

SOUTH AFRICA / JUDGMENT

Gale v Van Doorn and Another (3093/10) [2011] ZAKZDHC 17 (3 March 2011)

[2011] ZAKZDHC 17**COURT**

Kwazulu-Natal High Court, Durban

BEFORE

Gorven

CASE / FILE NUMBER

3093/10

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Source record**1****NOT REPORTABLE****IN THE KWAZULU-NATAL HIGH COURT,
DURBAN****REPUBLIC OF SOUTH AFRICA****Case no. 3093/10**

In the matter between:

J GALE

.....APPLICANT

and

C VAN DOORN

.....FIRST

RESPONDENT

M MACLEOD

.....SECOND

RESPONDENT

JUDGMENT**GORVEN J:**

The sectional title scheme Ditony was registered under the Sectional Titles Act 66 of 1971 (“the old Act”). The scheme comprises two sections, one owned by the applicant and one owned jointly by the two respondents. There has been an unhappy history in the relationship between the parties. This culminated in the applicant wishing to proceed to arbitration in respect of various complaints against the respondents. An arbitrator, one Richard Morgan (“Morgan”) convened a pre-arbitration meeting at the sectional title scheme on 8 October

2008. A minute of that meeting was prepared by Morgan. The meeting was attended by Morgan, the applicant and the two respondents.

The minute sets out certain agreements reached. These include confirmation that Morgan had been appointed to act as arbitrator, a determination that the arbitration would be conducted in accordance with certain rules, a recordal of the items in issue, agreement relating to certain of those items and an agreed schedule for submissions and the hearing. The parties adhered to the minute as regards the schedule. The written claim and the response to it were submitted and a hearing took place on 21 November 2008. Morgan indicated that he would deliver his award within seven days of that date but this did not take place. The award was only made available towards the latter part of March 2009 as a consequence of the arbitrator only being paid at that stage. It was agreed by the applicant that the aspects of the award which remain relevant to this application and which are capable of being

made an order of court are twofold, namely:

The respondents were, at their cost, to construct access stairs from the garage of the applicant’s unit to the central walkway, which would include the installation of a door and frame into the side of the garage. The design would be in keeping with the existing architecture and would be acceptable to the applicant.

The costs of the arbitration would be divided equally between the applicant on the one part and the respondents on the other part.

The applicant requests that the arbitration award be made an order of court and that the respondents pay the costs of the application. At the outset of the hearing before me Mr Schumann, who appeared for the respondents, sought to hand up a supplementary affidavit. This was objected to by Ms Oliver, who appeared for the applicant, and the respondents did not persist with the attempt to introduce this supplementary affidavit. Therefore nothing more need be said on this score.

The case of the respondent in opposition can be summarised as follows. Management Rules were promulgated under the old Act. The applicant proceeded in terms of these Management Rules. The initial request for arbitration was made pursuant to Rule 28 of the Management Rules. The respondents replied to this request by the applicant by letter dated 12 November 2007 in which they said the following:

We are surprised that your company has been approached to arbitrate this issue as the lawyers of choice according to Body Corporate Rules are Halse, Havemann and Partners. The above being said, we are still compiling information regarding Miss Gale's disregard for the same Body Corporate rules she is so quick to quote. It had (sic) become increasingly apparent that Miss Gale thinks that she is indeed the Body Corporate.

Arbitration in this instance can only be instigated on agreement by all parties on (sic) the Body Corporate.

The applicant's attorneys responded by letter dated 6 December 2007 indicating that they were not themselves arbitrating the matter but were acting on behalf of the applicant. They referred to section 28 of the Management Rules to the effect that only when the owners in the scheme were unable to agree on an arbitrator would Halse, Havemann & Partners nominate an arbitrator. The following paragraphs were then included:

The Body Corporate rules make provision for a senior advocate to be appointed as an arbitrator in the case of irreconcilable disagreement between the owners in the scheme. As we have previously stated, we are of the view that it would be more cost effective to nominate an attorney who specialises in Sectional Title Disputes.

We thus have sought your consent to appoint an attorney to act as an arbitrator in the matter. If you are not agreeable thereto we request that you nominate three senior counsel for appointment as arbitrator.

This letter was not responded to.

The applicant thereafter requested attorneys Halse, Havemann & Partners to appoint an arbitrator but received no response. The applicant's attorneys formed the view that the provisions of Rule 71(4) of the Management Rules promulgated under the Sectional Titles Act 95 of 1986 ("the new Act") would apply which provided that, where no agreement was reached, the registrar of deeds should appoint an arbitrator. They made such a request and the registrar of deeds appointed Morgan on 13 May 2008. He convened the pre-arbitration hearing and thereafter conducted the arbitration itself.

In their answering affidavit, the respondents did not dispute this recordal by the applicant of the steps taken by her and her attorneys. They contented themselves with disputing the correctness of the advice given by her attorneys to the applicant as to the manner in which the arbitrator should be appointed. The respondents went on, in their answering affidavit, to admit having taken part in the arbitration proceedings but having done so "under the mistaken impression that [Morgan] had been properly appointed and that the Arbitration that he was conducting was legitimate". The respondents then indicated that despite

their having subsequently been advised that the appointment of Morgan was irregular and that the entire arbitration process was

therefore flawed and voidable, they attempted to accommodate the applicant by complying with the agreements reached at the

arbitrator's meeting. They continued by stating that although they did not recognise the authority of the arbitrator they have complied with all of the issues raised by him except for three. The first does not concern this application and the second and third relate to the two matters mentioned in paragraph 2 of this judgment. In respect of the stairs, the respondents asserted that the applicant was obliged to have plans drawn for that stairway, that she had not done so and that they therefore withdrew the "offer to pay for the applicant's stairs, on the basis of her gross ingratitude". As regards the costs of the arbitration, they stated that paying half of the costs of the arbitrator "would be like paying someone to punish one, when one has done no wrong, and the party meting out the punishment has no authority to do so".

The applicant's case is that the respondents agreed to Morgan conducting the arbitration. She said that, at the pre-arbitration meeting, Morgan mentioned that he had been appointed by the registrar of deeds and that the respondents consented to his continuing. This is borne out by the minute which recorded that consent. The respondents, in their answering affidavit, did not in any way contest this evidence. In addition, after the pre-arbitration meeting, Morgan circulated the minute recording this and other agreements reached under cover of the letterhead of his firm, Richard Morgan & Associates, which is described as conducting project management and building engineering and reflects Morgan as a professional engineer.

Mr Schumann submitted that the failure of the applicant to mention at the pre-arbitration meeting that Morgan had not been appointed in terms of Management Rule 28 amounted to a material non-disclosure and that this vitiated the consent of the respondents at the meeting and thereafter to his acting as arbitrator.

There are a number of difficulties with this submission. In the first place, it does not accord with the facts. The respondents had, in their letter of 12 November 2007, shown that they were aware of the manner in which an arbitrator should be appointed under Management Rule 28 by quoting from it. Their letter made mention of an appointment being done by Halse Havemann & Partners, not one done by the registrar of deeds. In addition, as mentioned above, their letter provoked a response from the applicant's attorneys who mentioned that Management Rule 28 required the appointment of senior counsel. The letter even requested the consent of the respondents to depart from this and appoint an attorney but, in the event that they did not agree to this, to nominate three senior counsel at the Durban Bar. The respondents must therefore have understood that what was disclosed at the pre-arbitration meeting was that Management Rule 28 had not been invoked. Despite Morgan not being appointed by Halse Havemann & Partners, they consented to the appointment. In addition, as mentioned, after the meeting Morgan sent the minute under cover of the letterhead of his firm which would have made it clear, if the respondents had remained under any illusions, that he was not a senior advocate but a professional engineer and the proprietor of a firm of engineers. Despite this communication, the respondents at no time prior to the arbitration hearing indicated a lack of consent. How such conduct can amount to a material non-disclosure is not apparent to me.

The respondents did not say that they had been misled in any way. All that they said was that they were under a “mistaken impression” as to the appointment of Morgan. No prior representation by the applicant was alleged and none could have been given if, as was stated by the applicant without challenge by the respondents, it had been mentioned that the registrar of deeds had appointed Morgan. The only non-disclosure which might have taken place is that the applicant did not tell the respondents that she had invoked Management Rule 71(4) under the new Act.

It is so that in our law silence can amount to a misrepresentation. There is, however, no general rule that all material facts must be disclosed and that any non-disclosure therefore amounts to misrepresentation by silence.¹ The underlying rationale for this approach was explained in *ABSA Bank Ltd v Fouche*² in the following words:

That accords with the general rule that where conduct takes the form of an omission, such conduct is *prima facie* lawful (*BOE Bank Ltd v Ries* 2002

- (2) SA 39 (SCA) at 46G - H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (*Pretorius and Another v Natal South Sea Investment Trust Ltd* (under Judicial Management) 1965 (3) SA 410 (W) at 418E - F).

The court went on, in relation to actionable misrepresentations, to say the following:³

Having established a duty on the defendant to speak, a plaintiff must prove the further elements for an actionable misrepresentation, that is, that the representation was material and induced the defendant to enter into the contract. In the case of a fraudulent misrepresentation, that must have been the result intended by the defendant (*Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T) at 103F - J).

In relation to the non-disclosure contended for in the present matter, therefore, the following is the position. First, the applicant must have been under a duty to the respondents to disclose that Management Rule 28 had not been invoked. Put another way, the respondents must have been in a position where they had perforce to rely on the applicant in order to obtain knowledge of this fact. But the irresistible inference is that the respondents must have been aware of this, as I have explained. Secondly, this non-disclosure must have been material. Thirdly, it must have been this which induced the respondent to consent to Morgan conducting the arbitration.

The respondents have not said that, if they had known the true position, they would not have consented to Morgan conducting the arbitration. It was only after the arbitration had been conducted and the award awaited that the respondents' attorneys, by letter dated 12 December 2008, alleged to Morgan that his appointment “was not lawful” since Management Rule 28 required the arbitrator to be “a practising senior advocate at the Durban Bar”. It is also noteworthy that, despite this having been communicated, the respondents said that they had “complied with all the issues raised at the meeting save for three” and went on to say that the only

reason they had not constructed the stairs was that the applicant had not produced the plans timeously. They were prepared to give effect to at least part of the award in an attempt to forge a more peaceful co-existence with the applicant. There is nothing to show that this motivation would have changed with a disclosure that a different Management Rule had been invoked.

The facts show that there was no duty on the applicant to tell the respondents that Management Rule 28 had not been invoked. She had received a letter written by the respondents from which it became apparent that they knew the content of that Rule and, in the light of the communication by Morgan that he had been appointed by the registrar of deeds, the respondents would have known this fact. They were also not in a position of involuntary reliance on the applicant since they could have made a simple enquiry. In addition, the fact that it had not been invoked could not have been material to the respondents' agreement to Morgan as explained above.

I find, accordingly, that the respondents confirmed the appointment of Morgan as arbitrator without any actionable non-disclosure on the part of the applicant having induced their consent. They are thus bound by this consent since the Management Rules under both Acts provide for agreement by the parties to an arbitrator.

The applicant submitted that s 60A(8) of the new Act makes Rule 71 of the Management Rules promulgated under that Act applicable since it is inconsistent with Management Rule 28 registered by the scheme under the old Act. In those circumstances, the Management Rules under the new Act prevail. In the light of my finding above, it is not necessary to determine the question of consistency or otherwise of the two sets of Management Rules.

This accordingly means that the respondents are bound by the award unless there are any other bases for reviewing and setting aside that award. No other such bases have been suggested and nor has any such application been made by the respondents. They have contented themselves with submitting that the arbitrator was not correctly appointed and that the arbitration proceedings are therefore a nullity. I do not agree.

In the result, the following order is granted:

The respondents are to construct, at their cost, an access stairway from the garage of the applicant to the central walkway including the installation of a door and frame into the side of the garage. The design shall be in keeping with the existing architecture and acceptable to the applicant.

The respondents are directed to pay one half of the costs of the arbitration.

The respondents are directed to pay the costs of this application.

GORVEN J

DATE OF HEARING : 21 February 2011

DATE OF JUDGMENT : 3 March 2011

FOR THE APPLICANTS : Adv Z Oliver, instructed by

Henwood Britter & Caney Attorneys

FOR THE RESPONDENTS: Adv P Schumann, instructed by

Chamberlain's Attorneys

1Speight v Glass & another 1961 (1) SA 778 (D) at 781H

2 2003

(1) SA 176 (SCA) para 5

3Para 6

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