

SOUTH AFRICA / JUDGMENT

McGregor v Selborne Park Body Corporate and Others (AR224/2020) [2021] ZAKZPHC 87 (8 October 2021) [2021] ZAKZPHC 87

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Van Zyl, Poyo Dlwati, Mngadi

CASE / FILE NUMBER

AR224/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: AR224/2020

In

the matter between:

L
J
MCGREGOR APPELLANT
and
SELBORNE
PARK BODY CORPORATE FIRST
RESPONDENT
A
RIDL SECOND
RESPONDENT
M
O'CONNOR THIRD
RESPONDENT
H
KOEN FOURTH
RESPONDENT
J
JORDAAN FIFTH
RESPONDENT
R
TICKLE SIXTH

RESPONDENT
R
HAMILL SEVENTH
RESPONDENT
G
CRAIG EIGHTH
RESPONDENT
A
YOUNG NINTH
RESPONDENT
Coram: VAN
ZYL, POYO DLWATI and MNGADI JJ
Heard: 4
June 2021

Delivered:

ORDER
On
appeal from: KwaZulu-Natal Division of the High Court,
Pietermaritzburg (Ntshulana AJ sitting as a court of first instance):
The
appeal is dismissed with costs.

JUDGMENT

Poyo Dlwati J (Van Zyl J concurring):

- [1] This appeal concerns the issue whether the mandament van spolie remedy was available to the appellant in circumstances where his access, and the use of an electronic booking system utilised for renting his residential units, was deactivated by the first respondent for failing to pay his arrear levies.
- [2] The appellant is the owner of certain residential units situated within the Selborne Park Golf Estate (the estate) at Pennington on the KwaZulu-Natal South Coast. The first respondent is the body corporate of the estate, duly established in terms of s 36 of the Sectional Titles Act 95 of 1986 (the Act). The second to eighth respondents are the duly appointed trustees of the estate whilst the ninth respondent is the estate manager. It was common cause that the appellant does not reside within the estate but leases his units to various tenants. He does this through the estate's Glovent portal system (the system). The estate, as the administrator of the system, issues to homeowners authorisation to issue access codes or pin numbers to either guests or contractors wanting access to the estate. All homeowners in the estate, by virtue of their ownership, are registered as users of the system by the estate.
- [3] The appellant's contention was that he had peaceful and undisturbed access to and use of his units in the estate and the system since 13 December 2017 when the units were transferred to his name. This access was exercised by him through an access card issued to him by the estate which he would simply swipe at the electronic reading mechanism situated adjacent the main entrance to the estate. He averred that he was also denied

peaceful and undisturbed access to and use of the estate's visitor management solution application, the system utilised by the estate and homeowners as the facility through which homeowners wishing to lease their units to prospective tenants.

- [4] According to the appellant, the basis for the disturbance of his access and use of the estate and the system was as a result of a resolution passed by the trustees of the estate during December 2018, to the effect that unit owners who were in arrears with their levies would only be granted consent to let their units out from 1 March 2019 on condition that they had paid the outstanding arrear levies. Furthermore, those unit owners who were in arrears would have their access cards deactivated and would be required to sign at the main gate in order to gain access into the estate and would be required to use the intercom system to get to their units.
- [5] It was common cause between the parties that the estate had instituted an action in the Durban High Court against the appellant for outstanding levies. The appellant is defending that action and that case is still pending. It came as no surprise then that the appellant would be affected by the resolution. The parties exchanged various correspondence with regard to the action and the effect of the resolution but there was no agreement reached between them. As a result, the appellant, on an urgent basis, launched an application on 20 May 2019, seeking orders that the estate restore his possession and access to the estate and the units by activating or reactivating his access card to the estate and to the system. The orders sought included a punitive costs order, *de bonis propriis*, against the second to eighth respondents.
- [6] The respondents opposed the application on various grounds. They also launched a counter application seeking an order that the appellant be interdicted and restrained from hiring out his residential units in the estate until such time that he has obtained consent for doing so from the trustees of the estate and that he has complied with the resolution of December 2018. The respondents denied that the appellant's possession of and access to the estate and to the units was interrupted. They further disputed that the appellant had a right to the system in order to hire out the units. It was contended that the appellant's entitlement to admit tenants to the estate and access to the system was conditional upon his compliance with the terms of the management as well as conduct rules. Furthermore, that right was conditional upon the consent of the trustees. Reference in particular was made to conduct rule 13(1) and (5) of the conduct rules which deals with the letting of units. (I will deal with this rule later in the judgment).
- [7] Therefore, so went the averment, the appellant could not seek to hire out his units and derive income from them whilst refusing to pay levies for them. It was upon this basis that the trustees made the approval of any proposed lease conditional upon payment of levies. The respondents argued that as the appellant had a contractual right with the respondents, the mandament remedy was not available to him under the circumstances. Furthermore, the appellant was made aware of the December 2018 resolution, which was only going to be implemented from 1 March 2019, but did nothing until May 2019 when he launched the

application on an urgent basis. The respondents' contention therefore was that the appellant was given ample opportunity to rectify the arrear levies before the resolution was implemented. They therefore sought that the appellant's application be dismissed with costs.

[8] The court a quo, per Ntshulana AJ, found in favour of the respondents. It found that as the owner of the units in the estate, the appellant, was contractually bound by both the rules of conduct and management rules of the estate. It found that the relief sought by the appellant would be in conflict with conduct rule 13 and the resolution adopted by the trustees of the estate. This, so the court held, would be an illegality in terms of the scheme/contract. It further found that the trustees' application of the rules did not amount to self-help. As the rights in dispute were contractual in nature and as specific performance of contractual obligations were being claimed, the mandament van spolie was not applicable. It granted the counter application as sought by the respondents. This appeal is with the leave of the court a quo.

[9] Mostly notably, at the time that the application was heard by the court a quo, the appellant's access to the estate through his access card was restored.[1] The issue in the appeal therefore was whether the remedy of mandament van spolie was available to the appellant for access to the system. Did conduct rule 13 vest the respondents with the power to deactivate access to the system?

[10] The starting point must be the conduct rules and the trustees' resolution of 21 December 2018. Conduct rule 13 of the estate reads:

'(1) The owner of a residential section may, with the Trustees approval let to a person who is not a member of the Body corporate (a 'Third Party') or allow a Third Party to occupy the Owner's section provided that the Owner secure from the Third Party to whom occupation is given an undertaking in favour of the Body Corporate, substantially in the form of Annexure 'A' to the Conduct Rules, that such person will faithfully comply with and fulfil all of the terms and conditions of these Conduct Rules and of the Rules in force from time to time relating to the use and occupation of the unit and of the common property.....

(2)

(5) When granting the approval referred to in Conduct Rule 13(1), the Trustees may prescribe any reasonable condition to the grant of such approval and the Trustees may withdraw such approval in the event of any breach of any condition prescribed in terms of this Conduct Rule.'

[11] The resolution of 21 December 2018 signed by seven trustees of the estate reads:

'1. Based on legal advice obtained by the attorneys of the Body Corporate, Cox Yeats, notice be given in writing to Lawrence McGregor withdrawing any consent to his letting units M1 – M8 with effect from 1 March 2019 and that such withdrawal of consent shall remain until such time as all arrear levies owing by Lawrence McGregor to the Body Corporate have been paid.

2. All homeowners be subject to a withdrawal of the consent of the body Corporate to the letting of their units if the homeowner concerned is in default with the payment of levies'.

The appellant's contention that he was despoiled must be determined in this context.

[12] It is trite that the relationship between the appellant and the respondents has its foundation in contract and is therefore contractual in nature.[2] The issue that needs consideration in this appeal as I understand the appellant's case is not about the estate's conduct rules but about the legality of the trustee's resolution that his access and use of the system was deactivated as a result of his failure to pay outstanding levies. Spoliation was defined by Innes CJ in *Nino Bonino v De Lange*[3] as 'any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right'. Leach JA in *Eskom Holdings SOC Limited v Masinda*[4] said the following in regard to the spoliation remedy:

'The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute' as to which of the parties is entitled to possession.' (Footnote omitted.)

[13] In *Eskom Holdings*,[5] it was further held that

'In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession ... On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal, and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession.'

[14] Returning to the facts of this case, the appellant enjoys the right to access the portal system by virtue of being an owner of some units in the estate. There was no dispute that the portal system is used by owners to let their units to prospective tenants. In terms of rule 13, the appellant had to obtain approval from the first respondent prior to letting out his units to prospective tenants. The appellant and even the respondents for that matter do not possess the system at any given time as same is controlled by a service provider. They therefore do not have any physical control over the portal system. It must follow therefore that the appellant, under the circumstances, could not have been despoiled of anything as the access to the portal

system was not an incident of possession but of ownership.

[15] Even if one were to accept that the appellant was despoiled of access to the portal system it cannot, in my view, be said that it was wrongful. The trustees of the first respondent took a resolution in November 2018 and notified all the owners during December 2018 as to what was going to happen to those owners whose accounts fell into arrears. The appellant did nothing for almost five months to challenge the resolution and its effect. Under the circumstances, it cannot be said that the deprivation was wrongful and unlawful as the appellant was given ample notice as to what would happen when levies were in arrears. In my view, the remedy of spoliation was again not available to the appellant for the use of the portal system.

[16] As was held in *Telkom SA Ltd v Xsinet (Pty) Ltd*,^[6] the remedy of mandament van spolie is not available where personal rights are concerned and 'the order sought is merely to compel specific performance of a contractual

right in order to resolve a contractual dispute'. As correctly held by the court a quo, the appellant's rights are contractual in nature as they flow from him being a member of the body corporate. He requires the approval of the trustees of the first respondent to hire out his units. There is no evidence before us that he has sought the trustees' approval for hiring his units and that this was unreasonably refused. He therefore cannot seek an order of this court to compel the trustees to approve the letting of his units where he has not even sought such approval.

[17] In *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and others*^[7] Ponnann JA held that

'When the respondents chose to purchase property within the estate and become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature. The conduct rules, and the restrictions imposed by them, are private ones, entered into voluntarily when an owner elects to buy property within the estate.'

[18] I, therefore, agree with the court a quo's finding that the appellant's rights to access and use of the portal system are contractual in nature and do not avail him the remedy of spoliation. In line with the approval required to let out the units in terms of conduct rule 13, it seems to me that access to the portal system goes hand in hand with the approval to let out units. In other words, whilst the appellant could have access to the portal system, he would still require the trustees' approval to let out the units. Therefore, the appellant's application was one of seeking to compel the trustees to grant him approval to let out his units disguised as a mandament van spolie application.

[19] As alluded to earlier, the appellant has not challenged the reasonableness of the resolution or its legality. Even if he did, he

could not do so through a spoliation application. Reference was made, on behalf of the appellant, to *Fisher v Body Corporate Misty Bay*.^[8] However, that matter in my view is distinguishable on the facts from this matter. It was not in dispute when the matter was argued in the court a quo and before us that the appellant's access to all his units had been restored through the electronic access card. The only remaining live issue was his right to have access to the portal system. And for him to let out his units, he must obtain approval from the trustees of the first respondent. That rule stands and the appellant agreed to be bound by it when he bought his properties in the estate.

[20] As the appellant required approval from the trustees prior to him letting out his units, this shows that the appellant was never in physical control of the portal system. His right to let the units has always been subject to him obtaining approval from the trustees. That is a contractual right between him and the trustees. Further reference was made to *Singh and another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and others*.^[9] In my view, this matter is again distinguishable from *Singh* as there the challenge lay at the fairness and constitutionality of the conduct rules for residents. Accordingly, the appeal must fail.

[21] In the result, the following order shall issue:

'The appeal is dismissed with costs'.

POYO DLWATI J

I agree

VAN ZYL J

Mngadi J (dissenting):

[22] I have perused the judgment penned by my Sister Poyo-Dlwati J. Unfortunately, I have a slightly different approach, which leads me to a different result.

[23] The appellant, with leave of the court a quo (Ntshulana AJ), appeals against the whole judgment delivered on 28 February 2000. Ntshulana AJ dismissed with costs the appellant's application for an order restoring his possession and access to the body corporate and to his units in the body corporate, and for an order restoring his access to and use of a Glovent portal system in the estate and ordering the appellant to pay costs of a dismissed counter-application.

[24] The appellant in the notice of appeal as common cause facts sets out the following:

'1. The appellant is the owner of certain units within the Selborne Park Golf Estate which unit he rents out to tenants from time to time.

2. The first respondent is the body corporate of the Estate, and the second to eight respondents were the trustees at the time of the events in question.

3. Prior to March 2019, the appellant enjoyed peaceful and undisturbed access to and use of his units and the estate generally by means of the electronic access and system in the operation on the estate.
 4. The appellant also had peaceful and undisturbed access to the use of the first respondents computerised visitor management solution by means of which he would give access to the tenants staying at his units
 5. There is an ongoing dispute between the appellant and the first respondent relating to levies and other charges arising from his ownership of the units in the estate, the dispute is the subject of a pending litigation.
 6. On 1 March 2019, the first respondent terminated the appellant's ability to rent out his unit in the estate by deactivating his access to the body corporate's previously mentioned computer system until all amounts claimed for the levies and related charges had been paid.
 7. The first respondent simultaneously deactivated the appellant's card that enabled the appellant to gain access to the estate via the electronic access system, which resulted in the appellant in order to gain access to the estate having to sign in at the main gate and make use of the intercom system.'
- [25] By the date of the hearing of the application, the appellant's access to the estate and to his units had been restored but the respondents resisted restoring his access to and use of the Glovent portal system.
- [26] Ntshulana AJ found that the appellant was seeking final relief. The remedy of mandament van spolie on which the appellant was relying is a possessory interdict. It is confined to restoring possession of movable or immovable property. Its purpose is to protect undisturbed possession terminated wrongfully and against the will of the possessor. The learned judge found that the appellant had failed to prove the requirements of the interdict. He found that the relief sought in the counter application was rendered academic by the dismissal of the main application. He dismissed the counter application and ordered the appellant to also pay the costs of the counter application.
- [27] Ntshulana AJ found that the appellant was seeking access to the computer system in order to let his units to tenants. There was no interference with possession of his units. Further, the remedy of mandament van spolie was not available to the appellant. He found that the issue of access to the computer system is regulated by the contractual relationship between the appellant and the first respondent. For the court to direct or order the first respondent to restore access to third parties, like tenants would compel the trustees of the first respondent to commit an illegality in terms of the scheme/contract.

- [28] The appellant on 20 May 2019 filed an urgent application in the form of rule nisi with part of the relief relating to his access of the estate and his units to operate as interim relief. On 23 May 2019, the respondent reinstated the appellant's access to the estate and to his units. Therefore, the need for the interim relief fell away.
- [29] On 21 May 2019, the respondents filed an intention to oppose the application. A preliminary answering affidavit was filed on 24 May
2019. On the 24 May 2019, the appellant filed the replying affidavit to the preliminary answering affidavit. On 5 July 2019, the respondent filed a supplementary answering affidavit, which also served as a founding affidavit to the counter application. On the 22 July 2019, the appellant filed a replying affidavit to the supplementary answering affidavit, which also served as an answering affidavit to the counter application. On 8 May 2019, the respondents filed the replying affidavits to the counter application. The parties made averments traversing all the issues without making a distinction between the main application and the counter application. It is not surprising that the learned judge found that the dismissal of the main application rendered relief sought in the counter application academic.
- [30] The above shows that when the matter was heard, the urgency part of it had fallen away, as well as to a certain extent the restoring of the despoiled access before the merits are traversed. The appellant sought final relief. The parties in their papers had traversed the merits. The respondents in filing the counter application indicated that the relief sought by the appellant be regarded as final relief. The court a quo was then required to determine whether, on the facts averred in the appellant's affidavits, which have been admitted by the respondents together with the facts alleged by the respondents, justify the relief the appellant was seeking. Likewise, the relief sought in the counter application. The respondents, in their heads of argument, sought dismissal of the main application and the granting of the relief in the counter application. Therefore, it was common cause that both parties sought final relief.
- [31] The appellant as owner of the units in the estate was seeking continued access to the estate's Glovent portal system like all the other owners. The Glovent portal system is for use by owners of the units to facilitate access by both existing and prospective tenants and others to the units in the body corporate. The respondents contend as follows: The appellant does not have a prima facie right to the relief he seeks in respect of the Glovent portal system as any rights to hire out residential units at the estate is conditional upon the consent of the trustees. The appellant has not sought to lease his units and he has not presented any draft lease agreements to the trustees for approval. The appellant, when purchasing the units in the scheme, agreed to limit his rights to let out his units by making any lease conditional on the approval of the trustees and the compliance with any conditions reasonably imposed.

[32] The respondents state that the appellant is in default with his levy obligations in the sum well in excess of R1 million; that the appellant is both contractually and statutorily bound to comply with the first respondent's management rules and conduct rules. By December 2018, the appellant was aware that he would not be permitted to hire out units no 1 to no 8 with effect from 1 March 2019. The respondents refer to a letter written by the Estate Manager, dated 19 December 2018, and addressed to the letting agents. It reads:

'As a courtesy, the BC (body corporate) wants you to know that it has withdrawn its consent to the letting of Mr McGregor's units in M1-M8 with effect from 1 March 2019 and no persons will be allowed to occupy the units beyond that date. This action on the part of the BC is based on legal advice obtained by the BC from its attorney's, ... and all home owners including Mr McGregor will be subject in future to the clear and specific rule that unit may not be let if the particular owner concerned is in arrears with the payment of levies'.

The respondents attorney in a letter dated 12 February 2019 stated that the appellant

'was obliged to seek the body corporate's consent to the letting of any of his units and the body corporate has a right to prescribe reasonable conditions to the grant of such approval. This obligation and the concomitant right is encapsulated in Conduct Rule

13. The steps taken by the body corporate are in accordance with the rules and are lawful.....Conduct Rule require compliance with the terms and conditions of Rule 13 before any unit may be occupied by or let to any person who is not a member of the Body Corporate.... Mr McGregor has no right to continue to let his properties out from 1 March 2019. No further letting of his units will be sanctioned beyond 1 March 2019 whilst his levy accounts are in arrears.members with levy arrears will still be able to gain access by signing in at the gate but will not be able to issue access cards or obtain pin codes on the Glovent App in order for new tenants to gain access from 1 March 2019'.

[33] The respondents state that the decision is encapsulated in the Resolution of Trustees of December 2018, which is in terms of conduct rule 13. The resolution reads as follows:

1. Based on legal advice obtained by the attorneys of the Body Corporate, Cox Yeats, notice be given in writing to Lawrence McGregor withdrawing any consent to his letting units M1 – M8 with effect from 1 March 2019 and that such withdrawal of consent shall remain until such time as all arrear levies owing by Lawrence McGregor to the Body Corporate have been paid.
2. All homeowners be subject to a withdrawal of the consent of the body Corporate to the letting of their units if the homeowner concerned is in default with the payment of levies!'

[34] It may be convenient to quote the relevant part of conduct rule 13 at this stage:

'Letting and Occupancy of Units and Related Matters

- (1) The owner of the residential section may with the trustees approval, let to a person who is not a member of a Body corporate (a Third Party) or allow a Third party to occupy the owner's section provided that the owner secure from the third party to whom occupation is

given an undertaking in favour of the body corporate, substantially in the form annexure A to the Conduct rules that such person will faithfully comply with and fulfil all those conduct Rules in force from time to time relating to the use and occupation of the unit and of the common property. The undertaking shall confer upon the Body Corporate the right to evict the Third Party as to refuse such person entry to the estate should such a person breach the obligations contained herein and shall otherwise be in terms of as the Trustees from time to time require. The undertaking shall be lodged in writing with the Body Corporate prior to such Third Party being given occupation of the Unit.

(2) ...

(5) when granting the approval referred to in Conduct Rule 13 (1) the Trustees may prescribe any reasonable condition to the grant of such approval and the Trustees may withdraw such approval in the event of any breach of any condition prescribed in terms of this Conduct Rule.'

[35] The promulgated Selborne Park Body Corporate Conduct Rules provides that 'rules' means the conduct rules, the management rules and additional management rules. Rule 2(1) provides that the rules are applicable to and binding upon the trustees and upon all owners, lessees and other occupiers of the units. Conduct rule 19 provides that a contravention of a conduct rule may result in a penalty being imposed. The penalty imposed is recoverable as levy. In suitable circumstances, the trustees may apply to a court for an appropriate court order. Conduct rule 20 provides that no indulgence or relaxation in respect of the

conduct rules shall constitute a waiver or consent, or prevent the enforcement by the trustees at any time.

[36] The Estate Manager in a notice to the homeowners stated:

'In terms of a recent resolutions of the Trustees, owners who are in arrears with their levies will only be granted consent to let out their villas from 1 March 2019, on condition that the levy arrears be brought up to date. Those homeowners who let out their villas and who are currently in arrears have already been given due notice. This is in line with Conduct Rule 13, which requires members to obtain Trustees approval for letting of properties and entitles the Trustees to impose reasonable condition when granting their consent.....In addition whilst they remain in arrears their access to the Glovent Portal will be deactivated to prevent access codes being issued to tenants. These privileges will be reinstated once levy arrears are settled. Those homeowners who either personally or through letting agency breach the rules or are found to be letting their villas in contravention of the Rules may be penalised for their transgression and in terms of the prescribed tariff of penalties attached to the Conduct Rule. A penalty of up to R1000.00 may be imposed for the first transgression of Rule 13 going up to R5000.00 for second and R10 000.00 for the third and further transgressions.'

[37] The following provisions of the Sectional Titles Schemes Management Act 8 of 2011 (the Act) are of relevance. Section 2(5) provides that the body corporate is, subject to the provisions of this Act, responsible for the enforcement of the rules for the control, administration and management of the common property for the benefit of all owners. Section 10 provides that a scheme must, as from the date of establishment of the body corporate, be regulated and managed, subject to the provisions of the Act, by means of rules. The rules must provide for the regulation, management, administration, use and enjoyment of the units and common property. The management or conduct rules must be reasonable and apply equally to all owners of units. The rules bind the body corporate and the owners of the sections and any person occupying a unit. Section 1 defines common property in relation to a scheme to mean the land included in the scheme and such parts of the building or buildings that are not included in the unit.

Owner of a unit owns proportionately undivided shares in the common property determined in accordance with the quota of the unit of which he is the owner.

[38] The appellant admittedly owns ten (10) units in the scheme. He acquired the units when they were transferred to him on 13 December 2017. He also holds a real right to extend or develop a piece of common property described on the Sectional Plan as RR45. From 2017 in becoming a unit owner the appellant was granted access to the estate by means of an access card issued to him which he would swipe at the electronic reading mechanism situated adjacent to the main entrance whereupon the mechanised boom controlling access would be raised and he would be able to enter and leave the estate. Further, he enjoyed use of a Glovent portal system, which is a computerised visitor management solution application. It is utilised by the unit owners as a facility through which unit owners wishing to lease their units are able to grant access to both prospective tenants and existing tenants, and to persons visiting their units by issuing them with access codes or pin numbers. In March 2019, the respondents terminated the appellant's access to the estate and to the Glovent portal system. The respondents have not justified the termination of the appellant's access to the estate, which they later reinstated.

[39] The right of ownership of an owner in a sectional title scheme is limited and regulated by the scheme and its rules. The body corporate has no general power to limit the rights of owners of units except in terms of the rules. The Glovent portal system was installed in the scheme for use by unit owners to exercise their rights as owners of units in the scheme. It was paid for and its use remains paid for by the unit owners of the scheme. The right to use it belongs to the unit owners. The appellant as owner of units in the scheme has a right to access and use the Glovent portal system. The appellant's interest in and the right to use the system is an incident of his ownership of the units in the scheme. The denial of access to and the use to the appellant of the system is a diminution of his right of ownership to the units he owns. The denial is technically despoliation.[10] However, the denial of access to the system, if it was in terms of the rules, would not be an actionable despoliation, the body

corporate would not be taking the law into its hands. In this regard I differ from the Fisher judgment.[11] I agree with Fisher [12] that access, which is an incident of ownership, should be protected under the principles of mandament van spolie.

[40] A person buying property in a sectional title scheme accepts that the scheme is managed and controlled by a body corporate in terms of the rules. However, I do not agree with the view that he or she forms a contract with a body corporate. The scheme is statutorily created. The relationship with a body corporate is a statutorily created relationship. In this regard I differ from Singh and another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and others,[13] as well as Abraham v Mount Edgecombe Country Club Estate Management Association.[14] Therefore, in my view, an owner challenging a rule is not in the same position as a person resisting compliance with a contract. It suffices in his/her case to show that the rule is not in terms of the power of the body corporate. It is not required to show that the rule is unenforceable in that it is against public policy.

[41] The Glovent portal system is for use by all unit owners. There is no indication that when a decision to install it was taken, it was restricted for use by the unit owners not in arrears with the levies. If it is used, its use must be in terms of rules. In other words, a decision not to grant access or to withdraw access to the Glovent portal system must be authorised by a specific rule. Conduct rule 13 relates to letting of units. Access to the Glovent portal system and letting of units are two distinct acts. The provisions of conduct rule 13 regulate the letting of units whereas there is no rule regulating access to the Glovent portal system. If approval to let a unit is refused in terms of conduct rule 13, the owner may continue to have access to the Glovent portal system although he or she cannot use it to let the unit in question.

[42] Conduct Rule rule 13 refers to letting a unit with approval '... provided the owner receives from the third party...' and that when granting approval, the trustees may prescribe reasonable conditions to the grant of the approval and on breach thereof the approval may be withdrawn. It refers to approval and imposing of conditions at the time the unit is let. It does not authorise blanket withdrawal of approval before there is a request to let a unit. It also does not authorise blanket withdrawal of given approval. Conduct rule 13 cannot be used to deny approval for a reason not related to the particular unit being let or to the third party renting the unit. In terms of conduct rule 13, withdrawal of approval can only be done on breach of the conditions imposed when the approval was granted.

[43] The respondents are not entitled to rely on conduct rule 13, to deny the appellant access to the Glovent portal system as an anticipatory

measure that he would let his units contrary to the provisions of conduct rule 13. In the case of the breach of conduct rule 13, the respondents have remedies available in breach of conduct rules and they may approach a court for an appropriate order. The respondents are bound by the rules of the body corporate and they must find their authority in terms of the rules. They have no

power outside the rules. In the case of a decision purportedly taken in terms of the rules, the decision is reviewable under common law.[15] The grounds of review include, inter alia, failure to apply your mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice';

unwarranted adherence to a set principle as a hard and fast rule resulting in prejudging the matter and failure to consider the merits of the particular circumstances of the case. The respondents' enforcing of conduct rule 13 by denying access to the Glovent portal system is tantamount to a failure to exercise a discretion whether to grant an approval to let a unit or not. It results in them prejudging the issue even before it is brought to them for consideration. It results in a failure to exercise a discretion given to them for the benefit of unit owners in conduct rule 13.

- [44] The respondents in the counter application are seeking an order or declaratory order that the appellant is bound by the provisions of conduct rule 13 in letting his units. The appellant did not let any unit in breach of conduct rule 13. It is irrelevant that he has made the averments that the first respondent is not entitled to have a say as to whom he lets his units. He bought units in the scheme and he is bound by the rules of the scheme. The respondents are entitled to enforce the provisions of conduct rule 13 by proper and lawful means. If the appellant has grounds to oppose the enforcement, he will be entitled to raise those grounds. The respondents cannot apply for a declaratory order as an anticipatory move to stop the appellant from opposing the enforcement measures they take against him.
- [45] The respondents sought a declaratory to counter the appellant's resistance to the manner they enforced conduct rule 13. The appellant is entitled to resist the enforcing of conduct rule 13 in a misconstrued form. There is no live controversy that conduct rule 13 properly construed binds the appellant as an owner of units in the scheme. It is irrelevant that it was previously not enforced. In the result, in my view, there is no jurisdictional basis to grant a declaratory order sought by the respondents.
- [46] Although it may be competent for a court to make a declaratory order in any particular case, the grant thereof is dependent upon the judicial exercise by that court of its discretion with due regard to the circumstances of the matter before it. The fact that the respondents sought a declaratory to enforce misconstrued conduct rule 13 would cause the court to exercise its discretion against making the declaratory.[16] In my view, the court a quo correctly dismissed the counter application albeit for the wrong reasons. The correct reasons justified that it be dismissed with costs.
- [47] The appellant in the court a quo sought costs on attorney and client scale and as against the second to the ninth respondents to pay the costs de bonis propriis. The second to the ninth respondents are trustees of the first respondent. As trustees, they are required to act judiciously and in the best interest of the members of the body corporate. They in their quest to enforce payment of arrear levies relied on legal advice. It must not have been apparent to them that the legal advice was wrong. In my view, this is not a matter wherein

payment of costs de bonis propriis should be ordered. To do so, may cause a chilling effect and scare persons away from availing themselves to act as trustees.

[48] Costs on attorney and client scale are ordered in exceptional circumstances because of special considerations from the circumstances giving rise either to the action or from the conduct of the losing party. The respondents relying on legal advice misconstrued conduct rule 13. The respondents are entrusted with the application of the rules of the scheme. Members of the body corporate look up to the trustees for the control of the affairs and management of the body corporate strictly in accordance with the rules. If there is a situation not falling under a particular rule, the trustees must initiate a process to create the desired rule. The respondents in the manner they conducted the litigation there is no basis to order costs against them on a punitive scale. The fact that they relied on legal advice excuses them from blame for pursuing an issue, which clearly had no merit.

[49] In the result, I would make the following order:

1. The appeal is upheld with costs, including costs of two counsel where so employed.
2. Costs to be paid by the first respondent. No costs or charges to be apportioned to the account of the appellant as a member of the first respondent.
3. The order of the court a quo is set aside and it is replaced with the following:
'1. The application is granted with costs, including costs of two counsel where so employed.
2. Order is made in terms of paragraphs 1.1.1, 1.1.2 and paragraph 1.1.3 of the Notice of motion except that costs are awarded on party and party scale and not de bonis propriis.
3. The counter application is dismissed with costs, including costs of two counsel where so employed.
4. Costs to be paid by the first respondent except that no charges/costs to be apportioned to the account of the applicant as a member of the first respondent.'

MNGADI J

APPEARANCES

Date of Hearing: 4 June 2021

Date of Judgment: 08 October 2021

Counsel for Appellant: Mr Ender

Instructed by: Talbot

Attorneys

Counsel Respondent: Ms Annandale SC with Mr Shapiro

Instructed by: Cox

Yeates

c/o Austen Smith Attorneys

- [1] See: page 349 of the record, para13 of the judgment.
- [2] See: Singh and another v Mt Edgecombe Country Club Estate Management Association (RF) NPC and others 2016
- (5) SA 134 (KZD) para 10 and Abraham v Mount Edgecombe Country Club Estate Management Association [2014] ZAKZDHC 36.
- [3] Nino Bonino v De Lange 1906 TS 120 at 122.
- [4] Eskom Holdings Soc Limited v Masinda [2019] ZASCA 98; 2019 (5) SA 386 (SCA) para 8.
- [5] Ibid para 22.
- [6] Telkom SA Ltd v Xsinet (Pty) Ltd 2003
- (5) SA 309 (SCA) para 14.
- [7] Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and others [2019] ZASCA 30; 2019 (4) SA 471 (SCA) para 19.
- [8] Fisher v Body Corporate Misty Bay 2012
- (4) SA 215 (GNP).
- [9] Singh and another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and others 2016
- (5) SA 134 (KZD).
- [10] See Fisher v Body Corporate Misty Bay 2012
- (4) SA 215 (GNP) paras 10-14.
- [11] Ibid para 9.
- [12] Ibid para 24
- [13] Singh and Another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and Others 2016
- (5) SA 134 (KZD) para 10-11.
- [14] Abraham v Mount Edgecombe Country Club Estate Management Association [2014] ZAKZDHC 36 para 23.
- [15] See Body corporate of the Laguna Ridge Scheme No 152/1987 v Dorse 1999
- (2) SA 512 (D) at 522F-G.

[16] See *Reinecke v Incorporated General Insurance Ltd* 1974

(2) SA 84 (A) at 95C.

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