THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1139/2019

In the matter between

CITY OF CAPE TOWN METROPOLITAN MUNICIPALITY	**APPELLANT**

and

NU-WAY HOUSING DEVELOPMENTS (PTY) LTD	**RESPONDENT**

Neutral citation: *City of Cape Town Metropolitan Municipality v Nu-Way Housing Developments (Pty) Ltd* (1139/2019) [2021] ZASCA 19 (12 March 2021)

Coram: Navsa ADP, Molemela and Nicholls JJA and Ledwaba and Rogers AJJA

Heard: 22 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 14h00 on 12 March 2021.

Summary: Townships – Less Formal Township Establishment Act 113 of 1991 – conditions on which land designated – electricity supply – condition that local authority shall determine 'connection fee and conditions applicable' to electricity connections when application for supply made – 'conditions applicable' include development capital charge in force at time application made for electricity supply.

ORDER

On appeal from: The High Court, Western Cape Division (Baartman J sitting as court of first instance).

(a) The appeal succeeds with costs, including the costs of two counsel where engaged.

(b) The order of the court *a quo* is set aside and replaced with an order in the following terms: 'The application is dismissed with costs.'

JUDGMENT

Rogers AJA (Navsa ADP, Molemela and Nicholls JJA and Ledwaba AJA concurring)

[1] The present respondent, Nu-Way Housing Developments (Pty) Ltd (Nu-Way), sued the appellant, the City of Cape Town Metropolitan Municipality (the City), in the court a quo for recovery of R2 109 009, being an electricity development contribution which Nu-Way had paid the City, allegedly under protest. Nu-Way based its claim on the *condictio indebiti*, alternatively in contract, being the two conceptual bases for recovery in such circumstances identified in the majority judgment in *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A). The court a quo (Baartman J) upheld the claim on both bases. The City appeals to this Court with the leave of the court below.

[2] Nu-Way applied to the Department of Planning, Local Government and Housing in the Western Cape Provincial Government (WCPG) to have land in Langa designated for less formal settlement in terms of s 3(1) of the Less Formal Township Establishment Act 113 of 1991 (the LFTEA).[1] The land belonged to the Passenger Rail Agency of South Africa (PRASA), whose agreement to the project Nu-Way had secured. The proposal was to subdivide the land into 224 erven zoned Single Dwelling Residential, one erf zoned Business and five erven zoned Undetermined (Services) Use.

[3] In accordance with the LFTEA, the City was notified of the application. The City recommended that the application be approved on certain conditions set out in annexures E, G and G2 to its report. In November 2001 the WCPG notified Nu-Way that the application had been approved on certain conditions, including those recommended by the City.

[4] In relation to electricity, clause 18(1) of annexure G required Nu-Way, at its own cost, to provide the internal electrical reticulation and street lighting serving the subdivision. Independent connections were required for each erf. The erf owner was to make formal application to the City's electricity department for the connection of supply to that erf. Clause 18.6 provided:

'The Directorate *[ie the City's electricity department]* shall determine the connection fee and conditions applicable to the joining of the internal electrical reticulation of the proposed subdivision to the Directorate existing electrical infrastructure, on formal application by the Applicant.'

[5] Nu-Way completed the residential component in about 2004. The individual residential erven were transferred to the end-users, and each erf obtained an electricity connection. The business erf, which had become Erf 4330

[1] The LFTEA was repealed nationally by the Spatial Planning and Land Use Management Act 16 of 2013 and (as legislation the administration of which had been assigned to the Western Cape) by the Land-Use Planning Act 3 of 2014 (Western Cape).

Langa and over which Nu-Way had a 99-year lease from PRASA, remained undeveloped for some years. In February 2014 the City approved building plans for the construction of a shopping centre on the erf, and construction began in June 2014. In October 2014 Nu-Way applied to the City's electricity department for an electricity supply to the business erf of '1440A three phase at 400V', equating to 998 kVA. On 15 October 2014 the electricity department notified Nu-Way that a connection fee of R31 073 and a 'Development Contribution (DC) Cost' of R2 109 009 were payable for the requested supply. (I shall refer to the latter item as the DC charge.)

[6] According to the evidence of Nu-Way's Mr Gordon Mann, Nu-Way had not been expecting to pay a DC charge. This cost had not been factored into the leases which Nu-Way concluded with tenants of the new shopping centre, particularly Shoprite. Nu-Way believed that it was not legally obliged to pay the DC charge. However, unless Nu-Way secured electricity for the shopping centre by January 2015, it would be in breach of its obligations to the tenants. The City's officials suggested that in order to prevent further cost and delay for Nu-Way, the latter should make payment as an interim measure while the City investigated the issue. On 2 December 2014 Nu-Way paid the connection fee and DC charge by way of an electronic funds transfer. On the same day Nu-Way wrote to the City, attaching proof of payment and adding:

'Payment is made subject to the condition that the amount paid in respect of electrical development contributions will be refunded if it is determined by the City that such amount is in fact not due and payable in respect of Erf 4330 Langa.'

This wording had been suggested to Mr Mann earlier in the day by Ms Susan Mosdell of the City's Legal Services Department, following a meeting between representatives of Nu-Way and the City that morning.

[7] Although the City raised a number of other defences, it is convenient to start with the question whether the DC charge was in law due and payable. If it was, Nu-Way's claim naturally could not succeed. Counsel agreed that the appeal should be decided on that basis.

[8] The City of Cape Town in its current form came into existence in December 2000 as an amalgamation of a previous metropolitan council and various transitional municipal local councils. Mr Coenraad Steyn, an electrical engineer and employee of the City, testified that before amalgamation the various municipal administrations had different mechanisms for recovering costs when a developer or owner applied for a new or upgraded supply of electricity. In the case of this particular land, Mr Steyn believed that a guarantee scheme would have applied in terms whereof the developer would have had to provide a guarantee based on the projected monthly billing for five years. This and other mechanisms were repealed by the City's council in December 2003, and an interim electricity development contribution tariff was adopted. The DC charge was only to be applicable 'to additional capacity applied for above the existing capacity supplied by the developer, customer or others'. The DC tariff was to be recalculated annually on 1 July.

[9] By way of statutory background, the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) came into force on 1 March 2001. Section 74(1) required a municipal council to adopt and implement a tariff policy on the levying of fees for municipal services. Section 75(1) required a municipal council to adopt by-laws to give effect to the implementation and enforcement of its tariff policy. Section 75A, which came into force on 5 December 2002, provided in subsection (1) that a municipality could 'levy and recover fees, charges or tariffs in respect of any function or service of the municipality'. In terms of s 75A(2), such fees, charges or tariffs were to be levied by council resolution.

[10] In May 2005 the council by resolution replaced the interim tariff with a development capital tariff which distinguished between four categories of networks. The new tariff was applicable only 'to additional capacity applied for above the existing site connection supply capacity'. The council resolved that 'formal and informal low-cost housing schemes are exempted from paying DC tariffs'. The DC tariff was thereafter revised annually by council resolution.

[11] In April 2010 the City enacted its Electricity Supply By-Law.[2] Section 5 stipulates that no person may use an electricity supply unless a written agreement for such supply has been concluded with the service provider (usually the City itself). In terms of s 8, an application for electricity supply must be made in writing on the prescribed form and such application must specify the maximum required demand in kVA. Section 16 states that copies of electricity charges and fees may be obtained free of charge from the service provider's office. In terms of s 18(1), the consumer 'shall be liable for all charges listed in the prescribed tariff for the electricity service as approved by [the City]'.

[12] The DC tariff formed part of the City's broader electricity tariff. The electricity tariff policy and tariff in force when Nu-Way applied for a supply of electricity to the business erf in October 2014 were the 2014/2015 policy and tariff. The policy identified the nature of the charges. The development capital tariff was described as 'a charge to cover the costs incurred to increase the capacity of shared networks to meet the additional demands imposed by new developments and additional capacity requested'. The tariff itself specified the DC charges for various types of networks at an amount in rands per kVA, distinguishing between DC charges 'for new developments' and 'for upgrades'. The policy as read with the tariff provides for a subsidised connection fee for residential consumers in qualifying low-cost housing schemes, backyarder

[2] City of Cape Town Electricity Supply By-Law, 2010.

programmes and informal settlements. Although the policy and tariff do not mention an exemption from DC charges, it appears from the evidence that the exemption approved by the City in May 2005 has continued to apply.

[13] Mr Steyn explained that the DC charge does not relate to new equipment installed as part of the new or upgraded connection but is a mechanism for recovering the cost of shared networks from all consumers on an equitable basis. When a consumer asks for a new or upgraded electricity supply, the additional capacity has to be provided over shared networks all the way from the 'Eskom intake point' to the erf's individual connection. In simplified terms, the replacement cost of the shared network is divided by the capacity of the network, yielding an amount in rands per kVA, which is the marginal cost of supplying the next kVA of infrastructure. This is the basis of the DC charges.

[14] In cross-examination, Mr Steyn was taken to a Development Charges Policy for Engineering Services which the council adopted in May 2014. This policy indicated that DC charges for engineering services were levied as a condition for the approval of planning applications such as subdivision and rezoning. The quantum of the charge was to be agreed with the applicant before approval of the planning application. It was put to Mr Steyn that Nu-Way's planning application had been approved in 2001, that no DC charge had been imposed as a condition of approval, and that it was impermissible for the City to attempt to levy the DC charge in October 2014.

[15] Mr Steyn disagreed. He said that in the case of electricity services, it is unusual for the connection fee and DC charges to be determined and paid as a condition for the approval of a planning application. This is because the developer would typically not know, at that early stage, precisely what the electricity requirements will be. This is particularly so for non-residential erven. In most

cases, therefore, the connection fees and DC charges only become payable, and are only determined, when the developer (or an owner who has taken transfer of a subdivided erf) applies for a supply of electricity to the erf in question. The application would specify the power supply which the client needed. In the present case, by way of example, the residential erven had a standard residential supply of 4 kVA. Nu-Way's notified demand for the business erf in 2014 was 998 kVA. This was regarded by the City as a high requirement, attributable to the fact that the operations on the site were to include a large bakery and two fast food outlets with numerous deep fryers. One can infer that if Nu-Way had instead decided to develop the business site as a modest office block the notified demand, and thus the DC charge, would have been much less.

[16] With reference to the 2014 policy, Mr Steyn testified that he had attended the first meeting at which the policy was discussed. He told the meeting that the electricity DC charges should be excluded from the policy, because the electricity department already had a policy which had been in place for ten years. He also considered that electricity DC charges stood on a different footing from DC charges for other engineering services, not least because they were not typically determined and payable as a condition of planning approval. For this reason, he did not attend subsequent meetings about the policy, and it was approved without further reference to the electricity department.

[17] The 2014 policy is in alignment with Mr Steyn's historical analysis. The applicable provisions of the policy are clear. Although 'engineering services' are defined in clause 1 as including electricity, the concluding paragraph of clause 3 states as follows:

'This policy covers the following engineering services: roads, stormwater, water, sewerage, electricity, public transport and solid waste. However, the specific details of the charges applicable for electricity are the subject of a separate policy and legal framework. The separate policy on charges for electricity is essentially compatible with the approach proposed in this

draft policy, although the charges for electricity are paid at the point of connection not as part of the land development application.'

[18] Clause 7.3 of the 2014 policy states that a description of the components of external engineering services for each of the engineering services is provided in annexure A, adding: 'The amount payable excludes the capital charge for electricity connections as the provisions relating to this charge are described in the Electricity Development Capital Policy'. The table in annexure A states, with reference to electricity: 'Refer to Electricity Development Capital Tariff Policy'. There is a similar reference in the table in clause 10.1.

[19] I thus reject Nu-Way's submission that the 2014 policy precluded the City from levying an electricity DC charge other than as a quantified condition for the approval of a planning application. The 2014/2015 policy and tariff as read with the council resolution of May 2005 authorised the electricity department to raise a DC charge whenever an applicant for a supply of electricity to an erf sought a new or upgraded supply. The tariff and resolution, in turn, fell within the ambit of ss 74 to 75A of the Systems Act and s 18 of the Electricity Supply By-Law.

[20] Nu-Way did not take issue with the calculation of the DC charge in the event of its being found that the 2014/2015 tariff was applicable. During the trial a question arose as to whether the exemption in the council resolution of 31 May 2005 applied. Although the court a quo did not base its judgment on this exemption, Nu-Way in the appeal persisted with its reliance on the exemption. In my view, such reliance is ill-founded. The resolution in question was that 'formal and informal low-cost housing schemes are exempted from paying DC tariffs'. Mr Steyn testified that the City has always regarded this exemption as confined to qualifying residential erven. The DC charge is payable by the owner of the erf, which could be the end-user or a developer who would pass on the cost to the end-user. The exemption was intended as relief to indigent end-users. Commercial

erven and other non-qualifying residential erven (eg GAP and market-related housing) do not benefit from the exemption, even though those erven may have come into existence as part of the same process in which the low-cost housing scheme was created.

[21] Since the DC charge was levied in accordance with the City's 2014/2015 electricity tariff and policy and was otherwise in accordance with the law, the next question is whether there is anything in the terms of the approval of November 2001 which precluded the City from imposing the DC charge. This requires one to interpret the terms of approval. I accept that the process of interpretation must take into account the statute under which the approval was issued.

[22] Counsel for Nu-Way argued that the LFTEA was social legislation and evinced an intention that developers of designated land for less formal settlement should be spared costs which would ordinarily be payable when townships are established. While the submission that the LFTEA is social legislation is substantially true, counsel pressed it too far, particularly when arguing that an exemption in respect of non-residential erven would help to make unprofitable or marginal schemes commercially viable. The primary purpose of the LFTEA was to shorten and streamline the planning processes (rezoning and subdivision) when land was to be used for less formal residential settlement. The expedited procedure would naturally be less costly for the developer. For the rest, the LFTEA was explicit when exempting less formal townships from legislation that would otherwise apply. Paragraphs *(a)* to *(g)* of subsection 5(3) listed various laws that did not apply to designated land, and paragraph *(h)* gave the Administrator the power by notice in the *Official Gazette* to add other laws to the list. In terms of s 9(8), there was also an exemption from transfer and stamp duties when an erf was transferred. Section 3(5) did not contain any exemption in

relation to legislation governing municipal charges in general or charges for electricity in particular.

[23] There is thus no basis for approaching the interpretation of the terms of approval on the assumption that in order to give effect to the LFTEA the WCPG probably intended to provide an exemption in respect of any particular category of municipal charges. The conditions relevant in the present case were conditions proposed by the City itself, and we must ascertain their proper meaning.

[24] Read as a whole, the conditions formulated by the City and adopted by the WCPG do not suggest that the City had in mind a general exemption from ordinary municipal charges. In relation to electricity, I have already referred to the condition (contained in clause 18.1 of annexure G) requiring the developer at its own cost to provide the internal electrical reticulation and street lighting. Counsel for the City also referred us to clause 2.3 of annexure E which imposed the following condition:

'The developer shall be responsible for all costs incurred in respect of the upgrading, extension, deviation or removal of any existing storm water, sewerage, electricity or other services or works, whether on the property of [the City] or any other body having authority so to require as a result of the development of the property and for any connection costs in respect of such services or works.'

[25] With reference to clause 18.6, counsel for Nu-Way emphasised that the only charge specifically mentioned was a 'connection fee'. Although the clause envisaged that the City's electricity department would, when the application for supply was made, determine not only the connection fee but also the 'conditions applicable to the joining of the internal electrical reticulation . . . to [the City's] existing electrical infrastructure', counsel resisted the proposition that those conditions could include a requirement to pay a DC charge. In my view, the word 'conditions' in clause 18.6 is wide enough, in its ordinary meaning, to include a

condition requiring payment of a charge. After all, it was not in dispute that a 'condition' of approval in terms of s 3(1) of the LFTEA could include a condition requiring payment of a valid quantified charge. One of Nu-Way's arguments was that if the City had wished to recover a DC charge, this should have been quantified and specified as condition of approval in November 2001, which presupposes that a 'condition' can include a condition as to payment. I see no reason why the word should receive a narrower meaning in clause 18.6.

[26] Indeed, I did not understand counsel for Nu-Way to argue that 'conditions' was inapt to include a condition as to payment. His argument was that in clause 18.6 the conditions had to be conditions 'applicable to joining' the internal electrical reticulation to the City's electrical infrastructure, and that this envisaged no more than the requirements and costs associated with the physical exercise of making the connection. I disagree. The DC charge becomes payable whenever a person wants a new or upgraded supply of electricity. This requires a new or upgraded connection to the City's infrastructure. In addition to the connection fee (which would cover the sorts of matters counsel was referring to), the City has since 2005 required the payment of a DC charge. Unless the DC charge is paid, a connection to provide the new or upgraded supply will not be made. In the present case, the DC charge falls comfortably within the ambit of conditions imposed by the City in order to join the electrical reticulation on the business site with the City's infrastructure.

[27] On the basis, then, that clause 18.6 is wide enough to include a condition for the payment of the DC charge, the final question is whether it matters that the DC regime was not in force when the approval was issued in November 2001. It was this feature which lay at the heart of the court a quo's judgment. In my view, it entails no impermissible retrospectivity to find that Nu-Way was obliged to pay the DC charge when it applied for the supply of electricity to the business site in

2014. Clause 18 envisaged a written application for electricity supply, and the most natural meaning of clause 18.6 is that the connection fee and other conditions are those applicable at the time the application for supply is made.

[28] As Mr Steyn testified, no quantified electricity capacity was applied for or allocated to the land in 2001. The supply of electricity lay in the future. The mere fact that in 2001 the erf was zoned for business use did not without more confer on the developer a right to any particular supply of electricity or (as counsel for Nu-Way appeared to contend) a limitless supply. Clause 18 of annexure G required an application to be made for a supply of electricity. The principle of legality would require the City to determine connection fees and other conditions of supply in accordance with the instruments governing these matters at the time the application for supply is made.

[29] When applications were made to provide electricity connections to the residential erven, the subsidised connection fees prevailing at that time were apparently charged, and there was an exemption from the DC charges because the residential erven constituted low-cost housing. When Nu-Way made an application for a supply of electricity to the business erf in October 2014, the prevailing connection fee and other conditions as at October 2014 were applied, and correctly so. The connection fee was the fee determined in accordance with the 2014/2015 tariff, not the 2000/2001 tariff. Counsel for Nu-Way accepted that his client had correctly been charged the connection fee determined by the 2014/2015 tariff; he did not argue that this involved impermissible retrospective action. Similarly, the DC charge, for which there was in this instance no exemption, was determined in accordance with the 2014/2015 tariff. It would not make commercial sense, and would be of doubtful legality, for a local authority to give an open promise of indefinite duration to grant a supply of electricity on

terms which were fixed at the outset and which disregarded future changes in the cost of providing and maintaining electrical infrastructure.

[30] It is irrelevant that as at November 2001 the City would not, when using the word ‘conditions’ in clause 18.6, have had a DC charge specifically in mind. The word ‘conditions’ was probably used without further specificity precisely because the conditions of supply might change from time to time. The City was referring to the conditions, whatever they might be when the time arrived. If Nu-Way had applied for a supply of electricity to the business erf in 2002, the ‘conditions’ prevailing at the time of the application for supply would have included the guarantee scheme. In 2014, though, the prevailing ‘conditions’ of supply instead required the payment of the DC charge.

[31] It follows that the court a quo erred in its conclusion on the central issue. It is unnecessary to address the City’s other defences. Although the City employed one counsel in the court a quo, two were engaged for the appeal, which was in my opinion justified.

[32] The following order is made:

(a) The appeal succeeds with costs, including the costs of two counsel where engaged.

(b) The order of the court a quo is set aside and replaced with an order in the following terms: ‘The application is dismissed with costs.’

O L Rogers

Acting Judge of Appeal

APPEARANCES

For Appellant:	K Pillay SC (with her R J Steyn) Instructed by: Cluver Markotter Inc, Stellenbosch c/o McIntyre van der Post Inc, Bloemfontein
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