or methodology, if any, the City used to decide that the property was a "*multiple-dwelling*";

21.3 to provide any rationale or reasonable justification for its decision.

[22] It was argued that this decision was arbitrary and/or irrational as there exists no rational connection between the decision and the means used to reach the decision and/or irrational as there existed no connection between the decision and the information relating to the decision serving before the decision-maker.

[23] According to the evidence before this Court, the City took the impugned decision without using any means and without considering any information at all. There is just no evidence placed before this court to conclude otherwise. In other words, there is simply no probative material in the Rule 53 record or in the City's answering affidavit that shows, directly or indirectly, that the City took any information into account or used any particular means, to decide that the applicant's property was a "*multiple-dwelling"* and not "*blocks of flats".*

[24] The City failed to state or show which individual or which committee took the impugned decision, when the decision was made, and what decision-making process led to the decision.

[25] On the information before this court, the City's decision to classify the applicant's property as a "*multiple-dwelling*" and not as "*blocks of flats*" was devoid of any supporting information, reasoning or decision-making process and was manifestly irrational and arbitrary.

[26] The City's only justification for its decision is its contention that the property falls within the definition of "*multiple-dwelling*" in the tariff policy. But in my view this contention is without merit for the following reasons:

> 26.1 First, the contention merely begs the question of why the City considered the property to fall within the definition of "*multiple-dwelling".* The City's unreasoned assertion that the property does fall within the definition of "*multiple-dwelling*" is circular and unhelpful.
>
> 26.2 The City must have overlooked the definition of *"multiple-dwelling*" which expressly excludes "*block of flats"* whilst the property patently consists of nothing other than "*blocks of flats*".
>
> 26.3 If the plans and photographs of the development or scheme, which was approved by the City, are considered then the nature of the property is a clear indication that what has been built are flats within "*blocks of flats":*

26.3.1 The are several buildings on the property;

26.3.2 The buildings have multiple storeys;

26.3.3 Each building accommodates several different flats;

26.3.4 On average, each building (or "*block"*) consists of 8 separate flats;

26.3.5 In total there are 42 blocks accommodating 470 separate flats;

26.3.6 Each block has a common entry which will provide access to the flats.

[27] The exclusion in the definition of "*multiple-dwelling*" refers to "*block of flats"* (in the singular) and not to "*blocks of flats*" (plural). The court raised with the applicant during argument whether this reference in the singular makes any difference considering that the applicant owns various "*blocks of flats*".

[28] The court was referred to section 6 of the Interpretation Act, Act 33 of 1957. Section 6 provides as follows:

"In every law, unless the contrary intention appears –

(a) words importing the masculine gender includes females; and

(b) words in the singular number include the plural, and words in the plural number include the singular."

[29] The court can thus accept that the reference in the definition would also be a reference to "*blocks of flats*". The contrary intention does not appear from the tariff policy. This conclusion is further supported by the fact that in paragraph 2.2. of the tariff policy, reference is in fact made to "*blocks of flats".* The tariff for "*blocks of flats*" is specifically stipulated to be R250,00 per unit per month.

[30] As indicate hereinabove the applicant's property consists of various blocks of flats. On average, each building consists of eight separate flats. In total there are 42 buildings, or "blocks", totalling 417 separate flats. Each of the blocks has its own communal entrance and only the flats on the ground floor have direct access to the ground level. In my view the nature of this development can be described as *"blocks of flats"* and is specifically excluded in the definition of "*multiple-dwellings*".

[31] The court is of the view that the classification decision is in conflict with the definitions and could accordingly not have been made rationally or reasonably.

[32] Accordingly, the City's decision to classify the property as a "*multiple-dwelling*" and not as "*blocks of flats*" is irrational and arbitrary and this decision should therefore be reviewed, declared invalid and set aside in terms of sections 6(2)(e)(vi) and 6(2)(f)(ii) of PAJA, and/or, in terms of the principle of legality enshrined in section 1C of the Constitution.

[33] What remains to be decided by this court pursuant to the setting aside of the impugned decision of the City is whether it will be just and equitable for this court to substitute or vary the decision of the City by classifying the "*blocks of flats*" as such for purposes to determine the applicable tariff to be paid. Has exceptional circumstances, as contemplated in section 8(1)(c)(ii) of PAJA been shown by the applicant for a court to make this decision which vests with the city.[3]

[34] I am of the view that I should exercise this court's discretion given that:

> 34.1 The classification by the City was clearly wrong and was therefore taken in an arbitrary and irrational way without any supporting reasons or information, and without following any particular decision-making process.

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[3] See in this regard section 8(1)(c)(ii) which reads:

"*1. The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable;*

(c) setting aside the administrative action; and

(ii) in exceptional circumstances –

(aa)substituting or varying the administrative action or correcting a defect resulting from the administrative action; "

34.2 After considering the tariff policy the court is in as good a position as the City to decide whether the property is a "*multiple-dwelling*" or "*blocks of flats*".

34.3 If the decision is remitted to the City, and if the City takes a rational and valid decision, it should be a foregone conclusion that the City will classify the property as "*blocks of flats*", as that is precisely what the property comprises of.

34.4 It would not be just and equitable to refer this foregone conclusion back to the City for further consideration.

[35] An order in terms of which the classification is done by the court should therefore be done. The tariffs applicable after the classification has been made remain to be determined by the City. As the tariffs were determined for the 2019/2020 year the tariff would be R250 per unit for flats within "*blocks of flats".*

[36] The court makes the following order:

36.1 The decision of the second and/or third respondent to classify Erf [....] Erard Gardens, Ext 36 Township, held by Certificate of Consolidated Title T[....] ("the property") as a "*multiple dwelling*", taken in terms of the second respondent's tariff policy under section 74(1) of Act 32 of 2000 ("the Act") and/or the second respondent's tariff resolution under section 75(a)(ii) of the Act is reviewed, declared invalid and set aside.

36.2 The decision in paragraph 1 is substituted with a decision that the property is classified as "*blocks of flats*" in terms of the second respondent's tariff policy and/or tariff resolution referred to above.

36.3 The Respondents are ordered to pay the applicant's costs, including the costs of two counsel where so employed.

RÉAN STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

For the Applicant:	Adv. F Erasmus SC
	Adv. HW van Eetveldt
Instructed by:	JDB Attorneys
	%Pagel Schulenburg Inc.
For the 1st; 2nd & 3rd Respondents:	Adv. T. Makgate
Instructed by:	Prince Mudau & Associates
Date of Hearing:	15 February 2022
Date of Judgment:	01 March 2022