

SOUTH AFRICA / JUDGMENT

Extra Dimensions 121 (Pty) Ltd v Body Corporate of Marine (9015/2014) [2016] ZAKZDHC 1 (5 February 2016) [2016] ZAKZDHC 1

COURT
Kwazulu-Natal High Court, Durban

BEFORE
Masipa AJ

CASE / FILE NUMBER
9015/2014

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OFFICE
OF THE CHIEF JUSTICE
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL
LOCAL DIVISION, DURBAN
CASE
NO: 9015/2014

DATE: 05 FEBRUARY 2016
IN

THE MATTER BETWEEN: EXTRA
DIMENSIONS 121 (PTY)
LTD.....APPLICANT
And
BODY
CORPORATE OF MARINE
SANDS.....FIRST
RESPONDENT
REGISTRAR
OF DEEDS, PIETERMARITZBURG.....SECOND
RESPONDENT

JUDGMENT

MASIPA AJ

INTRODUCTION

[1] The applicant seeks an order declaring invalid and to be of no force and effect, Rule 26 in and Annexure “B” of the first respondent’s amended conduct rules. By virtue of its position, the first respondent has as part of its functions the

authority to pass resolutions regulating the management of its operations and to have such resolutions registered with the second

respondent.

[2] The order sought by the applicant follows a special resolution of the first respondent adopted on 23 August 2012 wherein the first respondent resolved to modify contributions by owners. The provisions of the special resolution were as follows:

In terms of Section 32(4) of the Act, the liability of owners to make contributions and the value attached to votes is hereby modified

according to percentages set out in the attached Annexure “B”.

[3] Annexure “B” also deals with modification to contributions and reflects section numbers, floor area (Square metres) and modification participation quota percentages. It then sets out the participation quota in respect of each unit.

THE

FACTS

[4] The Applicant is the owner of six units in the Marine Sands Sectional Scheme which he acquired in 2002. The scheme is partly residential and partly non-residential (commercial). The applicant’s units are designated non-residential. The participation quota for all the non-residential properties was determined by the developer of the scheme in terms of section 32 (2) of the Sectional Titles Act, 1986 (‘the Act’) when he applied for the opening of a sectional title register. At that time, the participation quota for the non-residential component was determined to be 6% of the whole.

[5] While the developer was entitled to make provision for a different value to be attached to the vote and for the modification of the liability of the units in respect of levy contributions, this was not done. In 1992, the participation quota for each unit in the non-residential component of the scheme was determined by dividing the 6% allocated to the non-residential units between each

non-residential section in proportion to their respective floor areas. The Surveyor General approved this determination on 21 May

1993. This meant that the registered participation quota of all units belonging to the applicant was 5.4979%.

[6] An extension to the non-residential section in 1997 necessitated an amendment to the sectional plan and an adjustment to the participation quota percentage allocated to each non-residential owner. The participation quota for the non-residential component of the scheme remained at 6% as had been determined by the developer but the division of that percentage between the non-residential owners was adjusted. The revised participation quota for the non-residential sections amending the sectional plan was registered with the Deeds

office. After the extension, the applicant's revised scheme participation quota was 4.8409%. In 2002, when the applicant acquired the units, his the participation quota remained at 4.8409%.

[7] During 2011, it became apparent that the first Respondent's managing agent, Wakefields Property Management (Pty) Limited were incorrectly charging the non- residential owners levies which were above that determined by the participation quota. The effect of this was that the applicant's levies were higher than they should be. The issue was raised by the owners since there had never been modification to their participation quota in respect of their liability to levies as envisaged in section 35 of the

Act Subsequent to this and in June 2012, the applicant's monthly levy was reduced from R16201.36 to R9 134.15.

[8] Effective January 2013, the applicant's levy increased from R9 134.15 to R19 878.17, an increase from 4.8409% to 10.5349% more than double the monthly levy. This was following the special resolution passed at the annual general meeting of 23 August 2012 to substitute the conduct rules of the scheme and modify levy contributions. At this meeting, Warren John Charlton held proxy for the Applicant and objected to the passing of the resolution. It was nevertheless passed. The substituting conduct rules were adopted and the second respondent being the Registrar of Deeds, Pietermaritzburg was notified of the amendments. The modification of the levy contributions to each member is charged according to the ratio which the floor area of his section bears to the total floor area of all sections of the scheme, residential and non-residential alike. This in effect means that the Applicant's levies amount to 10.5349% of the total levies for the scheme while its participation quota is 4.8409%.

THE ISSUE TO BE DETERMINED

- [9] The issue to be decided as agreed to by the parties is the meaning/interpretation of the words ‘adversely affected’ as referred to in section 32(4) of the Act. The question is whether the applicant is adversely affected by the special resolution passed by the first Respondent and whether it is envisaged from the Act that his written consent be obtained prior to the passing of such resolution. If the Applicant was adversely affected, then the resolution is contrary to the legal provisions and falls to be set aside.

APPLICABLE LAW

- [10] The relevant part of Section 32(4) of the Act provides as follows:

'Subject to the provisions of section 37(1 (b), the developer may, when submitting an application for the opening of a sectional title register, or the members of the body corporate may by special resolution, make rules under section 35 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 37(1)(a) or 47(1) is modified: Provided that where an owner is adversely affected by such a decision of the body corporate, his written consent must be obtained

- [11] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] Wallis JA dealt with the approach in interpreting written agreements. He stated at para 8 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... A sensible meaning is to be preferred to one that leads to insensible or un-business like results or undermines the apparent purpose of the document...”

- [12] Wallis JA held further at para 26 that:

“In resolving the problem the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, un-business like or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.”

- [13] In *Algar v Body Corporate of Thistledown & Others*[2] the court considered the meaning of the words adversely affected by first looking at the 1971 act[3]. In terms of section 24(3) of that act, a unanimous resolution of members of the body corporate was required the variation of member's

voting rights and liability of contributions to the levy. The court was of the view that due to the wording of the section, a member of the body corporate could act capriciously and without reason in blocking a change in the basis upon which levies were calculated by not participating in a meeting where such unanimous resolution was to be adopted.

[14] Theron J found that section 32(4) of the Act reduced the requirement to that of a special resolution which required a 75% majority and the consent of an owner who was adversely affected by the resolution. The court rejected the argument by the applicant that

the fact that he had to pay an increased monthly levy, it meant that he was 'adversely affected'. It held that if that was the interpretation to be placed on the words adversely affected, it would have been difficult to envisage any special levy changing the basis upon which levies were calculated. The result would be that the situation would be the same as that which existed under the 1971 act. The court found that the result would 'render the provisions of section 32(4) nugatory' which could not have been the intention of the legislature.

[15] The court's view was that the philosophy underlying the Act is for owners of the units to be treated fairly and that this is reflected in the scheme of the Act as legislature in section 32(4) recognised that when it comes to determination of levies, each scheme may be different. Since there was no authority dealing with the meaning of the terms, the court after considering cases where the courts made reference to it. At page 5, the court concluded that in order to arrive at the meaning of the terms 'adversely affected' within the meaning of section 32(4) of the Act, all facts and circumstances must be taken into account and not only the fact that a member has to pay more levies.

[16] The court found it necessary in that case to consider the scheme and found that unlike most sectional schemes, it which comprised of units to which exclusive garden areas are allocated, the vast garden areas at Thistledown are common property open for equal

enjoyment by all unit owners. In addition to this, there were outside buildings forming part of the common property and all unit members derived benefit. The effect of the levies as they stood meant other members of the body corporate subsidised the applicant when he enjoyed equal access and enjoyment of the common areas. The special resolution was intended to redress this inequitable situation. When considering all the circumstances, the court found that the applicant was not adversely affected.

[17] In Silberberg and Schoeman[4] where the provisions of section 32(4) were considered, the authors interpreted the phrase adversely affected to mean of detriment to. It was stated that the effect of the rigid interpretation of the phrase would retain the requirement for unanimous resolution.

THE CONTENTIONS BY THE PARTIES

[18] Ms Mills for the applicant submitted that the context of the provision appeared firstly in section 32(3) of the Act which provides that levies imposed on owners be in line with their registered participation quotas and section 32(4) which allows the body corporate to pass a special resolution which alters this. She submitted that the purpose of the proviso in section 32(4) is to guard against the majority imposing its will on the minority to its detriment. She contended that there was a distinction between the 1971 act and the current Act.

[19] She submitted that in the context of the Act as a whole, a purchaser who buys a unit would have constructive knowledge of the participation quota of that unit and of any conduct rules providing for the computation of levies on a different basis to the participation quota. This knowledge would influence the purchaser in his decision whether to purchase the unit or not and the purchase price to offer. It would be inequitable for the value of the levy to be hanged by a majority of owners to the detriment of the new owner without his consent. Ms Mills argued that the legislature had this consideration in mind when it enacted section 32(4). in terms of the

section, the developer is required to disclose any intention to impose a different levy structure to potential purchasers in instances where the sectional title register is not yet opened.

[20] She submitted that the ordinary, grammatical meaning of the words ‘adversely affected’ is clear and unambiguous and ought to be applied. With reference to Thistledown, she submitted that the court was not constrained to follow that decision for various reasons including the fact that the facts are distinguishable. She submitted that in Thistledown, the scheme was purely residential and the only body corporate expense was the maintenance of the common property which was enjoyed equally by members regardless of the sizes of their units. Ms Mills contended that the Thistledown judgment was wrong and was not binding on me. [5] She submitted that Theron J had based her decision on equitable principles rather than applying the letter of the law. A further

ground upon which she based her argument against Thistledown was that the applicant continued to obtain the same benefits from the common property before and after the resolution.

[21] Ms Mills contended that the first respondent’s case was that the levy regime imposed by the developer was unfair because the participation quota allocated to the non-residential component of the scheme was less than the floor they occupied. There was nothing placed before the court in respect of the developer’s reasons as to why he had determine the scheme the way he did. She further contended that the purchasers of the units would have considered the participation quota and associated financial implication on them which would have influenced the purchase price they offered.

[22] She submitted that the special resolution ‘adversely affected’ the applicant and was passed without the Applicant’s

consent as required by section 32(4) and that the resolution was ultra vires the first respondent’s powers and void. Consequently, the conduct rules were also void.

[23] Mr Boule for the first Respondent submitted that in order for the court to find in favour of the applicant it would have to make the following findings:

1. That Theron J was clearly wrong;
2. That van der Merwe in 'Sectional Titles, Share Blocks and Time Sharing', Volume 1: 4-10(3) is wrong as he supports the decision of Theron J;
3. That Silberberg is wrong as he also supports Theron J
4. That LAWSA was also wrong ;
5. That 1986 amendments to the sectional titles act was useless.

[24] The court would be required to interpret the act in an unfair and inequitable, adopt an interpretation of the act that permits absurdity and overlook a presumption that legislature knows the law and how it is interpreted.

[25] It was submitted that in Terblanche VS A. Eagle Insurance 1983 (2) 501 (N) at 504, the court held that court must find legislature knows how the law was interpreted previously when considering amendments to an existing legislation. Mr Boule argued that all authorities concurred with the approach followed by the in Thistledown.

[26] Mr Boule submitted that this court was called upon to decide whether to give the phrase a wide or narrow interpretation. A wide meaning includes all relevant factors including purpose of the Act while a narrow meaning is that which the Applicant relies on

being to look at the words in isolation to the circumstances. He contended that in determining the issue, consideration must be given to the test set out in Natal Joint Municipal Pension Fund and Bothma-Batho Transport (Edms) Bpk v S Bothnia & Seun Transport

(Edms) Bpk 2014 (2) SA 494 (SCA) at para 12. He submitted that the court should have regard to the Act as a whole including its purpose, previous legislation dealing with the same issue and the unique facts of the matter.

[27] In respect of the Act, Mr Boule contended that it in respect of the financial obligations, the intention of the legislature was to ensure a fair and equitable dispensation is created between various owners, in this regard he relied on a reference to Thistledown in Sectional Titles, Share Blocks and Time-Sharing [6] He submitted that it could not be contended that the purpose of the Act was create an unfair and inequitable distribution of expenses. He submitted further that section 32(1) and 32(2) of the Act expressly distinguished between the calculation of the residential and non-residential schemes.

[28] While participation quotas for residential sections are determined according to floor area, with non-residential sections, the developer

must determine the participation quota. It is expected that the developer's calculation should be based on section size as well as other relevant features including exterior design, designated use, location, proximity to facilities, interior decorations and fittings and available parking space in allocating participation quotas in non-residential and mixed schemes. He relied on Silberberg to support this contention [7]

- [29] Mr Boulle submitted that the developer's determination did not take requisite considerations into account when it determined the participation quotas for Marine Sands and disregarded the fact that non-residential sections represented 11.68% of the aggregate floor space while they paid 6% of the levies. He contended that in response to the first respondent's proposition that the developer's determination discriminated unfairly against residential owners, the applicant only advanced bare denials.
- [30] In respect of the 1971 act, Mr Boulle contended that the purpose of the Act was because legislature wanted to relax stringent requirements of amongst others the need to obtain unanimous resolution to change levy calculations. He relied on Thistledown and a finding by the court that a stringent interpretation to the words 'adversely affected' would have the same effect as the 1971 act and render the provisions of section 32(4) nugatory which could not have been the intention of legislature.
- [31] On the facts of this matter, Mr Boulle submitted that the applicant did not dispute that previous levy calculations operated harshly on residential owners. As an example, he indicated that while a non-residential owner would pay 0.3109% for 56 square metres, residential owners would have to pay 0.7103 which is more than double. Since the applicant conceded that insurance was calculated based on square metres, it would not be unfair that owners pay per area which was not the case until after the special resolution was adopted. While the applicant accepts that all members must contribute equally to levies regardless of the extent of the benefit, it contends that it did not use security services or lifts which constitute a large portion of expenses. On the other hand, the applicant stated that an enquiry as to who benefits from a service lift would cause havoc and that it did not contend that it should not pay for the lift and the like.
- [32] Mr Boulle argued that the applicant makes a bare allegation that the impugned resolution has achieved an equitable position where all owners are treated fairly with no undue burden on any unit. While the previous system was inequitable, the latter achieves an even spread of the costs. As the applicant accepted that costs could not be spread based on use, it could hardly be said that

the applicant is adversely affected by the change which Mr Boulle argued was reasonable and achieved the purpose of the Act. He

submitted that the applicant enjoys its fair share of all services in respect of the common property.

[33] In interpreting relevant legislation, Mr Boulle submitted that the court must avoid absurdity and achieve a sensible result. The applicant's interpretation could lead to absurdity since would result the situation which existed prior to the enactment of section 32(4) where an owner can prevent a change in levy payments. He submitted that the court was alive to this in Thistledown. Also, an opportune developer could allocate nominal participation quota to a non-residential section and retain ownership and then prevent the body corporate from ever increasing the payment by withholding written consent.

[34] Mr Boulle submitted that the challenged resolution did nothing but to seek to address the imbalance created by the seemingly arbitrary allocation by the developer and to ensure that unit owners share expenses in a fair and equitable manner. He submitted further that there was no dispute on the papers that the proposed levy calculation method will achieve that purpose. In view of this, he

submitted that Thistledown was not clearly wrong and that the first respondent's interpretation be preferred.

[35] In reply to the contentions by Mr Boulle, Ms Mills argued firstly that what academics say is not binding precedent. She submitted that it was apparent from the authors that they neither supported nor criticized Thistledown. Van der Merwe appeared to try and explain the judgment. Ms Mills argued that in any event, this court was not bound to follow it. She submitted that the provisions

of section 32(4) were not unfair since the Act requires that all facts are brought to the knowledge of the purchaser. She contended

further that the Applicant's interpretation did not create absurdity but created certainty to the would be purchasers/owners. In interpreting the Act, the court should not introduce uncertainty. She disputed that legislature believed that the courts were aware of Thistledown decision and that it was not correct. She argued that it was court's function to correct wrong judgments. Theron J read in to the Act that which is simply not there and introduce fairness.

[36] In respect of the meaning of adversely affected, she argued that the Respondent sought to place proper interpretation. The words permit for only one meaning in the context of the provision it can only mean that an owner's levy went up. The resolution

changes the manner in which the levies can change. The court says participation quota. The change is that the other owners pay more.

EVALUATION

[37] Although the decision in Thistledown was taken prior to the Natal Joint Pension Fund matter, the Court's interpretation fails within the principles set out by Wallis JA. In Thistledown, the Court took into account the ordinary grammar syntax of the word adversely affected and considered several cases where the word was used.

[38] However, as submitted by Mr Boulle no person can give consent to reasonable paying more money. The result of this interpretation would be that there can never be a levy increase. In *Thistledown* the court took into account the fact that when the legislature drafted the provisions of §32(4), it had at its disposal the provisions of §24(3) of the 1971 Act where the resolution could only be passed by unanimous vote of members. This provision made it difficult if not impossible for body corporates to change the basis

upon which levies could be increased.

[39] Having considered the earlier provision and the challenges it had introduced to body corporates legislature, it could not have intended for a similar context in the subsequent provision.

[40] Another factor is that legislature being aware of the earlier provision, could not have intended for absurdity in the subsequent Act. It would be absurd to suggest that legislature intended that there be no change in levies unless an owner consents. This would mean that certain owners would benefit from the proper use of common property at the expense of other owners. In any event, the

applicant accepted in his affidavits that all members must contribute equally to levies. If this is the case, then he cannot be complaining about the increase of his levies.

[41] Although the result of the impugned resolution is that the applicant pays more money on a consideration of all relevant facts, it cannot be said that he is adversely affected since he now gets to pay for what he uses or benefits from. As submitted by Mr Boulle, the applicant conceded that all members had to contribute equally to levies regardless of the extent of benefit. To achieve this, the Body Corporate had to increase his levies. Although suggested otherwise by Ms Mills, it is improbable that the Applicant would have given his consent to pay more. He evidence this through his objection even prior to the meeting. A consideration of fairness

which Ms Mills argued was wrong in *Thistledown* becomes relevant since it is unfair that one owner benefits from the use and enjoyment of the common property at the expense of others.

[42] It could not have been the purpose of the Act and the intention of legislature that one owner benefits from the use and enjoyment of the common property at the expense of others. This would lead to an insensible and un-business like result. Further, legislature could not have enacted legislation allowing for the value attached to a vote of each one to be amended by special resolution on the one hand while on the other it restricts this by requiring consent by an adversely affected owner to the detriment of all other owners. The context within which the phrase was used can only give effect to the intention of legislature when interpreted in line with the *Natal Joint Municipal Pension* decision.

[43] In order to arrive at a sensible and business like meaning taking into consideration the context of the phrase, it cannot be said that the applicant is adversely affected by the resolution.

[44] In the result, the following order is made:

1. The application is dismissed with costs.

APPEARANCES:

For the plaintiff: Ms L Mills

Instructed by: Richard Evans & Associates

For the interested party: Mr A J Boulle

Instructed by: B E S Agar and Associates.

Matter heard on: 11 November 2015

Judgment

delivered on: 05 February 2016

[1] 2012 (4) SA 593 {SCA}

[2]

[2010] JOL 26140 (N)

[3] Sectional Titles Act 66 of 1971

[4] Silberberg and Schoeman's 'The Law of Property', 5th Ed, Bardehorst, Pienaar & Mostert: para 19.5.1(c)

[5] At para 12{b} of the Applicant's Heads of Argument; LAWSA second edition Vol 5 (2) at para 170; Harris & others v Minister of the Interior and Another 1952 (2) SA 428 at 452Cto 454B; R Phillips Dairy (Pty) Ltd 1955 (4) SA 120 (T) 122 A to E

[6] Van der Merwe Sectional Titles, Shareblock and Time-Sharing Vol 1 Sectional Titles at 4-10(3)

[7] Badenhorst, Pienaar & Mostert Silberberg and Schoeman: The Law of Property 5th edition at 1.9.5.1: (b)

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