IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE, CAPE TOWN.

CASE NO.: 13035/2009

In the matter between:

DESMOND WHITE **Applicant**

and

THE CITY OF CAPE TOWN **Respondent**

JUDGMENT DELIVERED THIS 31st DAY OF MARCH, 2010

THRING, J.:

The respondent, the City of Cape Town, has adopted a certain Tariff By-Law which was promulgated on the 29th June, 2007, paragraph 3 of which reads:

"ADOPTION AND IMPLEMENTATION OF TARIFF POLICY

(1) The City shall adopt and implement a tariff policy on the levying of fees for a municipal service provided by the municipality or by way of service delivery agreements which complies with the provisions of the Systems Act,

> the Local Government: Municipal Finance Management Act, 53 of 2003 and any other applicable legislation.
>
> (2) The City shall not be entitled to impose tariffs other than in terms of a valid tariff policy."

On the 27th May, 2009, and pursuant to this by-law, the respondent's council approved the latest revision of the city's tariff policy, which is applicable to the 2009/2010 budget year which ends on the 30th June, 2010. The tariff policy makes provision, in chapter 2 thereof, for tariffs of charges for the supply of water to, inter alios, domestic consumers, and in chapter 4 thereof for charges for the removal of solid waste (refuse) from, inter alia, residential properties. The water tariffs for domestic consumers provide for the following categories of consumers:

> "Domestic full: consumers with access to an uncontrolled volume of water supply that is metered.
>
> Domestic cluster: where one metered connection point serves a multi residential unit development."

For the sake of convenience, I shall refer herein to "domestic full" consumers as "single residence dwellers" and to "domestic cluster" consumers as "flat dwellers". The latter category, however, also includes consumers of

municipal water who live in cluster housing developments, golf estates, etc., whether such dwellings are owned under sectional title or otherwise.

In accordance with its tariff policy the respondent issued a schedule of tariffs for 2009/2010 in respect of the supply of water to various categories of consumers. Single residence dwellers (categorised as "domestic full") were to pay for their water according to a stepped tariff, as follows:

"Step (kl)	Tariff (R/kl)
1. (0-6)	0
2. (6-12)	R3.66
3. (12-20)	R7.81
4. (20-40)	R11.57
5. (40-50)	R14.29
6. (>50)	R18.85 "

Flat dwellers (categorised as "domestic cluster") were to pay on a different basis. The tariff applicable to them is:

"Step (kl)	Tariff (R/kl)
1. (0-6)	0
2. (>6)	R7.83 "

As for solid waste removal, the respondent's tariff policy in respect of residential properties reads, in para. 18.2.2.2 thereof:

> "Billing categories
>
> In all instances the Property owner will be billed and not the Tenant. The City of Cape Town will not enter into agreement for service delivery or additional service delivery with a Tenant. In the case of Sectional Title Developments and Blocks of Flats, Billing will be i.t.o. a Service delivery Agreement. However the Minimum number of containers to be billed will be at least a Third of the total number of living units in the Development.
> Residential properties will be billed for a Basic 240 L container service irrespective of whether the service is used or not, whether a container is issued or not or whether no waste is generated. Billing for Residential properties (1st Container) is automatic and no Service Delivery Agreement is required."

The applicant is dissatisfied with the manner in which the respondent charges consumers in the two residential categories to which I have referred, viz. single residence dwellers as against flat dwellers, for water supplied to them and for solid waste (refuse) removal. In these proceedings he seeks orders, inter alia, in the following terms:

> "1. Declaring that the City of Cape Town has contravened the provisions of Section 74(3) of Section 74(1)(a) and (b) of the Municipal Systems Act 32, 2000 in that the City charges residents of flats and cluster dwellings to which

the City provides water through a single bulk meter a tariff considerably higher than the tariff charged to residents of single dwellings through individual water meters.

.....

5. Declaring that the City of Cape Town has imposed an unfair and discriminatory tariff for SOLID WASTE REMOVALS on residents in Sectional Title blocks of flats and Domestic Cluster complexes insofar as the tariff provides that a minimum charge based on one third of the residential units in the aforesaid flats and cluster complexes be raised irrespective of whether the municipal service for the removal of waste bins is or is not used and irrespective of the number of bins that have actually been used (over the past 5 years) by those customers.

.....

7. The applicant therefore prays that the Court declare that those sections of the Tariff Policy relating to Water and Sanitation costs and also relating to Solid Waster (sic) Removal costs be declared null and void and of no force and effect."

He is unrepresented. The Municipal Systems Act to which he refers in prayer 1 of his notice of motion is the Local Government: Municipal Systems Act, No. 32 of 2000.

On reading the papers I had grave doubts as to whether the applicant has locus standi to bring this application. The respondent's charges for water supplied to single residences are "billed" to the owner of the property concerned, i.e. it is the owner who is liable to the respondent for payment thereof. In the case of flat dwellers, it is the owner of the block of flats or of the development concerned, or the body corporate in the case of sectional title developments, who is "billed" by the respondent for water used by all the consumers in the relevant block or development, and not the individual occupant of each flat or unit.

The applicant resides in a certain flat in Sea Point. The flat is owned under sectional title by a company of which he is not even a shareholder, his wife owning all its shares. His only interest in these proceedings, it seems, is that he happens to pay for the water consumed in the flat which is occupied by him, and for the removal of refuse from it. Furthermore, it seems from figures supplied by the respondent that, at the average rate at which water has been consumed in the block of flats occupied by the applicant since June, 2008 the difference which would result from applying the "domestic full" tariff thereto (as the applicant contends should be done) as opposed to the "domestic cluster" tariff, would amount to

only some R4.59 per month in respect of the flat occupied by him. De minimis non curat lex. Moreover, as far as solid waste (refuse) removal is concerned, it is clear on the papers that, even if he had been in the position of the body corporate of the block of flats in which he lives, he could not complain that the charges levied in respect thereof by the respondent were "unfair or discriminatory" because he would, in fact, have been in a more favourable position than a single residence dweller: whilst the latter is obliged to pay for the removal of at least one bin per week, whether he uses the service or not, the body corporate is required to pay for only one bin for every three flats in the block.

Cases such as Patz v. Greene & Co., 1907 TS 427 at 433, Dalrymple and Others v. Colonial Treasurer, 1910 TS 372, Cabinet of the Transitional Government for the Territory of South-West Africa v. Eins, 1988(3) SA 369 (A) at 386 B, United Watch and Diamond Co. (Pty.) Ltd. and Others v. Disa Hotels Ltd and Another. 1972(4) SA 409 (C) at 415 A – C and Vandenhende v. Minister of Agriculture, Planning and Tourism, Western Cape and Others, 2000(4) SA 681 (C) at 696 D-E would seem to me to dictate clearly that, in the circumstances, the applicant has no locus standi in this matter, inasmuch as he has no direct and substantial interest in it.

However, sec. 38 of the Constitution, Act No. 108 of 1996 now makes provision for so-called "class" actions and appears to have revived something akin to the actio popularis of the Roman law, which has been obsolete since 1578. In its relevant parts the section reads:

> "Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -
>
> (a) .....
>
> (b) .....
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; ....."

See Erasmus, "Superior Court Practice", E 8-4. The precise ambit of, and the procedural rules applicable to, these actions remain as yet undetermined: as the learned authors of Erasmus, loc. cit. say with reference to the actio popularis:

> ".....it may be necessary for the Constitutional Court to develop some controlling mechanisms to ensure that it is not flooded by mischief-makers and busybodies....."

The learned authors of Herbstein & van Winsen, "The Civil Practice of the High Courts of South Africa", 5th Ed. say this of sec. 38 (c) and (d) of the Constitution at 187 – 8:

> "Section 38(c) may be seen as introducing a class action or representative action into South African law, when the enforcement of constitutional rights is in issue. Section 38(d) opens the door to public interest actions, though its ambit is still unclear.
>
> .....
>
> An enquiry into standing is an enquiry into whether a matter which has been brought before a court is justiciable. The requirement of procedural justiciability is based upon the principle that it is not the function of the courts to determine academic or hypothetical issues. Procedural aspects of justiciability include issues of standing, ripeness and mootness. Standing enquiries relate to whether the person who has claimed relief has the right and interest to do so or is the correct person to be before the court."

See, also, à propos class actions, Beukes v. Krugersdorp Transitional Local Council, 1996 (3) SA 467 (W), Ngxuza v. Secretary, Department of Welfare, Eastern Cape, 2001(2) SA 609 (E) at 642 E, Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuza and Others, 2001(4) SA 1184 (SCA) at 1197 G – 1198 A (para. [16]) and Herbstein & van Winsen, op.

cit. at 199-202; and à propos actions in the public interest see Herbstein & van Winsen, op. cit. at 202 – 203 and cases there cited.

The point that the applicant has failed to establish that he has the necessary locus standi to bring this application was taken in the papers by the respondent. There is no clear indication in the applicant's notice of motion or in his founding or replying affidavits that this application is clothed as a class action or as proceedings which are being brought in the public interest. However, in a letter to the respondent's City Manager dated the 25th April, 2008 which is annexed as annexure "C" to his founding affidavit the applicant averred that:

> "I am addressing you on behalf of thousands of consumers of water regarding the proposed tariff for 'Domestic Cluster'."

The "thousands of consumers" to whom he refers are presumably some or all of the flat dwellers within the municipal area of the respondent, of whom, of course, he is one.

Surprisingly, Mr. Paschke, who appears for the respondent, did not pursue the issue of locus standi, either in his heads of argument or in addressing the Court. The respondent's attitude appears to be that, whilst it

does not concede that the applicant has locus standi, it leaves this aspect of the matter in the hands of the Court.

I continue to entertain grave doubts about the applicant's locus standi in this matter. However, especially in the light of the attitude adopted by Mr. Paschke on behalf of his client, and, I may add, after considerable hesitation, I have decided to give the applicant the benefit of the doubt in this connection, so to speak, and to assume in his favour, without deciding, that he does, indeed, enjoy locus standi because these proceedings can just possibly be regarded as falling somewhere within the ambit of section 38(c) or (d) of the Constitution as being a class action or an application brought in the public interest.

I turn now, therefore, to the merits of the application.

THE RESPONDENT'S WATER TARIFF

The applicant's case appears to be that the respondent's water tariff:

(1) unfairly discriminates against flat dwellers in contravention of sec. 74(3) of the Local Government Municipal Systems Act, No. 32 of 2000 (to which I shall refer herein as "the Systems Act");

(2) is "inequitable" to flat dwellers in contravention of sec. 74(2)(a) of the Systems Act (the references in paragraph 1 of the applicant's notice of motion to sec. 74(1)(a) and (b) of the Act are clearly erroneous, as such sub-sections do not exist: he clearly intended to refer to secs. 74(2)(a) and (b); and

(3) requires individual consumers of water to pay for such service amounts which are not "generally.... in proportion to their use of that service" in contravention of sec. 74(2)(b) of the Systems Act.

I shall deal with each of these contentions in turn. Before I do so, however, it is necessary to set out the relevant provisions of secs. 74(2) and (3) of the Systems Act.. They read as follows:

"(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;

.....

(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."

The allegation of unfair discrimination ((1) above)

In the context of the Interim Constitution, Act No. 200 of 1993, the enquiries which are to be embarked upon by a Court in deciding whether, with reference to sec. 8 of the Interim Constitution (now sec. 9 of the present Constitution), a particular provision whose equality is challenged is unfairly discriminatory were formulated as follows by the Constitutional Court in Harksen v. Lane & Others, 1998(1) SA 300 (CC) at 324 I – 325 E (para. [53]):

"(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics

which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."

These principles have since been applied also to the corresponding sec. 9 of the present Constitution: see Weare and Another v. Ndebele N.O. and Others, 2009(1) SA 600 (CC) at 615 E – G (para.[46]), Geldenhuys v. National Director of Public Prosecutions and Others, 2009(2) SA 310 (CC) at 319 C – D (para. [29]) and Hassam v. Jacobs N.O. and Others, 2009(5) SA 572 (CC) at 582 A – F (para. [23]).

The applicant does not contend that the respondent's water tariff violates sec. 9(1) of the present Constitution, which reads:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

Nor, in my view, could it properly be so contended. (The corresponding provision in the Interim Constitution was sec. 8 (1)).

It seems to me, moreover, that the respondent has succeeded in showing, on the papers, that the differentiation which is brought about in its tariff between different categories of residential consumers of water is rationally connected to a legitimate government purpose. Thus Mr. G.D. van Schalkwyk, the Director of the respondent's Inter-Services Liaison Directorate, and the deponent to the respondent's main opposing affidavit, says in his affidavit:

> "71. In light of the characteristics of the Domestic Full category, I submit that the sliding scale is a rational means of achieving the policy objectives of (a) facilitating the financially (sic) sustainability of the water service, (b) being pro-poor and (c) discouraging excessive water usage. Indigent households in the City, the overwhelming majority of whom reside in the Domestic Full category, benefit from the free and low tariffs for low

water usage below 12 kl per month. At the same time, residents in properties which have the potential to use high amounts of water are discouraged from doing so through a punitive scale for water usage above 40 kl, and even more so above 50 kl per month. The stepped tariff in the Domestic Full category also means that users who use more water, cross-subsidise the costs of providing water for free (sic) or below-cost to indigent households.

72. Compared with the Domestic Full category, it is less appropriate to apply a sliding scale to the Domestic Cluster category for the following five reasons:

72.1. First, residents in the Domestic Cluster category (except for very few exceptions) do not fall within the definition of indigent households (i.e. with a property value of R199,000 or less). There is accordingly less need to accommodate the poorest of the poor in this category.

72.2. Second, since there are probably fewer individual households in the Domestic Cluster category who use excessive amounts of water, there is less need to curb excessive water usage in this category.

72.3. Third, in any event, the sliding scale would be ineffective in preventing water wastage by households in the Domestic Cluster category. Any household residing in a block of flats with a single bulk meter which is inclined to use excessive amounts of water, would know that the costs of excessive water usage would be spread among the owners of all the units in the block.

Without individual accountability, the punitive tariff for excessive water is less likely to be a deterrent.

72.4. Fourth, a further reason why the sliding scale would be ineffective in preventing water wastage by households in the Domestic Cluster category is that the effect of 'averaging' would negate the operation of the sliding scale. The effectiveness of the sliding scale is premised upon the ability of the City to measure the consumption of water by individual households. This enables the City to charge individuals (sic) households which use large amounts of water at a punitive rate. However, in cluster developments such as blocks of flats with a single, bulk water meter, water usage by individual units cannot be measured. If the total consumption of a block of flats were to be divided by the number of units to arrive at an average usage per unit, then excessive usage by individual units would tend to be 'smoothed out'.

A little later in his affidavit he adds a fifth reason. viz.:

"72.6 Fifth, the relatively low consumption of water by most flat dwellers means that the Domestic Full tariff applied to this category would severely under-recover the costs associated with rendering the service to the average Domestic Cluster household."

None these statements are seriously disputed by the applicant.

The next enquiry is as to whether or not the differentiation concerned amounts to discrimination.

It is not contended by the applicant that residence in a flat or other domestic cluster complex is one of the grounds of discrimination which are expressly proscribed in sec. 9(3) of the Constitution, such being "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth": nor could it be so contended. Thus whether or not there is discrimination will here depend upon "whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner" (Harksen's case, supra at 325 A – B (para. [53]). Thus, differentiation which is not based on any of the grounds specified in sec. 9(3) of the Constitution can become (unfair) discrimination only when it is based on grounds which have a potential impact on the fundamental dignity of human beings: see the Harksen case, supra at 320 C – 325 E (para's [43] – [53]), and the Weare case, supra at 621 F – 622 B (para. [72]). Only a limited number of such "analogous"

grounds have so far been recognized by our Courts, viz. marital status (before it was expressly included in sec. 9(3) of the present Constitution: see Brink v. Kitshoff, N.O., 1996(4) SA 197 (CC) and Harksen's case, supra); citizenship (see Larbi-Odam and Others v. Member of the Executive Council for Education (North-West Province) and Another, 1998(1) SA 745 (CC at 756 G – 757 E (para. [19]) and Khosa and Others v. Minister of Social Development and Others; Mahlaule and Others v. Minister of Social Development and Others, 2004(6) SA 505 (CC); and HIV status (see Hoffmann v. South African Airways, 2001(1) SA 1 (CC). Differentiation which is based neither on a ground specified in sec. 9(3) of the Constitution nor on an "analogous" ground, as that term has come to be understood, is mere differentiation, and does not amount to discrimination: see Prinsloo v. van der Linde and Another, 1997(3) SA 1012 (CC) at 1024 F – 1025 A (para. [25]) and Union of Refugee Women and Others v. Director: Private Security Industry Regulatory Authority and Others, 2007(4) SA 395 (CC) at 410 H – 411 B (para. [43]).

In his opposing affidavit van Schalkwyk says:

"110. The type of residence occupied by a person is not a ground of discrimination listed in s 9(3) of the Constitution.

> 111. Furthermore, whether a person lives in a flat or a house is not an immutable biological attribute or characteristic nor does it relate to the intellectual, expressive or religious dimensions of humanity. Living in a flat also does not have the potential to impair the fundamental dignity of persons as human beings or to affect them in a comparably serious manner. Accordingly, residence in a flat rather than a house is not analogous to any of the grounds of discrimination listed in s 9(3) of the Constitution."

These averments are not disputed by the applicant in his replying affidavit, and I agree with them. I also agree with Mr. Paschke's submission that flat dwellers as such are not subject to prejudice, systemic disadvantage or discrimination simply on the ground of being flat dwellers, nor have they been stigmatised or marginalised, nor are they a vulnerable group in South African society.

Consequently it seems to me that residence in a flat or other form of cluster development or complex cannot be said to be "analogous" to any of the grounds of discrimination which are specified in sec. 9(3) of the Constitution. It follows, in my view, that the differentiation which is brought about by the respondent's water tariff between single residence dwellers on the one hand and flat dwellers on the other does not amount to

discrimination, and that the applicant's challenge of the respondent's water tariff as being in contravention of sec. 74(3) of the Systems Act cannot succeed.

If I am wrong in arriving at the above conclusion, and the differentiation to which I have referred does amount to discrimination, I am in any event not persuaded that such discrimination as there may be is unfair. In Harksen's case, supra, the Constitutional Court set out as follows at 323 I – 324 E (para. [51]) the various factors which must be considered in order to determine whether or not a discriminatory provision has an unfair impact on the complainants concerned:

> "(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.....

(c) with due regard to (a) and (b) above, and any relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."

Since the applicant does not rely on any prohibited ground of discrimination which is specified in sec. 9(3) of the Constitution, the onus of establishing that the discrimination on which he does rely is unfair, rests on him: see sec. 9(5) of the Constitution and the Harksen case, supra, at 325 C – D (para. [53]).

Applying the above criteria to the applicant and other flat dwellers in Cape Town it seems to me, on the respondent's undisputed averments, that:

(a) They are not members of a group which has suffered in the past from patterns of disadvantage, nor are they vulnerable, stigmatised or marginalised; in fact, according to the undisputed evidence of van Schalkwyk only a miniscule fraction (0.004%) of so-called "indigent households", as that term is defined by the respondent, fall into the "domestic cluster" category;

(b) The respondent's water tariff structure aims to achieve certain worthy policy objectives, viz. the facilitation of the financial sustainability of the respondent's water service, the assistance of indigent households and the discouragement of excessive water use;

(c) As I have said, the respondent's water tariff policy affects the applicant's own interests to a very minimal extent, inasmuch as the application to the applicant of the "domestic full" tariff, which is what he seeks, would reduce his water bill by approximately only R4.59 per month on average;

(d) The average household in the "domestic cluster" category is charged less for water than the cost to the respondent of its production and supply, and the applicant in particular is considerably undercharged in this regard: he pays, on average, only some 16% of the cost of the water which he consumes;

(e) Flat dwellers pay less, on average, for solid waste (refuse) removal than do single residence dwellers.

I conclude that the applicant has failed to demonstrate that the differentiation of which he complains in this regard, even if it amounts to discrimination, constitutes discrimination which is unfair in the circumstances, or that it contravenes sec. 74(3) of the Systems Act.

The alleged inequitability of the respondent's water tariff ((2) above)

I find myself in agreement with Mr. Paschke that the requirement of sec 74(2)(a) of the Systems Act that users of municipal services should be treated "equitably" in the application of tariffs does not entitle such users all to be treated in exactly the same manner. So much is clear from the provisions of sec. 74(3), which expressly sanction differentiation in a tariff policy between different categories of users, etc., as long as the differentiation does not amount to unfair discrimination.

I also agree that the respondent's water tariff is, in fact, equitable if regard is had to the respondent's legitimate policy objectives with regard thereto, the unsuitability of the application of the sliding scale of water charges to the "domestic cluster" category of consumers, the fact that the average flat dweller's water charges are considerably less than the cost to the respondent of producing and supplying the water to him, and the position in society of flat dwellers in general, as deposed to by van Schalkwyk.

It must also be borne in mind, in construing and applying sec. 74(2)(a) of the Systems Act, that its provisions fall short of being mandatory in nature: they set out a collection of "principles" which a tariff policy must

"reflect", one of which is that users "should" (not "must") be treated equitably in the application of tariffs. Thus the sub-section does not purport to contain rigidly justiciable criteria for lawfulness. I also agree with Mr. Paschke that, as he puts it in his heads of argument:

> "The application of the principles is quintessentially a policy decision involving calculations of social and economic preference. These policy-laden, polycentric decisions are ill-suited to adjudication and a Court would tend to defer to a democratically-elected municipal council which has acted upon advice by specialist officials, after following due process."

See Director of Public Prosecutions, Transvaal v. Minister of Justice and Constitutional Development and Others, 2009(4) SA 222 (CC) at 285 A – E (para's [184] – [185]) and Ekurhuleni Metropolitan Municipality v. Dada N.O. and Others, 2009(4) SA 463 (SCA) at 467 H – 469 A (para. [10]).

For the year ended June, 2009 the average monthly water consumption of flat dwellers in the respondent's municipal area (i.e. of consumers who fall into the "domestic cluster" category) was 13.13 kilolitres, whilst that of single residence dwellers (the "domestic full" category) was 19.58 kilolitres. Applying the respondent's current water tariffs to these averages, the cost to the flat dweller of the average quantity of water

consumed by him (13.13 kilolitres) is R55.83, or R4.25 per kilolitre average overall, whilst the cost to the single residence dweller of the average quantity of water consumed by him (19.58 kilolitres) is R81.16, or R4.15 per kilolitre average overall. It is the applicant's case that regard must be had only to the cost implications at these respective average rates of water consumption; that they reveal that the average flat dweller is being charged more (i.e. 10 cents) per kilolitre of water consumed by him than the average single residence dweller is being charged for that consumed by him; that this is inequitable; and that it serves no purpose to examine the positions of flat dwellers and single residence dwellers relative to one another at levels of consumption other than the average, as set out above.

It is true that, applying the respondent's "domestic full" tariff to single residence dwellers and its "domestic cluster" tariff to flat dwellers, a flat dweller who consumes less than about 27 kilolitres of water per month will have to pay more, on average, per kilolitre than the single residence dweller will have to pay for the same quantity of water, so that the cost to a flat dweller of 13 kilolitres, for example, will be R54.81, whilst the cost to a single residence dweller of the same quantity will be only R29,77, i.e. approximately 45% less. At that level of consumption, therefore, the

applicant is correct in his somewhat graphic assertion that it will cost the flat dweller more to have a shower or to flush his toilet than it will cost the single residence dweller. However, the converse is true at rates of consumption in excess of about 27 kilolitres per month: for example, at a monthly consumption of 60 kilolitres the single residence dweller will have to pay R647.24 as opposed to the cost of an equal quantity of water to the flat dweller of only R422.82; that is to say, the flat dweller will pay some 35% less for the water consumed by him than the single residence dweller has to pay for an equal quantity.

Van Schalkwyk, on the other hand, points out that the overall monthly average water consumption by single residence dwellers of 19.58 kilolitres is made up of six "billing blocks", each consisting of a volume of water which is charged for at a different rate according to the applicable tariff, as follows:

Step (kl)	Kilolitres	Tariff	Billing
1. (0-6)	5.64	R0.00	R0.00
2. (6-12)	4.35	R3.66	R15.93
3. (12-20)	3.62	R7.81	R28.25
4. (20-40)	3.54	R11.57	R41.01
5. (40-50	0.70	R14.29	R9.93
6. (>50)	1.73	R18.85	R32.66
	19.58		R127.78

This results in an average charge of R6.53 per kilolitre to single residence dwellers (R127.78 divided by 19.58 kilolitres). Applying the same approach to flat dwellers, who pay according to the "domestic cluster" tariff, the following result is achieved:

Step (kl)	Kilolitres	Tariff	Billing
1. (0-6)	5.43	R0.00	R0.00
2. (>6)	7.71	R7.83	R60.35
	13.14		R60.35

This translates into an average charge of R4.60 per kilolitre to flat dwellers (R60.35 divided by 13.14 kilolitres), which is some 30% less than the corresponding average for single residence dwellers (the discrepancy between the total average consumption rates of 13.13 as opposed to 13.14 kilolitres is too small to be of any significance).

The applicant's approach appears to me to be selective and artificial; that adopted by van Schalkwyk is, to my mind, to be preferred, based as it is on actual figures of water consumption and the charges levied therefor spread over the various applicable "billing blocks".

In any event, in my view any inequitability which may exist here must be marginal in its nature and extent, and cannot render the respondent's tariff policy unlawful, in the circumstances.

The allegation that the amounts which certain individual consumers of water are required to pay for the water service is not generally in proportion to their use of that service ((3) above).

The applicant contends that the respondent's water tariff contravenes sec. 74(2) (b) of the Systems Act, inasmuch as individual water users do not pay for the water service in proportion to their use of the service. I am unable to agree.

Water supplied by the respondent to blocks of flats and other cluster developments under the "domestic cluster" tariff is measured by means of a bulk water meter at the point where the water is delivered to the block or development concerned. The applicant has no quarrel with this. As I have said, it is the owner of the entire block, or the body corporate of the development, as the case may be, and not the tenant or sectional titleholder of each individual flat or unit, who or which then becomes liable to the respondent for payment of all the water consumed in the relevant block or

development. The owner of the block or the body corporate of the development, as the case may be, consequently "pay(s) for (the) service" vis-à-vis the respondent. The tariff makes clear provision for each such block owner or body corporate to pay for the water used directly in proportion to the extent of his or its use of the water consumed, viz. at the rate of R7.83 per kilolitre after the first 6 kilolitres used in each flat or unit, for which no charge is levied.

Moreover, and even if the occupant of each individual flat or unit were to be regarded as a separate "user" for the purposes of sec. 74(2)(b) of the Systems Act, it seems to me that the amount which each such occupant may be required by the owner or body corporate concerned to contribute to the respondent's overall water charges will be "generally in proportion to their use of that service" if, as appears generally to be the case, such charges are shared equally by the various occupants. Such is one of the practical consequences and limitations of bulk water metering. The applicant does not raise any complaint in the papers about the manner in which water charges are allocated amongst the residents of the block of flats where he resides.

Furthermore, what I have said above about the non-mandatory nature of sec. 74(2) (a) of the Systems Act applies with at least equal force to sec. 74(2)(b), the operative words in the latter sub-section being "should generally".

I conclude that the respondent's water tariff policy is not inconsistent with sec. 74(2)(b) of the Systems Act.

THE RESPONDENT'S CHARGES FOR SOLID WASTE (REFUSE) REMOVAL

In prayer 5 of his notice of motion the applicant seeks an order declaring, in effect, that the charges levied by the respondent on flat dwellers for solid waste (refuse) removal are "unfair and discriminatory", and in prayer 7 he asks for them therefore to be "declared null and void and of no force and effect".

The allegation that the charges are discriminatory can be dealt with very briefly. As I have said, single residence dwellers are obliged to pay a fixed amount each month to the respondent in respect of the removal of a single bin of refuse per week, whether or not they make use of this service.

The amount has been fixed at R63.93 per month for the 2009/2010 budget year. Flat dwellers, on the other hand, are in effect obliged to pay only one-third of this amount, as the owner of a block of flats or the body corporate of a development, as the case may be, has to pay for the removal of only one bin for every three flats in the block or units in the development: so that, on average, the amount payable by the occupant of each flat or unit is only R21.31. There is clearly no discrimination here against flat dwellers: on the contrary, they are in a substantially more favourable position in this regard than single residence dwellers. In any event, the proper enquiry under both the Constitution and the Systems Act is not whether the respondent's solid waste tariff policy is discriminatory, but whether it amounts to or brings about discrimination which is unfair. I shall deal with the alleged unfairness next.

The applicant seems to suggest that the respondent's charges for solid waste (refuse) removal are "unfair" because the respondent is "penalising residents who do not use its service" and is "charging residents for removals they do not use" (paragraph 6 of his founding affidavit). In this regard van Schalkwyk says the following in his affidavit:

> "93. Owners of **single residences** are charged for at least one bin regardless of whether it is used. The reasons for this policy include the fact that the City is legally required to provide its

residents with a refuse removal service. The system in which all single residences are both required and entitled to have at least one bin removed on each weekly round of refuse collection, promotes a clean environment and administration, is cost-effective, and simple to administer.

94. By contrast, if individual residents were allowed to opt out of having the municipal refuse collection service, then:

94.1 the environment and health of the City's inhabitants would be placed at increased risk as some residents would resort to illegal dumping rather than pay to have their refuse removed;

94.2 the cost to each resident for the service would increase since the fixed costs of the service would have to be divided among a smaller pool of paying users and the benefits of the economies of scale would be reduced;

94.3 the system would become more complex to administer since the workers collecting the refuse would have to check whether each resident who places a bin outside their property had contracted with the City for its removal; and

94.4 the risk of corruption would increase as some residents may choose not to contract with the City for the official refuse collection service but would instead seek to bribe cleaning workers directly to remove their bins.

95. The City's amendment of the Tariff Policy in 2008/09 to introduce a minimum number of bins for **sectional title developments and blocks of flats** was for similar reasons.

96. When the City was considering introducing the requirement for a minimum number of bins in sectional title developments and blocks of flats, the City based the ratio of bins to living units upon the extensive experience of the City and its predecessors over many years of providing a municipal refuse collection service. The decision was a considered one.

97. I should mention that at the time, there was a debate about whether the minimum number of bins for sectional title developments and blocks of flats should be equivalent to a half or a third of the total number of living units. The City eventually settled on the more relaxed requirement of a third."

None of these statements are challenged by the applicant in reply.

It seems to me that, quite apart from not being discriminatory towards flat dwellers, it can also not be said, in the light of the reasons furnished by van Schalkwyk, that the charges currently levied by the respondent in respect of solid waste (refuse) removal are unfair to anybody.

It follows that the applicant's attack against these charges can also not succeed.

COSTS

The costs must follow the result. However, the respondent seeks costs on an attorney-and-client scale. Van Schalkwyk points out in his affidavit that on a previous occasion, in 2007, the applicant unsuccessfully brought proceedings against the respondent in this Court, in which he challenged certain aspects of the respondent's rates dispensation, and in which he was not ordered to bear the costs; that before the applicant instituted the present application, the respondent's officials went out of their way to explain its tariff policy to him; and that, despite having been treated by the respondent's officials in a professional and respectful manner, the applicant has referred to them and to their explanations in "insulting, disparaging and abusive language and accused them of lacking integrity", such as:

> "....'some ridiculous proposition', 'inane poppycock'. 'odd no-brain ..... assertion', 'pulling a fast one', 'playing with semantics', 'an exposition of why the Director thinks he can flout the Systems Act', 'an inane excuse', 'arithmetical logic [which] is absurd' and 'patently incorrect and nothing less than a lame excuse'"

(paragraph 150.9 of his affidavit). He maintains that the applicant has been reckless and vexatious in instituting these proceedings.

However, I am unable to agree that the applicant's conduct in this matter justifies a punitive costs order.

Generally speaking, it is not a healthy thing for private persons who genuinely feel aggrieved by the conduct of public institutions and their servants to be deterred by the prospect of punitively adverse costs orders from approaching competent Courts for appropriate relief. from challenging government bodies which are clothed with authority over such persons, and from ventilating their complaints in appropriate fora, provided that they do so in good faith and not recklessly or vexatiously. I am not persuaded that the applicant is mala fide, nor do I think that it has been established that he has acted recklessly or vexatiously in this matter: indeed, several of the arguments which he advanced in this Court were not entirely without merit. If during the last year or so he has on occasion directed language at the respondent's functionaries which might be described as somewhat flamboyant or even intemperate, it must be borne in mind that the environment in which the respondent and its officials function is not that of a Sunday school, and that disgruntled members of the public can be expected sometimes to be outspoken and to express themselves forcefully: the City of

Cape Town should not be taken for a wilting violet. Local authority, like ambition, should be made of sterner stuff.

For these reasons, the application is refused, with costs.

THRING, J.