

SOUTH AFRICA / JUDGMENT

North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme (12465/2011) [2012] ZAKZDHC 47 (17 August 2012)

[2012] ZAKZDHC 47

COURT

Kwazulu-Natal High Court, Durban

BEFORE

D. Pillay

CASE / FILE NUMBER

12465/2011

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IN THE HIGH COURT OF SOUTH AFRICA, DURBAN

REPUBLIC OF SOUTH AFRICA

Case no.: 12465/2011

In the matter between

NORTH GLOBAL PROPERTIES (PTY) LTDApplicant

and

BODY CORPORATE OF THE SUNRISE BEACH SCHEME,

SCHEME NO. SS278/2006Respondent

JUDGMENT

Heard: 15 August 2012

Handed down: 17 August 2012

D. PILLAY J

[1] Northglobal Properties (Pty) Ltd (Northglobal) applies in terms of rule 30(1) of the Uniform Rules of Court to set aside the

application for leave to appeal on the preliminary basis that the Body Corporate of the Sunrise Beach Scheme, Scheme number SS278/2006

(the Body Corporate) and the Trustees of the Body Corporate (the Trustees) (the applicants for leave to appeal, collectively referred

to as the applicants) took an irregular step by failing to deliver proper powers of attorney.

Northglobal brought a notice in terms of rule 7(1) to dispute the authority of the attorneys acting for the applicants. It called on the applicants to deliver a power of attorney supported by a valid resolution of the Body Corporate and the Administrator of the Body Corporate I appointed in my

judgment

which is the subject of this appeal.

- [2] The respondents purported to comply with the rule 7(1) notice by delivering a power of attorney on behalf of the Body Corporate and the Trustees supported by a resolution of the Trustees.
- [3] Mr Harpur for Northglobal contended that the resolution has to be by all 17 members of the Body Corporate and not merely the four Trustees because in terms of the rules of the Body Corporate, Trustees cannot incur expenses in excess of R50 000.00 without the members' prior approval. As the costs of this application and any ensuing appeal would exceed R50 000.00 the resolutions and powers of attorneys filed were inadequate.
- [4] Mr H. P. Jefferys for the applicants contended firstly that no power of attorney is required in terms of rule 7(1) until after this application for leave to appeal is granted. Secondly, the resolution by the applicants is sufficient as they represent the members. Furthermore, Northglobal has not proved that the costs of the application for leave to appeal would exceed R50 000.00. It is only the costs of this application and not the appeal itself that is relevant. So he submitted.
- [5] Turning to the applicant's opposition to the Rule 30 application, rule 7(1) is the procedure a party may follow if it disputes the authority of anyone to act on behalf of a party. In the event of such a challenge the person may no longer act unless he satisfies the court that he is authorised to act. Case law confirms that rule 7 is the prescribed procedure for challenging the

authority of a party to act.¹ In the unanimous decision of this division in ANC Umvoti Council the full bench observed

'that the legislature intended the authority of "anyone" who claimed to be acting on behalf of another in initiating proceedings, and not only attorneys, to be dealt with under rule 7(1) . . .'

- [6] I agree with the full bench that rule 7(1) requires a broad interpretation having regard to the purpose of the rule. The purpose of the rule is, on the one hand, to avoid cluttering the pleadings unnecessarily with resolutions and powers of attorneys. On the other hand, it provides a safeguard to prevent a person who is cited from repudiating the process and denying his or her authority for issuing the process.² Rule 7 can be invoked anytime before

judgment. It is a practical rule which mostly turns out to be compliance with a procedural formality. In this case it is not merely a procedural formality. It impacts substantively on the pockets of all the members of the Body Corporate, including the opposition Northglobal.

- [7] Mr Jeffreys is correct that rule 7(3) requires a power of attorney to be filed when an application for a date for hearing of an appeal is set down. Similarly, rule 7(3) requires a power of attorney from other parties to an appeal before the hearing. However,

sub-rules 2 and 3 are additional to sub-rule 1 and do not derogate from it.

- [8] Rule 7(1) requires the court to be satisfied that the party whose authority is disputed is authorised to act. In this case Northglobal has disputed the competence of two Trustees namely, Mr and Mrs Ashworth, to represent the Body Corporate. I appointed an Administrator for the Governing Body because I found that the Trustees, in particular the Ashworths, were unsuitable to represent the Body Corporate. Consequently, I need to be satisfied that the attorneys are properly authorised to act on behalf of the applicants and that the latter are properly mandated to represent and bind the members to the consequences of this application. Therefore properly mandated powers of attorney are required in this application for leave to appeal.

- [9] Any party to legal proceedings bears the onus of proving that its legal representative is properly authorised and that it has the authority to instruct its legal representatives. In this case meeting this onus is not accomplished by simply filing powers of attorney and resolutions on behalf of the applicants. The applicants have to comply with a substantive requirement of the Body Corporate Rules namely, that in instructing legal representatives, they will not exceed their mandate by incurring costs in excess of R50 000.00.

- [10] Contrary to Mr Jefferys' submission, it is not only the costs of the application for leave to appeal that counts but also the costs of the appeal if leave is granted. This must be so if the applicants are serious about the appeal. They are serious about the appeal because the special powers of attorney filed are not only to apply for leave to appeal but also to petition and to prosecute the appeal. This application is but the first step towards the appeal. If they were not serious about the appeal, or if the members decline to grant a power of attorney to prosecute the appeal, this application will be entirely academic. I therefore reject Mr Jefferys' submission that only the costs of this application for leave to appeal counts.

- [11] The costs of the appeal to the Supreme Court of Appeal will certainly exceed R50 000.00. Northglobal's attorney estimated

those costs to be as follows:

preparing heads of argument to be R30 000.00 plus VAT,

perusing heads of argument, replying and appearing R60 000.00 plus VAT; and

preparing the appeal record R50 000.00 plus VAT according to an estimate from Appeal Document Services.

This total of R140 000.00 excludes the attorneys fees on both sides.

[12] However, assuming in favour of the applicants that only the costs of this application is relevant to determining whether they are authorised to instruct legal representatives then they have not discharged their onus of proving that the costs of the application

for leave to appeal will not exceed R50 000.00. In fact, Mr Jefferys was unable to say what his own attorneys costs might be and whether the applicants' legal costs could be pegged to not more than R50 000.00. Expenses for the Body Corporate include potentially the costs of both parties. The applicants cannot guarantee what Northglobal's costs will be.

[13] If this application fails, then the applicants risk incurring expenses in excess of R50 000.00. In that event they would have acted ultra vires in applying for leave to appeal and these proceedings would be not only a nullity but a waste of court time and expense. Furthermore, even if I were to accept the applicants' submissions that the power of attorney by the members is due only after leave to appeal is granted this application for leave to appeal will be entirely academic if the members decline to continue with the appeal.

[14] At the commencement of the hearing I indicated to the parties that as regards the grounds of appeal my prima facie view was that important issues arise in relation to the functioning of a body corporate, meeting procedures, voting and mandates. Consequently, I was inclined to grant leave to appeal. However, the difficulty I had is with the authority of the applicants to bind the members without their express mandate to incur expenses. Even if costs were limited to the application for leave to appeal they could exceed the applicants' mandated limit of R50 000.00. I invited him therefore to indicate whether the applicants were prepared to undertake to accept personal liability for any costs in excess of R50 000.00. He was unable to give me such an undertaking. Consequently, I was unable to assist the applicants to overcome what could have been treated as a procedural hurdle in order to deal with the substantive merits of the appeal.

[15] In response to my enquiry as to whether there was any likelihood of the members refusing to authorise legal representatives to prosecute the appeal, Mr Jefferys pointed out that Northglobal would refuse to authorise the appeal. He referred me to Wimbledon Lodge (Pty) Ltd v Gore NO and Others 2003 (5) SA 315 (SCA) which, he submitted, was authority for his proposition that the authority of a developer who acts fraudulently could be bypassed in litigation. Mr Jefferys did not discuss how Wimbledon Lodge assisted the applicants beyond saying that the similarity was that in both cases the developer acted fraudulently. A significant difference between the two cases is that the allegation of fraud or theft in Wimbledon Lodge was 'essentially unchallenged'.³ Whether Northglobal acted fraudulently is highly contested in the main action for damages. Furthermore, in as much as the applicants seek to exclude Northglobal from voting on the resolution to authorise the applicants' legal representatives, Northglobal itself contests the competence of the

Ashworths to vote on such a resolution as Trustees.

- [15] As to the remedy, rule 7 challenge would usually result in the hearing of an application being postponed. However, Northglobal gave the applicants notice to prove their authority by way of delivering a power of attorney supported by a resolution by the members. Rule 30 prescribes that an application to set aside an irregular step may be made only if an applicant has by written notice afforded its opponent an opportunity to remove the cause of complaint within 10 days and thereafter delivers an application after the expiry of those 10 days. The notice in terms of rule 7(1) was delivered about 9 March 2012 and the application in terms of rule 30(2)(b) was filed on 12 March 2012. The application in terms of rule 30(2)(c) was filed on 19 April 2012. It is not the applicants' case that they did not have an opportunity to the remove the cause of complaint. It is simply that there is no basis for a complaint.
- [16] In the circumstances I grant an order in terms of paragraph (a) and (b) of the notice of motion in the Application in terms of Rule 30(2)(c).

D.PILLAY J

Date of Application: 15 August 2012

Date of Judgment: 17 August 2012

Counsel for the Applicant Mr G. D. Harpur SC

Instructed by: Halstead Paola

Unit 5B, 7 Holwood Park

La Lucia Ridge Office

Estate

Counsel for the Defendant: Mr H. P. Jefferys SC

Instructed by: Tiefenthaler Attorneys

c/o Carl v d Merwe & Ass

3rd Floor, 6 Durban Club

Place

1Eskom v Soweto City Council 1992 (2) SA 703 (WLD) at 705 E-706 C ; Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624 ; ANC Umvoti Council Caucus v Umvoti Municipality 2010

(3) SA 31 (KZP) para 13-29

2Erasmus Superior Court Practice Rule 7(b)(1) - 59

3Wimbledon at para 3?

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