

SOUTH AFRICA / JUDGMENT

Ketzer v Gardens Lodge Body Corporate (1073/17) [2019] ZASCA 15 (20 March 2019)

[2019] ZASCA 15

COURT

Supreme Court of Appeal

BEFORE

Navsa, Tshiqi, Swain, Carelse, Matojane

CASE / FILE NUMBER

1073/17

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SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1073/17

In the matter between:

NORBERT KETZER

APPELLANT

and

GARDENS LODGE BODY CORPORATE

RESPONDENT

Neutral citation: Ketzer v Gardens Lodge Body Corporate (1073/17)

[2019] 15 ZASCA (20 March 2019)

Coram: Navsa AP, Tshiqi and Swain JJA and Carelse and Matojane AJJA

Heard: 20 February 2019

Delivered: 20 March 2019

Summary: Rule 14(1) of the magistrates' court rules – interest rightly disputed – calculation of capital amount claimed – inextricably linked to interest claimed – summary judgment refused.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nuku AJ and Fortuin J concurring, sitting as the Court of first instance):

1 The appeal is upheld and no order is made as to costs.

2 The order of the court below is set aside and substituted as follows:

‘1. The appeal is upheld and no order is made as to costs.

2. The order of the Magistrates’ Court is set aside and substituted as follows:

“a. The application for summary judgment is refused.

b. The defendant is granted leave to defend.

c. No order is made as to costs.”

Carelse AJA (Navsa, Tshiqi and Swain JJA and Matojane AJ):

- [1] The issue in this case is whether the Magistrates’ Court, Cape Town, should have granted summary judgment in favour of the respondent, the Gardens Lodge Body Corporate (the Body Corporate), incorporated in terms of s 36 of the Sectional Titles Act 95 of 1986, against the appellant, Mr Norbert Ketzer, in an amount of R233 383.52, with interest at the rate of 34,8 per cent per annum compounded monthly plus costs on a scale as between attorney and client as well as collection commission. The claim was based on ‘outstanding levies and/or interest and/or costs’, in relation to four units within the sectional title scheme administered by the Body Corporate. At the outset, it is necessary to record that Mr Ketzer represented himself throughout the proceedings culminating in the appeal and was responsible for the drafting of his pleadings.
- [2] Mr Ketzer opposed an application for summary judgment by the Body Corporate. The answering affidavit is somewhat obscure, but, at the heart of it, is a complaint that the claim, formulated as set out in the preceding paragraph, included a claim for interest at the exorbitant rate of 38,4 per cent, impermissible charges for ‘legal monitoring’ and collection charges. Mr Ketzer complained that the interest charged was not premised on the rules of the Body Corporate, nor was it agreed. Four schedules were attached to the Body Corporate’s particulars of claim from which it appears that in successive months, the amount claimed in respect of outstanding levies included interest and the other charges. Simply put, interest was capitalised and the capital amount shown as the opening balance in each successive month included both the interest and the other charges. The total amount of R233 380.52 claimed, thus comprised these constituent parts.
- [3] The opposing affidavit by Mr Ketzer, that is in respect of the capital amount that might have been due and payable, put up no viable defence in relation to levies outstanding. The Magistrate, in adjudicating the application for summary judgment, had regard to Mr Ketzer’s contentions in relation to a lack of authority on the part of the Body Corporate to claim the amounts in question, the substance of which, for present purposes, it is not necessary to

have regard to. He did, however, raise questions about the rate of interest that the Body Corporate was entitled to charge on overdue amounts. More about that later. The Magistrate took the view that the claim for outstanding levies for the period September 2012 until July 2014, in respect of the four units, was 'a very simple, straightforward claim'. The Magistrate was satisfied that Mr Ketzer had failed to show that he had a bona fide defence. Consequently, an order was made in the terms set out at the commencement of this judgment.

- [4] In adjudicating an appeal by Mr Ketzer, the Western Cape Division of the High Court, Cape Town, (Nuku AJ with Fortuin J concurring)

disregarded the contents of a document obtained by Mr Ketzer from the Registrar of Deeds which appears to be a unanimous resolution of the trustees of the Body Corporate, circumscribing the rate of interest and the charges that may be imposed on unit holders. That resolution, limited the recovery of interest on overdue amounts to the prime rate of the Body Corporate's bank plus two per cent. The high court rejected Mr Ketzer's reliance on the resolution, classifying it as inadmissible hearsay evidence. The high court also rejected Mr Ketzer's alleged counter-claim as well as his attempt to have to resort to arbitration which he alleged was provided for in the rules of the Body Corporate. The high court went on to state that none of the defences raised by him had any merit and dismissed the appeal with costs.

- [5] Before us, counsel on behalf of the Body Corporate was constrained to concede that the rejection of the resolution could not be justified. [1] In heads of argument on behalf of the Body Corporate, the following is stated:

'If this Court is of the view that Ketzer's opposing affidavit, benevolently considered, raises a dispute with regard to the applicable interest rate, i.e. a rate exceeding prime plus 2%, which could possibly be resolved by way of arbitration, it is respectfully submitted that:

- (1) Ketzer does not dispute his liability for levies in respect of his section, garage and/or parking bays;
- (2) Ketzer does not dispute his liability for the payment of electricity charges raised;
- (3) Ketzer concedes that he is liable for payment of interest calculated at the prime rate plus 2%.'

It was submitted on behalf of the Body Corporate that, in the event of this court being inclined to hold that the interest rate is in dispute, it ought, in terms of Rule 14(6)(b) of the Magistrates' Court Rules, to find that the Magistrates' Court should have given judgment in relation to that part of the claim which was not disputed.

- [6] Before us, the Body Corporate presented for consideration, a recalculation based on the prime bank rate plus two per cent which,

it was submitted, amounted to a total of R184 103.07 being due rather than the R233 380.52 that was initially claimed.

- [7] The offer to recalculate is, regrettably, too late. Mr Ketzer cannot, at this late stage, contest the recalculation. It is not clear to us, nor should it have been to the Magistrate or to the high court, that the interest and the other charges could be disentangled from the capital amounts. It is clear, however, that the interest claimed was disputed on bona fide grounds. The rate is patently exorbitant and disputed. If regard is had to the unanimous resolution presented to the court below, the compelling conclusion is that Mr Ketzer justifiably disputed the rate of interest.
- [8] Having regard to the manner in which the Body Corporate formulated its case by including, within its capital claim, the justifiably disputed interest rate and ostensibly questionable charges, this is not an instance in which a court would be justified in giving summary judgment for part of the amount claimed.[2] How, one might rightly ask, in these circumstances, could a court determine an amount which it could confidently say was owing.
- [9] It follows that the appeal should succeed. Mr Ketzer, who appeared personally before us, was urged to find a means of arriving at a mutually satisfactory method of calculating what was indeed owing in relation to arrear levies and to make payment of the amount so agreed. He undertook to make every effort to do so. Since he appeared personally, no costs in the conventional sense were incurred by him.
- [10] The following order is made.
1. The appeal is upheld and no order is made as to costs.
 2. The order of the court below is set aside and substituted as follows: ‘1. The appeal is upheld and no order is made as to costs.
 3. The order of the Magistrates’ Court is set aside and substituted as follows:
“a. *The application for summary judgment is refused.*
b. The defendant is granted leave to defend.
c. No order is made as to costs.”

Z Carelse

Acting Judge of Appeal

Appearances

For the Appellants: Norbert Ketzer

For the Respondent: H von Lieres

Instructed by: Von Lieres, Cooper, Barlow & Hangone c/o Rossouws Attorneys, Bloemfontein

[1] See D R Harms Civil Procedure in the Superior Courts SI 54 at B-222.

[2] See in this regard D E van Loggerenberg Erasmus Superior court Practice SI 6 Vol 2 at D1-418.

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