

SOUTH AFRICA / JUDGMENT

Metro Body Corporate v Diem and Others (7927/2022) [2024] ZAWCHC 372 (18 November 2024)

[2024] ZAWCHC 372

COURT

Western Cape High Court, Cape Town

BEFORE

A Bhoopchand

CASE / FILE NUMBER

7927/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NUMBER: 7927/2022

In the matter between

THE METRO BODY CORPORATE APPLICANT and BELINDA JANE DIEM FIRST RESPONDENT
THE TRUSTEES, FOR THE TIME BEING OF THE DN FAMILY TRUST SECOND RESPONDENT
MOEGSINA ASHMAIL THIRD RESPONDENT THE REGISTRAR OF DEEDS FOURTH RESPONDENT
FIRSTRAND BANK LIMITED FIFTH RESPONDENT

JUDGMENT

Date of hearing: 12 November 2024

Date of judgment: 18 November 2024

BHOOPCHAND AJ:

1. For those who litigate the law in the name of others without their approval and those who break the law and enter its citadels with unclean hands, expect not its generosity nor look to it for reward. Should a Court award costs against a person not a party to the proceedings, and should a Court award costs to any party who comes to it with unclean hands? These are the issues that this application morphed into determining.
2. The Metro Body Corporate is a sectional title scheme incorporated under the Sectional Titles Act 95 of 1986 (“DTA”). The scheme's housing is in the central business district of Cape Town (“the Scheme”/the Applicant”, “the body corporate”). It was established in 2010 and consists of two units. The First Respondent, Belinda Jane Diem (“Diem”), was the registered owner of the smaller Unit 1 of the scheme. Diem acquired her unit in October 2016. The owner of the larger unit 2 is Panjo Investments (Pty) Ltd. The Second Respondent, DN Family Trust (“DN Trust”), purchased the unit from Diem. The registration of its ownership of Unit 1 occurred on 23 November 2020. The Third Respondent, Moegsina Ishmail, is an attorney and conveyancer who transferred Unit 1 to the DN Trust. The Fourth Respondent is the Registrar of Deeds, and the Fifth Respondent is the First Rand Bank. The Second and Fourth Respondents have not participated in this application.
3. The Applicant sought an order declaring that the property transfer from the First Respondent to the Second Respondent was unlawful and invalid. The Applicant also sought consequential relief to cancel the sale registration. The application was initiated on 25 March 2022 by Coughlan Pather (“Pather”), who attested to the founding affidavit. He alleged that he was authorised to represent the Applicant. He does not allege that he was authorised to initiate the application nor to litigate it. As Pather’s authority to initiate and prosecute this application was disputed, he produced two resolutions annexed to his replying affidavit: one of the Trustees of the body corporate authorising him to represent them and the other ratifying his actions in instructing attorneys and instituting the application. Two persons who bore Pather’s surname signed these resolutions as Trustees of Unit 2. They turned out to be his wife and son. More of this later.
4. After the exchange of affidavits,[1] The matter went into limbo. The application was set down for hearing on the opposed motion roll of 19 October 2023 but was removed on 27 September 2023. Pather contended in his written submissions that it was patently clear that he did not intend to prosecute it. The First Respondent acknowledges that in a supplementary note. The First Respondent submitted that Pather did not take active steps to progress the application after 2023. The Fifth Respondent set the matter down for hearing on 12 November 2024.
5. The Fifth Respondent applied to be joined as a party to the application on 11 April 2024. The Fifth Respondent advanced a loan of R4 800 000 to the Second Respondent to enable it to purchase Unit 1 of the scheme. The Second Respondent failed to pay the monthly instalments, causing the entire outstanding amount under the facility to become due and payable. The Fifth Respondent instituted proceedings against the Second Respondent on 26

April 2022 to claim payment of the outstanding balance. It obtained an order to declare unit 1 specially executable. This court issued a writ of execution against the Second Respondent on 31 August 2022. A sale in execution was arranged for 30 May 2023. The Fifth Respondent elected not to proceed with the sale largely due to the dispute between the parties.

6. The Fifth Respondent alleged that no provision had been made for the cancellation of the mortgage bond they held over the property or the repayment of the loan amount. The Fifth Respondent contended that it would forfeit its security and be prejudiced in recovering the outstanding amounts owed if judicial execution followed the ancillary relief sought in this application. The Applicant, through Pather, sought the cancellation of the transfer deed on unit 1. The Fifth Respondent contends that Pather should have known of the mortgage bond held by the Fifth Respondent when he initiated the application. The Fifth Respondent's demands to Pather that the Bank be joined to the application on 8 September 2023 was of no avail.
7. The Fifth Respondent acknowledged that the application was removed from the opposed motion roll of 19 October 2023 and that there was an attempt to convene a meeting between interested parties to resolve the matter. The matter was not resolved when the Fifth Respondent applied to join the application. The First Respondent contended that Pather should have withdrawn the application if he did not intend to prosecute it. After the matter was set down for hearing, Pather filed a practice note and submitted a written argument.
8. The First, Third, and Fifth Respondents raised various points in limine. These included Pather's authority to institute the application, the prescription of the First Respondent's indebtedness to the body corporate, the lack of any legal defect in the First Respondent's sale of the unit to the Third Respondent when viewed under the abstract theory of transfer, and the doctrine of unclean hands as applied to Pather's conduct. The Respondents asserted that Pather realised he held no authority to raise and prosecute the application.
9. Yet, Pather's practice note submitted on his behalf on 8 November 2024 indicated that if the Court found he had the requisite authority to institute the application, it should grant the relief sought. The heads of argument submitted on behalf of the Applicant simultaneously contained the jaw-dropping request: that the application should be struck from the roll with no order as to costs. An application to strike a matter off the roll falls within the exclusive preserve of the Respondents, and the order to do so is within the prerogative of the Court. An Applicant can seek to withdraw his matter with the agreement of the Respondents coupled with an assurance to attend to their costs.
10. The First, Third and Fifth Respondents submitted in unison that the application should be dismissed and Pather should pay their costs. Dismissal would ensure that the application would not resurface at a later date. The Respondents contended that the Applicant should not bear the costs as it would impose an inequitable burden on the owner

of Unit 1 to pay for unauthorised litigation.

WAS THIS APPLICATION PROPERLY AUTHORISED?

11. A prerequisite to ordering costs against Pather, who is not a party to the litigation, is for this Court to find that the Applicant did not authorise this application. Pather did not concede that he held no authority to institute this application. In the practice note submitted on behalf of the Applicant, Pather's authority to institute the application was listed as one of the issues the Court had to determine. This point escaped the attention of the First, Third, and Fifth Respondents when they sought costs against Pather, i.e., the Court had to find that Pather did not hold the authority to initiate and prosecute this application.
12. Section 10 (1) of the "STSMA" provides that a body corporate must be regulated and managed by its rules from the date of its establishment. Section 10(2)(a) provides for amendment of the prescribed management rules. The prescribed management rules differentiate between a body corporate with less than four members and one with more than four. The former applies to this application, meaning that the owners of Unit 1 and Unit 2 or their representatives were the only Trustees of the Applicant. The members had no authority to appoint additional Trustees.
13. The prescription of two Trustees in a body corporate with the same number of units risks deadlock in decision-making. Section 16 of the STSMA allows any owner to apply to the Magistrate's Court for

the appointment of an Administrator to handle administrative mismanagement of the corporate body. Section 9 of the STSMA

permits an owner to litigate against another owner through and by notice to the body corporate to institute proceedings, failing which an application is made for the appointment of a curator ad litem to institute and conduct proceedings on behalf of the body corporate. This application was neither pursued through the appointment of an administrator nor a curator.

14. The party concerned need not authorise the deponent to an affidavit in motion proceedings. It is the institution and prosecution of the proceedings that must be authorised. The limitation imposed on litigation on behalf of corporate bodies is to protect them from unmeritorious proceedings. The authority to initiate proceedings concerning community schemes like the Applicant is restricted to owners who can show that they suffered loss or damage.[2] Pather's resolutions did not comply with the STSMA's requirements. For the resolution to be valid, Pather required the owners' signatures of units 1 and 2. The scheme did not have a managing agent who could have approved litigation with the owner of Unit 2 against the First Respondent. The owner of Unit 2, Panjo Investments, remains as illusory as Pather's authority to institute this application. The Court is satisfied that Pather had no authority to institute this application on behalf of the Applicant.

SHOULD PATHER BEAR THE COSTS OF THIS APPLICATION?

15. Someone has to be liable for the legal costs incurred by a Respondent arising from a failed application. It cannot be that a person with no authority to initiate or prosecute an application can fade into obscurity after causing their opponent to incur costs in defending themselves against the claims instituted against them or, as in the Fifth Respondent's case, causing them costs to defend their legal interest in the order sought. [3] The distinction between locus standi and the authority to act is acknowledged. Authorisation pertains to whether a party is properly before the court, and locus standi concerns the direct interest of a party in the relief sought in legal proceedings.[4] The rule is that a Court will not order costs against someone not a party to the application. There are exceptions to the rule. The Respondents are entitled to look to the person who initiated the application. Pather alleged in his founding affidavit that he represented the First Applicant and later provided tainted authority to litigate on the Applicant's behalf. The reluctance to award costs against someone not a party to the litigation arises because there is no legal conceptual basis to do so. The peculiar circumstances of a particular case may circumvent the difficulty.
16. The First Respondent acknowledged the conceptual difficulty of mulcting Pather with the application's costs. She sought the issuance of a rule nisi calling upon Pather to show cause why he should not personally pay the costs. In her written submissions, she contended that a rule nisi would invariably result in another Judge having to read the file. She suggested that as Pather is already on notice that costs are being sought against him, the Court should grant it subject to Pather's right to apply to reconsider the order. The First Respondent's position evolved after the Applicant belatedly made written submissions. The First Respondent contended that as Pather had addressed the issue of costs in those submissions, he should not be afforded a further opportunity to do so. It seems to be settled law that costs can be awarded against persons who do not hold authority to litigate. [5] A case has been made out to mulct Pather with the costs of this application.

SHOULD THE COURT AWARD COSTS TO THE FIRST AND THIRD RESPONDENTS?

17. The Fifth Respondent has made a case for costs from the date it opposed the application. The case of the Second and Third Respondents is more tenuous on the question of costs.
18. The First Respondent required a levy clearance certificate before she could sell Unit 1 to the Second Respondent. Section 10 of the STSMA requires two Trustees to sign a clearance certificate for it to be valid and binding. Section 15(4)(b) of the STA prohibits the registration of the transfer of a unit in a scheme unless a

conveyancer certifies that all monies a transferor owes to the corporate body have been paid. The First Respondent admits that she signed the levy clearance certificate. The First Respondent provides a plethora of reasons and excuses for signing the certificate in the Applicant's name. Those reasons are irrelevant when considering costs. The STSMA contains provisions to accommodate the position where the First Respondent could not obtain a levy clearance certificate. First Respondent's Counsel acknowledged that the Respondent had recourse to other measures in deadlock situations. The First Respondent could have applied for an administrator

or curator to facilitate her acquisition of a lawful clearance certificate. She did not. The First Respondent had no authority to sign the certificate on behalf of the corporate body. There is no difference in turpitude between her signing the certificate and Pather initiating an unauthorised application.

19. On 12 December 2019, Mangcu Lockwood AJ[6] delivered judgment against the First Respondent for compelling a prospective purchaser of Unit 1 to perform under an agreement of sale. The Court found that the First Respondent had failed to disclose material facts to the prospective purchaser. The Court stated that a reasonable, honest person in the First Respondent's position would have disclosed the information. The First Respondent's application was dismissed, and she was ordered to pay the costs of the prospective purchaser. An application to appeal the judgment was dismissed. The judgment did not deter the First Respondent from unlawfully signing a document on behalf of another.
20. The Third Respondent was the conveyancer who attended to the transfer of Unit 1 to the Second Respondent. She advised the First Respondent that she required the signatures of both trustees on the levy

clearance certificate to proceed with the transfer. Yet, she proceeded with the transfer using a false document signed by one Trustee. She alleges that the First Respondent advised her that the First Respondent was authorised to sign on behalf of the Applicant.

The First Respondent also advised her that the First Respondent was the holder of the larger portion of the participation quota. These allegations do not mitigate the position of the First Respondent. The Third Respondent knew she had to obtain a valid clearance certificate before Unit 1 could be transferred. The Third Respondent sought to justify her actions. Those are irrelevant for determining costs. The Court does not have to make a finding against either the First or Third Respondent to exercise its discretion to award or deny them costs of the application. It merely looks at their conduct against public policy considerations.

21. The fifth Respondent raised the common law principle of "unclean hands" in the context of Pather's conduct. It states that a party cannot seek equitable relief from a Court if they acted unethically, unjustly, or in bad faith concerning the subject matter of the claim. In other words, the party must come to Court with clean hands to receive a favourable outcome. The principle can be invoked by any party, not just the party commencing the litigation. The opposing party can use it as a defence to argue that the claimant should not be granted relief due to their own misconduct. The granting of relief encompasses the cost order sought by a successful party.
22. The "clean hands" doctrine is of English origin. It does, however, equate to the Roam-Dutch maxim of "*in pari delicto potior est conditio possidentis vel defendentis*", which means that in equal fault, the condition of the possessor is more favourable. It is known as the *par delictum* rule. It's a legal maxim that states that when both parties in a dispute are equally at fault, the defendant has the stronger position.[7] The *par delictum* rule is concerned with

the moral guilt of the parties, not their liability. The principle underlying the *par delictum* rule is that the law discourages illegality. It would be contrary to public policy to assist or reward those who defy the law. The rule was strictly and consistently applied in our Courts[8] until it was relaxed.[9] The Appellate Division (SCA) affirmed that considerations of public policy underly the rule but that its application should be limited to instances where public policy should properly be taken into account to achieve simple justice between one person and the other.[10]

23. The Fifth Respondent relied on applying the rule in the context of Pather's conduct. Pather, in turn, referred to the First Respondent's conduct in producing a certificate alleged to be that of the Applicant. This Court censured the First Respondent for previous conduct relating to her previous attempt to alienate Unit 1. The First Respondent informed the Third Respondent that she was authorised to sign on behalf of the Applicant and that she held the

larger portion of the participation quota. The Third Respondent, in turn, facilitated the transfer of Unit 1 to the Second Respondent,

knowing full well that two Trustees had to sign to validate a levy clearance certificate and that this was a peremptory provision of the transfer.

24. The Court could not surmount its knowledge about the First and Third Respondent's conduct. It would be wrong to reward them with the cost order they sought. The Court does not have to decide whether the First or Third Respondents' conduct was in *par delictum* with Pather, i.e., their actions showed equal turpitude. There is no reason why the rule should not form part of the considerations

applicable in exercising a Court's discretion to award cost in any matter.

25. The First Respondent submitted that Pather should pay their party and party costs with Counsel's taxed or agreed costs on the B scale. The Third and Fifth Respondents supported the submission. The Court finds favour with the submission except that in exercising its discretion and as a token slap on the wrist, the First and Third Respondents will be deprived of a percentage of their costs. The latter will be reflected in the order that follows.

ORDER

26. The application is dismissed,
27. Coughlan Pather, with identity number 6[...], shall pay the costs arising from this application,
28. The Fifth Respondent is entitled to its costs, which include the taxed or agreed cost of Counsel on the B scale,
29. The First Respondent is entitled to sixty (60) per cent of her costs, such costs to include the taxed or agreed costs of Counsel on the B scale,

30. The Third Respondent is entitled to eighty(80) per cent of her costs, including the taxed or agreed-upon costs of Counsel on the B scale.

Ajay Bhoopchand

Acting Judge of the High Court

Western Cape Division

Cape Town

Judgment

was handed down and delivered to the parties by e-mail on 18 November 2024

Applicant's Counsel: T Moore

Instructed by Mac Gregor Erasmus Attorneys

Counsel for the First Respondent: A Brink

Instructed by Biccari Bollo Mariano Inc.

Counsel for the Third Respondent: B Braun

Instructed by Jaffer & Associates

Counsel for the Fifth Respondent: W Jonker

Instructed by STBB Attorneys

[1] It is unclear when Pather filed his replying affidavit. The affidavit was commissioned on 16 August 2023

[2] Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another in respect of the repealed section 41 of the Sectional Titles Act

[4] Erasmus, Superior Court Practice, at D1-96

[5] See, e.g., Richards and Another v Rabie and Others (9530/2021) [2021] ZAWCHC 214 (27 October 2021)

[6] As she then was

[7] Klokow v Sullivan 2006 (1) SA 259(SCA)

[8] Brandt v Bergstedt 1917 CPD 344

[9] Jajbhay v Cassim (AD 537) 1939

[10] Afrisure CC and Another v Watson NO and Another [2008] ZASCA 89; 2009 (2) SA 127 (SCA) at para 39 et seq

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