THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 16/05

Reportable

In the matter between

RATES ACTION GROUP **A**ppellant

and

THE CITY OF CAPE TOWN Respondent

Coram**:** **Howie P, Streicher, Lewis, Jafta JJA Nkabinde AJA**

Heard: 8 November 2005

Delivered: 25 November 2005

Summary: ***The levying of a rate as a charge for sewerage services and refuse removal is permitted under the Local Government: Municipal Systems Act 32 of 2000.***

JUDGMENT

LEWIS JA:

[1] This appeal is against a decision of the Cape High Court (Budlender AJ, Moosa J concurring) in which it was found that the respondent, the City of Cape Town (the 'City'), was entitled to levy a charge based on the municipal value of property for sewerage services and refuse removal. The judgment of the court below is reported in 2004 (5) SA 545 (C). The appellant impugns only one aspect of the decision, and in view of the fullness and lucidity of the judgment of Budlender AJ there is no need to deal with any other issue raised in the court of first instance.

[2] The appellant is a voluntary association that represents a number of different ratepayer associations in parts of the City. It sought an order declaring that the levying and recovery from ratepayers of the City of (a) sewerage charges based solely on the value of a ratepayer's property, and unrelated to the volume of water supplied, imposed by the City since 1 July 2002; and (b) refuse removal charges based solely on the value of a ratepayer's property, as imposed by the respondent since 1 July 2002, was unlawful, alternatively, unconstitutional, in terms of the provisions of the Local Government: Municipal Systems Act 32 of 2000, and hence of no force from these respective dates. The appellant also

asked that, consequent on the order being granted, the City credit all its ratepayers with the amounts paid, and interest, as from the date of the imposition of such charges; and that the City reverse the charges, and interest accruing thereon, to those ratepayers who had not paid. The application was dismissed. The appeal lies with the leave of this court.

[3] The background to the case is, very briefly, this: the City was created in December 2000 by the amalgamation of the Cape Metropolitan Council and six transitional municipal local councils. In what had formerly been the Cape Town and South Peninsula Local Council areas, sewerage and refuse removal services were funded from property rates. There were no consumption charges for these services. In other areas charges for the services were based either on consumption or on a flat rate. These charges, and the different methods of determining them, were permissible in terms of s 10G of the Local Government Transition Act 209 of 1993 (the 'LGTA').

[4] After its establishment the City compiled a general valuation roll incorporating all of the properties which fell within its

jurisdiction. This led to a substantial increase in the valuation of many properties which had not been valued for several years. The revaluation of properties had a significant effect not only in so far as rates were concerned (see in this regard *City of Cape Town v Robertson* 2005 (2) SA 323 (CC)) but also in so far as charges for sewerage and refuse removal were concerned, for these were based, in part, on the rateable value of property from 2000. It is these charges that are the subject of the dispute before the court.

[5] In 2002 the City Council approved a budget and for the first time determined a uniform method of charging for sewerage and refuse removal services applicable throughout the areas under its jurisdiction. Sewerage service charges consisted of two elements. The first was a charge based on estimated consumption, which was capped for single residential properties. The second was a basic charge of R38 for each property, but which was subject to a rebate based on the value of the property. The rebate ranged from a full one in respect of properties worth less than R50 000, to one of R8 for properties valued between R1m and R1,5m. Refuse removal charges also had two elements: user charges, subject to

rebates based on property values; and, secondly, a percentage of the rateable value of the property if it was in excess of R50 000.

[6] Towards the end of 2002 the Council, newly-controlled by a different political party, adopted a policy to combat poverty within the City. An independent study was commissioned to obtain advice on how to recover the costs of services, while at the same time subsidising households where the occupants could not afford the costs – about a third of the people living in the area. The Council, after considering the report and recommendations made pursuant to the study, agreed to a significant shift in policy in relation to the funding of services. The aim was to ensure that at least 50 per cent of revenue in respect of sewerage services was based on fixed charges, determined in accordance with the rateable value of the property. Previously, only some 20 per cent of the revenue was based on a fixed charge. The balance of revenue would be based on a consumption charge.

[7] The charges imposed for the 2003/2004 year were made up as follows. The sewerage service charge again had two elements. The first was a range of consumption charges based on estimated

water consumption, but capped at 28 kl per month in the case of single residential properties. The second element was a charge based on the value of the property in question. In the case of single residential properties, this was charged at the rate of 0,153 cents in the rand of rateable value above R50 000, subject to a 30 per cent rebate. It was not capped. This change from the 2002/3 flat rate of R38 per property (subject to a value-based rebate) resulted in an increase in that element of the sewerage charge in respect of all properties with a rateable value of R128 509,80 or higher.

[8] The refuse removal charges were also based on two elements. There was a range of consumer charges, coupled with a charge based on the property value. In the case of residential properties, the charge based on the property value was 0,041588185 cents in the rand on rateable value above R50 000. This was not capped.

[9] The removal of the cap and the increased rate at which the sewerage charge was made led in many cases to significant increases in the charges for sewerage services and refuse

removal. The objections to the increases by ratepayers gave rise to the application for the orders that the City was not entitled to charge on the bases adopted.

[10] The legislative framework for local government, and for the charging of fees and the levying of rates, is described comprehensively in the judgment a quo in paras 24 to 31 and there is no need to repeat it here. Suffice it to say that municipalities derive their power both from the Constitution and from legislation. Section 229 (1) of the Constitution provides that a municipality may impose

'(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and

(b) if authorized by national legislation, other taxes, levies and duties appropriate to local government . . . , but no municipality may impose income tax, value-added tax, general sales tax or customs duty.'

The powers of a municipality are limited, however, by subsec (2), which provides, inter alia, that they must not be exercised in such a way as to 'materially and unreasonably' prejudice national economic policies. Subsection (2)(b) provides that the powers may be regulated by national legislation. The regulatory legislation principally in issue in this appeal is the Local Government:

Municipal Systems Act 32 of 2000 (the ‘Systems Act’), which came into operation on 1 March 2001.

[11] The appellant contends that in terms of this Act, the City does not have the power to charge for a service by imposing a rate – an amount determined on the basis of the municipal value of the property. It accepts that this was permissible under s 10G of the LGTA, but contends that the relevant parts of the section were impliedly repealed when the Systems Act came into operation. The court below found that the section was not repealed, and that for a period s 10G existed alongside the corresponding financial provisions in the Systems Act. A municipality could accordingly choose which system of charging for services it would implement – one permitted under s 10G or one determined under the Systems Act.

[12] In my view it is not necessary to determine the question whether a municipality had a choice, since the Systems Act, to which I shall turn shortly, does not preclude the levying of a rate as a charge for a service. (After this matter was decided in the court below, the final legislation in the suite of statutes designed to

regulate local government and its financial powers was enacted, and the relevant provisions of s 10G were expressly repealed by s 179 of the Local Government: Municipal Finance Management Act 56 of 2003, which came into operation on 1 July 2005. The Act came into operation generally on 1 July 2004, save for sections (including s 179) referred to in the schedule to the Act, the last of which will come into operation on 1 July 2008. The Act must be read with the Local Government: Municipal Property Rates Act 6 of 2004 which came into operation on 1 July 2005. This is the statute envisaged in s 229(2)(b) of the Constitution which provides that the imposition of property rates by a municipality may be regulated by national legislation.)

[13] The essence of the appellant's argument is that while s 10G of the LGTA allowed expressly for a rate to be levied for a service, s 74 of the Systems Act requires a tariff to be charged. In *Gerber v Member of the Executive Council for Development Planning and Local Government, Gauteng* 2003 (2) SA 344 (SCA), this court accepted the definition of a rate in the *Concise Oxford English Dictionary* (7 ed): 'Assessment levied by local authorities for local purposes at so much per pound of assessed value of buildings and

land owned.' A tariff, on the other hand, is a table of charges for items or services.

[14] The relevant provisions of s 10G are subsecs 7(a) and (b):

'(7)(a)(i) A local council, metropolitan local council and rural council may by resolution, levy and recover property rates in respect of immovable property in the area of jurisdiction of the council concerned: Provided that a common rating system as determined by the metropolitan council shall be applicable within the area of jurisdiction of that metropolitan council . . . .

(ii) A municipality may by resolution supported by a majority of the members of the council levy and recover levies, fees, taxes and tariffs in respect of any function or service of the municipality.

(b) In determining property rates, levies, fees, taxes and tariffs (hereinafter referred to as charges) under para (a), a municipality may -

(i) differentiate between different categories of users or property on such grounds as it may deem reasonable. . . .'

[15] Chapter 8 of the Systems Act regulates municipal services. Part 1 of the chapter deals with service 'tariffs'. Section 74 deals with tariff policy. It read, at the relevant times:

'74 Tariff policy

(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 and with any other applicable legislation.

(2) A tariff policy must reflect at least the following principles, namely that -

(a) users of municipal services should be treated equitably in the application of tariffs;

(b) the amount individual users pay for services should generally *be in proportion to their use of that service*; (my emphasis)

(c) poor households must have access to at least basic services through -

(i) tariffs that cover only operating and maintenance costs,

(ii) special tariffs or life line tariffs for low levels of use or consumption of services or for basic levels of service; or

(iii) any other direct or indirect method of subsidisation of tariffs for poor households;

(d) *tariffs must reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges;* (my emphasis)

(e) tariffs must be set at levels that facilitate the financial sustainability of the service, taking into account subsidisation from sources other than the service concerned;

(f) provision may be made in appropriate circumstances for a surcharge on the tariff for a service;

(g) provision may be made for the promotion of local economic development through special tariffs for categories of commercial and industrial users;

(h) the economical, efficient and effective use of resources, the recycling of waste, and other appropriate environmental objectives must be encouraged;

(i) the extent of subsidisation of tariffs for poor households and other categories of users should be fully disclosed.

(3) A tariff policy may differentiate between 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.'

Section 75 requires that by-laws be adopted in order to give effect to tariff policy. It reads:

'75 By-laws to give effect to policy

(1) A municipal council must adopt by-laws to give effect to the implementation and enforcement of its tariff policy.

(2) By-laws in terms of ss (1) may differentiate between different categories of users, debtors, service providers, services, service standards and geographical areas as long as such differentiation does not amount to unfair discrimination.'

The general power to levy and recover fees, charges and tariffs is conferred by s 75A, inserted in 2002.

[16] The appellant argues that all charges for services must be made in terms of these sections. Thus there must be a tariff, and before that is adopted, there must be a tariff policy and by-laws promulgated. When the City imposed the sewerage service and refuse removal charges, no policy had been adopted and no by-laws passed. Accordingly, the argument goes, the charges based on the value of the property, rather than on use of the service, are not permitted in terms of the Systems Act. The appellant finds support for these contentions in s 74(2)(b), which requires that the amount paid for services by a user should 'generally be in proportion' to their use; and in s 74(2)(d), which requires that tariffs must reflect the costs 'reasonably associated' with rendering the service.

[17] The implication of these provisions, the appellant contends, is that charges for all municipal services must be based on use – actual consumption – and must be proportionate to the use. A rate, which is determined by the value of property, bears no relation to actual consumption, and thus cannot be levied for a service.

[18] Counsel for the appellant conceded, however, that a municipality may use revenue accumulated through the collection of rates for general services – those to which all members of the public have access, such as the use of library facilities, or the maintenance of roads and pavements. Indeed, in *South African Municipal Workers Union v City of Cape Town* 2004 (1) SA 548 (SCA) this court found that the use of some municipal services, such as a city police service, cannot be measured such that it can be charged to individuals. He conceded also that the Act does not preclude the use of rates for the purpose of subsidising households. He argued, however, that where consumption is attributable to a particular user, such as the use of electricity, water, sewerage services and refuse removal, the service charge must be based on use and determined in accordance with a tariff.

[19] There is, however, no limitation to be found in s 74, or in any other part of the Systems Act, on the uses to which rates may be put nor on the number of rates that may be charged by a municipality. There is nothing to preclude the levying of several rates in respect of a property. And the Systems Act does not oblige a municipality to charge for services in accordance with a tariff – it

simply entitles it to do so provided that a tariff policy has been adopted and by-laws promulgated.

[20] In the circumstances the argument for the appellant that the City was not permitted to charge a rate for the sewerage services and refuse removal cannot succeed. Since this was the only issue argued on appeal, the appellant must fail.

[21] The appeal is dismissed with costs including those occasioned by the employment of two counsel.

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C H Lewis
Judge of Appeal

Concur:
Howie P
Streicher JA
Jafta JA
Nkabinde AJA