

SOUTH AFRICA / JUDGMENT

Bogatsu and Another v 108 on 8th Street Homeowners Association (A2022/037938) [2024] ZAGPJHC 611 (28 June 2024)

[2024] ZAGPJHC 611

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mdalana-Mayisela, Strydom

CASE / FILE NUMBER

A2022/037938

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

APPEAL NO: A2022-037938

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

28 June 2024

In the matter between:

GEORGE GOTHUSAMANG BOGATSU 1st Appellant

MAHLAPANE JEANETTE BOGATSU 2nd Appellant

and

108 ON 8TH STREET HOMEOWNERS ASSOCIATION

Respondent

Judgment

Mdalana-Mayisela J (Strydom J concurring)

Introduction

[1] This is an appeal from Randburg Magistrate Court against the judgment of the Additional Magistrate W Jansen delivered on 26 September

2022. The appellants are the owners of Unit 2[...] on Erf 2[...], N[...], extension 6[...], M[...], Gauteng. The respondent is 108 on 8th Street Homeowners Association, Noordwyk, Midrand, Gauteng.

Background facts

[2] The respondent instituted two actions against the appellants in the trial court. In the first action the respondent claimed an amount of R23 383.92 for monthly contributions, CSOS levy and ancillary charges for the period between 17 July 2015 to 8 October 2017. In the second action it claimed an amount of R45 439.00 for monthly contributions, CSOS levy and ancillary charges for the period between 1 November 2017 to 8 March 2021.

[3] The appellants defended both actions and filed their respective pleas. In the second action the appellants raised the special pleas of jurisdiction and *lis alibi pendens*.

[4] By agreement between the parties the two actions were consolidated, and the consolidated action proceeded to trial. The trial court dismissed the special pleas. It ordered the appellants to pay to the respondent the amounts of R23,388.92 and R45,439.00 plus interest, and legal costs on an attorney and client scale, the one paying the other to be absolved.

The grounds of appeal

[5] The appellants have lodged this appeal against the whole judgment of the trial court. Briefly, the grounds of appeal stated in the notice of appeal are as follow:

[5.1]. The trial court erred in fact and/or in law in not finding that the respondent lacked the *locus standi* to approach the court;

[5.2] The trial court erred in fact and/or in law in finding in favour of the respondent where the respondent did not have a properly adopted constitution;

[5.3] The trial court erred in fact and/or in law in granting monetary order in favour of the plaintiff where there is no documentary source of authority to charge the levy; and

[5.4] The trial court erred in fact and/or in law in dismissing the special pleas.

Applicable law

- [6] It is trite that this court's powers to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection, the trial court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellants must therefore convince us on adequate grounds that the trial court was wrong in accepting the witness' evidence. A reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage a trial court has of seeing, hearing and appraising a witness. It is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony.[1]

Jurisdiction

- [7] The appellants have taken a point that the trial court do not have jurisdiction to entertain the action. In the special plea filed in the second action they pleaded that:

"1.1 Section 38(1) of the Community Schemes Ombud Service Act, No 9 of 2011, ("the CSOS") reads as follows: "Any person may make an application if such person is a party to or affected, materially by a dispute."

1.2 The plaintiff is a party to or who is affected materially by a dispute and therefore the aforesaid section is applicable to the plaintiff.

2. Therefore, in the light of the above, this matter does not fall within the jurisdiction of the above Honourable Court but falls within the jurisdiction of the Community Schemes Ombudsman."

- [8] The appellants in support of their contention relied on the case of *Body Corporate of Via Quinta v Van der Westhuizen NO and Another*, where the Court stated that:[2]

"[18] If, on the other hand, the amount of the levy is disputed because it was not properly determined and this dispute is raised after the defaulter had received a demand, the appropriate forum for recovery of the levies would be the original office of the Ombud service. An adjudicator would then be appointed to investigate the matter and his order would be enforceable is a judgment of the magistrates' court or the high court with jurisdiction. The Body Corporate would then need to execute the order in the court concerned to recover the levies if the order so records."

- [9] The respondent in its replication denied that the trial court has no jurisdiction by virtue of the provisions of section 38(1) of the CSOS Act. It submitted that section 38(1) provides an alternative dispute resolution mechanism, which affords it an election and/or discretion as to the forum in which any dispute stands to be adjudicated. The language used in section 38(1) is permissive and not mandatory. Neither section 38(1), nor the CSOS Act read as a whole, excludes the jurisdiction of the court to adjudicate on the pending action or excludes its common law right to institute its action in a court of law.

- [10] The trial court dismissed the special plea of jurisdiction on the basis that the provisions of section 38(1) of the CSOS Act are not mandatory.

[11] In the notice of appeal the appellants contended that the trial court erred in dismissing the special plea of jurisdiction. It ought to have found that it had no jurisdiction to entertain the claims whose cause is, per statute, allocated to another forum.

[12] In the appeal the appellants also relied on Body Corporate of Via Quinta supra to support their contention. In my view the reliance on the Body Corporate of Via Quinta case is misplaced. Paragraph [18] of that case referred to a scenario where the amount of the levy is disputed because it was not properly determined. In the appeal before us, the appellants are disputing payment of the levy on various grounds, including that the respondent was not legally established and its constitution was not properly adopted. In paragraph [17] of that case the court stated as follows:

“If the claim for arrears levies or contributions is not disputed, for example if an owner simply ignores a demand for payment or simply refuses to pay, without disputing the amount of the claim or the proper determination of the levy, the Body Corporate can institute legal action in court to recover the arrear levies from the owner.”

[13] Section 38(1) of the CSOS Act provides that any person may make an application if such person is a party to or affected, materially by a dispute. In considering the interpretation of section

38(1), I am guided by the Supreme Court of Appeal decision in Natal Joint Municipal Pension Fund v Endumeni Municipality[3] where it was stated that:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.”

[14] The point of departure is the language of the section 38(1) provision itself, read in context and the purpose of the CSOS Act. The word “may” in a provision in an enactment usually indicates a permissive and enabling provision, giving the person who exercises it a discretion. However, in all cases the meaning will depend upon the context of the provision and the intention embodied in the enactment.[4] When the word “may” is read in the context of section 38(1) provision, it affords any person who is a party to or affected,

materially by a dispute, an election to make an application at CSOS. The wording of this section is not peremptory. It does not expressly state that the exhaustion of CSOS remedies is an indispensable condition precedent to launching an application to court. In the Body Corporate of Via Quinta supra paragraph [15] the Court held that:

“[15].... In terms of the CSOSA the Body Corporate has a discretion to either enforce payment of levies or contributions through the Ombud, or in terms of its common law right in any court of law[4] against a defaulting owner for their recovery of arrear levies....”

- [15] I agree with the decision in the Body Corporate of Via Quinta that the CSOS Act does not expressly or impliedly exclude the jurisdiction of the Magistrate court. The Supreme Court of Appeal in *Makhanya v University of Zululand*[5] explained the concept of concurrent jurisdiction in relation to statutes as follows:

“When a statute confers judicial power upon a special court it will do so in one of two ways. It will do so either by (a) conferring power on the special court and simultaneously (b) excluding the ordinary power of the High Court in such cases (it does that when ‘exclusive jurisdiction’ is conferred on the special court). Or it will do so by conferring power on the special court without excluding the ordinary power of the High Court (by conferring on the special court jurisdiction to be exercised concurrently with the original power of the High Courts). In the latter case the claim might be brought before either court.”

- [16] For the reasons stated above, I agree with the respondent's submission that section 38(1) provides an alternative dispute resolution mechanism, which affords the party affected by the dispute in matters relating to home schemes, an election and/or discretion as to the forum in which such dispute stands to be adjudicated. The trial court correctly dismissed the special plea of jurisdiction. This ground of appeal must fail.

Locus Standi

- [17] In their notice of appeal, the appellants contended that the respondent has no locus standi to approach the court because it was not properly registered in terms of the law, and therefore not legally existent for the purposes prescribed by law.
- [18] The general rule is that it is for the party instituting proceedings to allege and prove its locus standi, and the onus of establishing it, rests on that party. It must accordingly appear ex facie the founding papers that the party has the necessary legal standing.[6]
- [19] The respondent in its amended particulars of claim filed in both actions averred that it is a common law Homeowners Association established in terms of its constitution and it has the authority to institute legal proceedings in terms of clause 17.18 of the constitution.
- [20] Clause 17.18 of the constitution provides that:

“The Association shall be entitled to demand, sue or recover any arrear levy instalment or other amount due to the Association by a Member by instituting action against him in any Magistrate's Court having jurisdiction in respect of such levy or such other amount to which jurisdiction Members are deemed to have consented in terms of Section 45 of the Magistrate's Court Act. These provisions shall not preclude the Association from instituting proceedings in any other court which may have jurisdiction in respect of the claim or person of the Member concerned.”

- [21] In the plea filed in the first action, the appellants admitted that the respondent is a common law Homeowners Association and that it has authority to institute legal proceedings in terms of clause 17.18 of its constitution. In the plea filed in the second action, the appellants denied that fact and put the respondent to the proof thereof.
- [22] During the trial when the first appellant was cross-examined about the contradiction in the pleas relating to the establishment and locus standi of the respondent, he admitted that the respondent is a Homeowners Association established in terms of its constitution and that it has authority to institute legal proceedings in terms of clause 17.18 of the constitution.
- [23] The second appellant did not testify during the trial. The admission of the respondent's locus standi in the respondents' plea in the first action and the admission made by the first appellant during his testimony in court is dispositive of the locus standi issue.
- [24] The respondent's managing director Audun Steen Stenersen testified that the N[...] extension 6[...] township was established in terms of the Local Authority Notice 1308 published in the provincial gazette No 136 of 23 May 2007. The aforesaid notice was admitted as evidence in the court a quo and marked exhibit 1. It contained the following declaration:
- "In terms of Section 103 of the Town Planning and Townships Ordinance, 1986 (Ordinance 15 of 1986) the City of Johannesburg, hereby declares N[...] E[...] 6[...] township to be an approved township subject to the conditions set out in the Schedule hereto."*
- [25] The conditions of establishment were:
- [25.1] The applicant shall properly and legally constitute a Resident's association to the satisfaction of the local authority prior to or simultaneous with the sale of the first erf of the township;
- [25.2] Each and every owner of erven 2743 – 2745 and 2747 – 2795 shall become a member of the residents' association upon transfer of the erf; and
- [25.3] The residents' association shall have full legal power to levy from each and every member the costs incurred in fulfilling its function and shall have legal records to cover such fees in the event of default by the member.
- [26] Stenersen testified that the respondent was established as a Resident's association in accordance with the aforesaid conditions, and it is registered as such with the Community Schemes Ombud Service under Registration No. CSOS/REG/16/GP/007088. His testimony in this regard remained unchallenged.
- [27] The first appellant during his cross-examination introduced new issues stating that the respondent was not established as a section 21 company and no finance committee was established, and therefore, the conditions imposed by the Local Authority were not complied with. These issues were not pleaded by the appellants. Their plea in the second action contained a bare denial in relation to the establishment and locus standi of the respondent. It is trite that the parties are bound by their pleadings. It is impermissible to

plead one particular issue and seek to pursue another at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings.[7]

- [28] For these reasons, I find that the respondent has established that it has the locus standi to institute the actions against the appellants. The court a quo's finding on this issue was correct. The ground of appeal

that the respondent lacked locus standi to institute the actions against the appellants is without merit and it must fail.

Lis Alibi pendens

- [29] The appellants submitted that there is pending application between the same parties and based on same cause of action and in respect of the same subject matter in that it involves payment of levies at CSOS. The special plea of lis alibi pendens was filed only in the second action. The submission on the pending application is not applicable to the first claim.
- [30] The respondent argued that the submission by the appellants is factually incorrect, and not supported by the documentary evidence. In the application to CSOS the appellants sought an order to be provided with the list of records and itemized billing of monthly levies, and for a declarator that the refusal to provide same was unfair and arbitrary. In the second action the respondent claimed an amount of R45,439.00 for monthly contributions, CSOS levy and ancillary charges for the period between 1 November 2017 to 8 March 2021. The relief sought in the CSOS application is not the same as the one sought in the second action.
- [31] The trial court dismissed the special plea of lis alibi pendens on the basis that the period in which the arrear amounts are claimed, differ. It seems that the trial court misunderstood the special plea of lis alibi pendens to be about the two actions instituted by the respondent in court, instead of the second action in court and the application before CSOS. I agree with the decision of the trial court dismissing the special plea of lis alibi pendens but for a different reason.
- [32] There are three requirements for a successful reliance on the defence of lis alibi pendens. They are: the litigation is between the same parties, the cause of action is the same, and the same relief is sought in both sets of proceedings.[8] As stated in paragraph [32] above, the relief sought in the second action and the application to CSOS is not the same. Therefore, the appellants have failed to prove a defence of lis alibi pendens. This ground of appeal is unsustainable, and it must fail.

Constitution and Resolution

- [33] I deal with the adoption of constitution and resolution for the imposition of levies together, as they are closely interlinked. The appellants contended that the trial court erred in finding for the respondent and granting monetary judgment against them, in circumstances where the respondent did not have a properly adopted constitution and a resolution for imposition of levies adopted in terms of a valid constitution. They submitted that the constitution is of no force and effect, and that they are not bound by it.
- [34] It is common cause that the appellants became the registered owners of unit 27, on Erf 2[...], N[...] Extension 6[...] on 17 July 2015. N[...] Extension 6[...] township consists of a total of 58 units. The units are double-story dwellings. There is a roadway, and guards are posted at the main entrance. The main purpose of a homeowner's association is to protect the interests of owners, security, and maintenance of the township.
- [35] Stenersen testified that the respondent's constitution was drafted by Henkel Gregory Attorneys and accepted by the developer of the township, Jimal Properties CC. It was approved and adopted at the respondent's first meeting on 21 April 2015. Thus, before the appellants became members of the respondent. It was the only and current constitution of the respondent. The appellants did not tender evidence showing that the constitution was not adopted. Stenersen's evidence in this regard remained undisputed and had to be accepted as true. The trial court made a credibility finding that he was an honest and impressive witness. I accept that the constitution was adopted.
- [36] I now deal with the issue of whether the appellants are bound by the constitution. The first appellant during his testimony admitted the offer to purchase and title deed documents. In terms of the conditions recorded in those documents, the appellants became members of the respondent upon the registration of unit 27, shall remain members, and be subject to the respondent's constitution until they cease to be owners of unit 27. The first appellant conceded that the conditions in the title deed mean that he is bound by the constitution. The second appellant did not testify during the trial. The ground of appeal that the appellants are not bound by the constitution has no merit and must fail.
- [37] The appellants contended that the trial court erred in granting monetary judgment in favour of the respondent without documentary source of authority to charge levies. I have accepted that the respondent's constitution was adopted. Clause 17.2 of the constitution authorizes the respondent to levy and administer contributions upon members for the purpose of meeting all the expenses which it has incurred or which are reasonably anticipated to be put in the pursuance of its objects and whether by way of maintenance, repair, improvement, and keeping the land in good order and conditions of the roads, swimming pool, reception and/or security building, parking area, the common areas, the facilities and services of the respondent or for payment of all rates and other charges payable by the respondent in respect of any land so vested in it, and/or for the services rendered to it or by it, and/or for payment of salaries and/or wages of the employees of the respondent and generally for the payment of the expenses necessarily and reasonably incurred in connection with the management of the respondent.

[38] The first appellant conceded during his testimony that he is obliged to pay levies. He admitted that he received the email from Estie Lewis dated 30 August 2015 explaining how the levies were calculated on the estimated running costs of the township. After receiving the aforesaid email, he sent the email to Lewis requesting the statement of account and bill of costs. On 3 September 2015 he received the email responding to his request. In that email it was explained to him that every year a budget is compiled for the financial year and every owner contributes to the levy fund. The copy of the approved budget for that financial year as well as the monthly levy amount per unit contribution was attached to the email. He conceded that all the information he needed was contained in the budget. But he never paid the levies. He kept on asking for more documents relating to the calculation of levies. He was provided with all those documents, but he never paid. The copies of all those emails were admitted as exhibits in the trial court. The ground of appeal that there was no documentary evidence before the trial court is without merit.

Conclusion

[39] I have considered all the grounds of appeal, and in my view they are unsustainable. In light of what was stated in *S v Francis supra*, this court has no power to interfere with the findings made by the trial court in the absence of a misdirection. Accordingly, the appeal must fail. With regard to the issue of costs, the respondent has asked for costs. It is successful and it is entitled to costs of the appeal.

ORDER

[40] The following order is made:

1. The appeal is dismissed with costs.

MMP Mdalana-Mayisela J

Judge of the High Court

Gauteng Division

JJ Strydom J

(Digitally delivered by uploading on Caselines and emailing to the parties)

Date of delivery: 28

June 2024

Appearances:

On behalf of the Appellants: Adv M A Makhubedu

Adv R Baloyi

Instructed by: Frank

Setati Attorneys

On behalf of the Respondent: Adv A Vorster

Instructed by: Scalco

Attorneys

[1] S v Francis and Another (95/89) ZASCA 141; [1991] 2 ALL SA 9 C (26 November 1990)

[2](A196/2017)

[2017] ZAFSHC 215 (16 November 2017) para [18]

[3]

[2012] 2 ALL SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012) para [18].

[4] Lynch v Union Government 1929 AD 281.

[5] 2010 (1) SA 62 (SCA) para 25.

[6] Gross v Pentz [1996] 4 ALL SA 63 A[1996] ZASCA 78; , 1996 (4) SA 617 (A); Mars Inc v Candy World (Pty) Ltd 1991(1) SA 567 (A).

[7] Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 898 F-J; Home Talk Developments (Pty) Ltd v Ekurhuleni Metropolitan Municipality (225/2016) [2017] ZASCA 77 (2 June 2017) at paras 28-29; Minister of Agriculture and Land Affairs and Another v De Klerk and Others

[2014] 1 ALL SA 158 (SCA) at para 39.

[8] Electrolux South Africa (Pty) Ltd v Rentek Consulting (Pty) Ltd unreported (19664/2022) WC

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