

SOUTH AFRICA / JUDGMENT

Assegaai River Properties (Pty) Ltd v Derby Downs Management Association (5986/2015)

[2016] ZAKZDHC 39 (28 September 2016)

[2016] ZAKZDHC 39

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Gorven

CASE / FILE NUMBER
5986/2015

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IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
LOCAL DIVISION, DURBAN
NOT REPORTABLE
Case No: 5986/2015
In the

matter between: ASSEGAAI
RIVER PROPERTIES (PTY) LTD
Applicant
and
DERBY DOWNS
MANAGEMENT ASSOCIATION
Respondent

Coram: Gorven J

Heard: 27 May, 20 September 2016

Delivered: 28 September 2016
ORDER
1.
The application is dismissed.
2.
The counter application is
dismissed.

JUDGMENT

Gorven J:

[1] The Derby Downs Office Park is located near the Westville campus of the University of KwaZulu-Natal. It comprises a number of individually owned properties. The owners are voting members of the respondent Association. When the events dealt with in this application took

place, the governing legislation was the Companies Act 61 of 1973 (the Act).[1] The respondent functions as a company and was governed by Articles of Association.[2] A finance committee must present a budget to every annual general meeting. This is an itemised estimate of the anticipated income and expenditure of the respondent for the ensuing financial year. A levy fund must be established. Each member is required to contribute a proportion of the levies to the fund which must be used to meet the expenses of the respondent.

[2] The proportion in which levies are recovered from members is governed by article 14.7 of the Articles. At the time of the annual general meeting held on 12 December 2007 (the 2007 AGM), the relevant parts of this article read as follows:

‘14.7 The proportions in which members shall make contributions towards the levy fund established in terms of Article 14.2 shall be determined by the Finance Committee, who in determining such proportions shall have regard to all circumstances prevailing at the time and to equity and shall be guided by the following:

14.7.1 they shall assign those costs arising directly out of the land itself to the member owning such land;

14.7.2 they shall assign those costs relating to the office park generally, including all open spaces, to an owner in the ratio of the permissible gross area of that owner’s land in the office park over the total permissible gross area of land in the office park’.

[3] It will be seen that the property size provided the basis for the proportion of levies paid by each member. It was recognised that this was not an equitable approach because not all sites were able to utilise the full municipal building allowance. Among other things, a large lake encroached on some of the properties which prevented this. A proposal was put forward to the 2007 AGM to amend the basis upon which the levy proportions were calculated.

[4] The chair of the board motivated a new basis on which proportions would be calculated. For illustrative purposes he appended a schedule (the schedule) headed, ‘Present System compared with GLA System’. GLA stands for general lettable area of each property. The percentages for various systems were set out in three columns. The first was headed ‘Present Ratio’, the second ‘GLA Ratio’, and the third ‘Mixed Basis’.

[5] At the 2007 AGM, a special resolution was tabled and unanimously passed. This provided that:

‘The Articles of Association be altered in the following manner.

1. That Articles 14.7; 14.7.1 and 14.7.2 be deleted.
2. That a new Article 14.7 be included which will read: The proportions in which members shall make contributions towards the levy fund established in terms of Article 14.2 has been determined by the members in General Meeting and is set out in Article 14.7.1
3. That a new Article 14 be included as Article 14.7.1. This Article shall consist of a list of Erf Numbers and the proportion of the levy charges they shall bear. The proportions shall be as approved by the members in General Meeting on the 12 December 2007 as evidenced by signature of the Chairman.’

Immediately after that resolution, the minutes of the 2007 AGM record:

‘With regard to the levy contribution apportionment, after further discussion, it was agreed that Mr Diab would check the lettable area of his unit as it appeared to be in excess of the area actually built. The levies of the above G.L.A. (Gross letting area) system of apportionment was unanimously approved.’

Mr Diab was the representative of the applicant at the 2007 AGM.

[6] The dispute in this application arises from this part of the minutes. Both parties treated the dispute as one hinging on the interpretation of the special resolution read with what is recorded thereafter. The applicant contends that, properly construed, the resolution was to the effect that the levies would in future be calculated on the basis of the accurate and actual gross lettable area of each property. In order to give effect to this resolution, it says, an accurate measurement of the gross lettable areas of each property is required. It says that, since there are no such accurate measurements, the resolution requires this exercise to be undertaken by a land surveyor.

[7] The applicant therefore approached this court for the following relief:

‘(a) The respondent shall within one (1) month of the grant of this order or within such period as this court deems appropriate, cause Mr STANLEY GIBSON, alternatively a practising land surveyor appointed by the chairman of the South African Geomatics Institute to measure the gross lettable areas of the buildings constructed on the site within the office park Derby Downs situate at Derby Place, Derby Downs Westville, KwaZulu-Natal.

(b) The respondent is ordered to pay the costs of the land surveyor to measure the gross lettable areas as referred to in para (a) above.

(c) The respondent is ordered to pay the applicant’s costs of suit.

- (d) The respondent shall not recover from the applicant any costs of the surveyor referred to in para (a) above or any costs of this application payable by it to the applicant.'

The final prayer is because the applicant contracted Mr Gibson, a land surveyor, to undertake that exercise on its property. The applicant says that there is therefore no need for a fresh measurement of its property.

- [8] In opposing the application, the respondent raises two points in limine and deals also with the merits of the application. It raises a counter application which 'is brought in the event that this Honourable Court does not dismiss the application as a result of the issues raised in limine . . . or for any other reason not connected to the merits.' The counter application seeks payment of arrear levies by the applicant. This is framed in alternative amounts; the main claim being based on the applicant's proportion of the levies which the respondent says was agreed in the resolution and which the respondent applied from March 2008. The alternative is based on a proportion based on the gross lettable area of the applicant's property arrived at by Mr Gibson. Both of these amounts exceed the levy payable under the system which obtained prior to the resolution taken at the 2007 AGM.
- [9] The first point in limine is one of non-joinder. The respondent contends that each of its members should have been joined in the application. This because the levies of each member will be affected if the applicant is to succeed. The second is that there are material factual disputes which militate against the matter being dealt with on the papers and require resolution by way of oral evidence.
- [10] The applicant submits that the test concerning non-joinder is that the party concerned has a legal interest in the subject matter of the litigation which may be adversely affected by a judgment. It submits that a financial interest is not sufficient and, in support of the submission, calls in aid the decision in *In Re: BOE Trust Ltd & others* NNO.[3] In that matter, the application sought to vary the terms of a trust. The Supreme Court of Appeal held that charities which were beneficiaries of the trust should have been joined because they would no longer receive funds if the relief was granted. This decision is distinguishable in that the respondent comprises, and represents the interests of, all the members. In my view, therefore, it was not necessary to join each member.
- [11] The second point in limine is that material factual disputes exist on the papers. Any such disputes relate only to issues which are not material to the outcome of the application. The main factual dispute relates to when Mr Diab reverted to the Chair of the meeting. As will become clear later in this judgment, I do not regard that issue as of any moment in determining the application. I turn, therefore, to the merits of the application.
- [12] What is clear is that the special resolution sought to amend the Articles. After resolving to delete articles 14.7, 14.7.1 and 14.7.2, it resolved to substitute article 14.7 in the following terms:

‘14.7 The proportions in which members shall make contributions towards the levy fund established in terms of Article 14.2 has been determined by the members in General Meeting and is set out in Article 14.7.1’..

The resolution then provided for the contents of article 14.7.1. as follows:

14.7.1. This Article shall consist of a list of Erf Numbers and the proportion of the levy charges they shall bear. The proportions shall be as approved by the members in General Meeting on the 12 December 2007 as evidenced by signature of the Chairman.’

What was placed before the 2007 AGM for approval was the schedule with the three columns mentioned above. As regards that schedule, the minute records:

‘The levies of the above G.L.A. (Gross letting area) system of apportionment was unanimously approved.’

What was therefore approved is the list headed ‘GLA Ratio’ in the schedule appended to the report of the Chair. This list was converted from percentages to ratios and the Chair signed that list (the AGM GLA list). This then meant that the resolution resolved to incorporate those proportions into article 14.7.1 in the form of a list. The issue of whether Mr Diab reverted in time or not is not material because the list was signed and was thus resolved to be incorporated in that form into the articles. Whether the applicant would have a basis to challenge and set aside the signing of the list is a different matter.

- [13] As I say, the parties focused their argument on whether the resolution allowed Mr Diab to substitute his calculation for that on the AGM GLA list and whether it was required that other properties should also be measured and their actual areas included. However, since this was a special resolution, the provisions of the Act govern whether it has amended the articles.
- [14] Section 200(1) provides that, within one month of the passing of a special resolution, a copy of the resolution, together with a copy of the notice convening the meeting, shall be lodged with the Registrar of Companies who shall, upon payment of the prescribed fee, register the resolution. Section 203(1) provides that a special resolution shall not take effect until it has been registered by the Registrar. Section 202 of the Act provides that ‘[a]ny special resolution of which a copy is not lodged with the Registrar and registered by him within six months from the date of the passing of that resolution shall, unless the court otherwise directs, lapse and be void.’
- [15] When this was raised during argument, the parties requested an adjournment to establish whether or not the special resolution was lodged and registered with the Registrar within six months from the December 2007 AGM. Written argument would follow. It has been established that the special resolution was not lodged with the Registrar. No court order relating to the resolution has been made. As such, the special resolution passed at the 2007 AGM has lapsed and is void. Article 14.7 remains unamended.

[16] The relief sought by the applicant is premised on the special resolution coming into effect being void. In its written argument the applicant sought to argue that in future the issue of the accurate measurement of the gross lettable area is bound to arise and that, therefore, I should grant the relief sought. Whether or not such an order is competent, and I express no view on that issue, I cannot act as if a resolution in the exact form of the special resolution passed at the 2007 AGM will inevitably be passed in future. Some other formula may be settled on or the present system left intact. That is a matter for the relevant meeting of the respondent. It is therefore clear that the applicant cannot succeed in its application.

[17] In its written argument, the respondent did not seek to submit that it would be entitled to the relief sought since it is premised on the special resolution having brought about an amendment to the Articles and this has not taken place. The trustees can only collect levies on the basis set out in the Articles. The respondent can therefore also not succeed in its counter application.

[18] It remains to consider the question of costs. The applicant submits that, if both the application and the counter application are dismissed, no order relating to costs should be made. This would have the effect that each party would pay its own costs. The respondent submits that the counter application was conditional on the success of the applicant on the merits. This is not so. It was made conditional on the dismissal of the points in limine or a refusal to 'dismiss the application . . . for any other reason not connected to the merits.' The points in limine have not resulted in the application being dismissed, nor has it been dismissed for a reason not connected to the merits. In the

alternative, the respondent submits that no costs order should be made. I agree with this position as being the most appropriate in the circumstances.

[19] In the result:

1. The application is dismissed.
2. The counter application is dismissed.

GORVEN J

DATE OF HEARING: 27 May, 20 September 2016.

DATE OF

JUDGMENT:

28 September 2016.

FOR THE APPLICANT: GR Thatcher SC instructed by Sanan & Watts Inc.

FOR THE RESPONDENT: MB Pitman instructed by Francois Medalie & Co.

- [1] The Act was repealed by the Companies Act 71 of 2008 with effect from 1 May 2011.
- [2] The respondent was known as an Association Incorporated under Section 21 under the Act. Under the new Act, such companies are called non-profit companies.
- [3] In Re: BOE Trust Ltd & others NNO 2013 (3) SA 236 (SCA) para 19.
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