

SOUTH AFRICA / JUDGMENT

Sunrise View Home Owners Association NPC and Another v Nepemalo (Pty) Ltd and Another (46279/2016) [2017] ZAGPPHC 351 (24 March 2017)

[2017] ZAGPPHC 351

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson

CASE / FILE NUMBER

46279/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 46279/2016

DATE: 24/3/2017
In

the matter between: SUNRISE
VIEW HOME OWNERS ASSOCIATION
NPC First
Applicant
THE
BODY CORPORATE SUNRISE VIEW
II Second
Applicant
and
NEPEMALO
(PTY)
LTD First
Respondent
THE

REGISTRAR OF DEEDS: PRETORIA
Second Respondent

JUDGMENT

AC SASSON, J

[1] The applicants have launched an application ("the main application") against the first and second respondents in terms

of which relief is sought against the first respondent (Nepemalo (Pty) Ltd) arising from the sectional title scheme known as SS

Sunrise View Phase 2. In the main application an order is sought that the registration of certain erven, forming part of this phase of the sectional scheme which were registered in the name of the first respondent on 13 August 2003, be cancelled by the second respondent (the Registrar of Deeds: Pretoria) within 60 days of the grant of the order.

[2] This is an interlocutory application pertaining to the locus standi of the second applicant ("the body corporate") based exclusively on the provisions of section 36(6)(e) of the Sectional Titles Act ("the STA"). [1] The STA was replaced with the Sectional Titles Schemes Management Act [2] ("the Act") with effect from October 2016. More in particular, section 36(6) was replaced and by section 2(7) of the Act. Section 2(7) of the Act, however, remained identical to its predecessor and reads as follows:

"2 Bodies corporate

(7) The body corporate has perpetual succession and is capable of suing and of being sued in its corporate name in respect of-

- (a) any contract entered into by the body corporate;
- (b) any damage to the common property;
- (c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;
- (d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this

Act or any rule; and

- (e) any claim against the developer in respect of the scheme if so determined by special resolution."

[3] I will continue to refer to the section 36 of the STA in light of the fact that the parties have referred to this section in their

papers and their Heads of Arguments but with the understanding that section 36(6) of the STA has been replaced by section 2(7) of the Act (which reads identically).

[4] In this application the first respondent seeks a declaratory that Vogel Inc. may not act on behalf of the body corporate by virtue

of the provisions of section 36(6)(e) and may not do so until they have satisfied this court that they are so authorised in terms of the provisions of section 36(6)(e) of the Act.

[5] It is trite that a body corporate of a sectional title may sue and be sued in its own name subject to the express provisions of section 36(6)(a) - (e) of the STA. Put differently, a body corporate does not have locus standi to sue or to be sued in respect of a cause of action which is not provided for in section 36(6) of the STA. In respect of any claim against a developer, section 36(6)(e) specifically provides that a special resolution needs to be obtained to sue the developer. The rationale for this requirements is set out in the matter of Body Corporate of Greenwood Scheme v 7512 Sandown (Pty) Ltd and others:[3]

"In my view, the amendment does nothing more than limit the action against the developer to the fact that a special resolution needs to be obtained to sue the developer. I am of the view that it was the requirement of the special resolution which caused a legislator to make the amendment and not the creation of a right to sue the developer which did not formerly exist. Indeed, a reading of s 36(6) without the amendment does not indicate that there is any limit in relation to the body corporate's ability to sue the developer. Section 36(6) (e) refers to an action against the developer in respect of 'the scheme', which in turn is defined to mean 'a development scheme' and the latter is defined to mean a scheme in terms of which a building or buildings situated or to be erected on land within the area of jurisdiction of the local authority is or are, for the purposes of selling, letting or otherwise dealing therewith, to be divided into two or more sections, or as contemplated in the proviso to s 2(a), and that 'developer' is in turn defined to mean a person who is the registered owner of land, situated within the area of jurisdiction of a local authority, on which is situated or to be erected a building or buildings which he has divided or proposes to divide into two or more sections in terms of the scheme, or the holder of the right referred to in s 25 to extend a scheme, or his successor in title. In this sense, it is plain that the legislator intended that litigation so fundamental to the interests of owners could not be commenced without the express consent of three quarters of them, hence the rationale for the amendment, which relates more to the requirement of a sanction and the procedural safeguard of a special resolution than the creation of an action which did not exist before. (A special resolution in terms of the definition section means a resolution passed by a majority of not less than three fourths of the votes (reckoned in value) and not less than three fourths of the votes (reckoned in number) of members of the body corporate who are present or represented by proxy or by representative recognised by law at a general meeting of which at least 30 days' written notice, specifying the proposed resolution, has been given.)[4] It by no means follows that a legislator intended to limit such actions against the developer (save procedurally as stated above) and to further limit the action against the architect or the director of a developer. On the contrary, I am of the view that it was the intention of the legislator to merely limit actions against the developer by providing

that such actions could not be instituted without a special resolution. The requirement of a special resolution ensures collective decision-making and consensus of more than a majority of members."[5]

[6] The first respondent contends that the main application resorts under section 36(6)(e) of the STA whilst the applicants contend that the main application resorts under section 36(6)(c) and

(d) of the STA

[7] On behalf of the body corporate it was submitted that it is not necessary to have obtained a special resolution as section 36(6)(e) is not applicable to the relief sought in the main application which is, according to the argument, in relief sought in the form of a "declaratory". More in particular, it was submitted that the relief sought in the main application does not comprise a "claim" against the developer but is aimed at enforcing sections of the STA in respect of the unlawful registration

of units and where property reverts back to the communal property upon the lapse of a real right of extension.

[8] I do not agree with the submission that section 36(6)(e) is not applicable in light of the following common cause facts: Section 36(6)(e) of the STA specifically provides for "any claim" which the body corporate seeks to prosecute against a developer concerning the scheme. If regard is had to the relief sought in the main application, there is no doubt that the relief sought by the body corporate falls within the ambit of "any claim". The submission that the seeking of a declaratory cannot constitute a "claim" is overly simplistic in light of the fact that this section provides for "any claim". Furthermore, section 36(6)(e) of the STA is the only section that refers to "any claim" against a "developer" and hence the only section that grants locus standi to a body corporate in respect of claims against developers. In this regard it is of particular importance to note what the Supreme Court of Appeals held in *Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd*. [6] The SCA made it clear that a body corporate only has perpetual succession and therefore capable to sue in its own corporate name in respect of the five matters referred to in section 36 of the STA. More in particular, the SCA made it clear that in normal circumstances only the owners of a property or the joint owners of the common property

(which is owned by them jointly) would be able to sue. Section 36 enables a body corporate to sue in its own corporate name in those instances specifically identified in section 36. A body corporate has no contractual relationship with a developer. The provisions of section 36(6)(e), however, makes it possible to sue a developer despite the absence of such a contractual relationship:

"[24] A body corporate is constituted by law, and it is charged with responsibility for the enforcement of the rules and the control, administration and management of the common property for the benefit of all members. A body corporate has perpetual succession and is capable of suing or being sued in its own corporate name in respect of the five matters referred to. Some of the powers, such as the one in paragraph (a), are only declaratory but the power granted in paragraph (b) - and in some circumstances paragraph

(c) as well - gives it an entitlement it would otherwise not have had. Under normal circumstances only all the owners of the common property, ie the owners of the sections, would have been able to do so jointly as the common property is owned by them jointly. Section 36(6)(e) also bestows a power it would not otherwise have had on the body corporate: there is no contractual arrangement between the developer and the body corporate and, while there may be cases where a developer is contractually bound to a sectional owner to give effect to the scheme, the body corporate is in no such relationship with the developer. However, s 41 is not intended to detract from the powers enjoyed by the owner of a section to institute proceedings where his own rights whether of ownership in his unit or otherwise are infringed. In addition, the owner of a section who is prejudiced by a developer's failure to comply in this manner, may apply to court in terms of s 25(13) for an order for proper compliance with the terms of the reservation or other relief, including damages. Such an owner is, in other words, given the required standing to enforce strict compliance with the reservation. This is essentially the relief prayed for by the appellants in this case. The body corporate is empowered by s 36(6)(e) to institute proceedings against the developer 'in respect of the scheme; if so determined by special resolution'. This general power of the body corporate, however, does not detract from the specific right given to the individual owner under s 25(13)."

[9] In light of the above it is concluded that the body corporate is only able to proceed in the main application if so determined by

special resolution. In the event the first respondent's interlocutory application should succeed.

[10] Order:

1. Vogel Inc. was/is not authorised to bring the main application on behalf of the second applicant in that the second applicant has not complied with the provisions of section 36(6)(e) of the Sectional Titles Act 95 of 1986 (as amended by section 2(7)(e) of the Sectional Titles Scheme Management Act 8 of 2011).
2. Vogel Inc. may no longer act for the second applicant until they have satisfied this Court that they are so authorised in terms of the provisions of section 36(6)(e) of the Sectional Titles Act 95 of 1986 (as amended by section 2(7)(e) of the Sectional Titles Scheme Management Act 8 of 2011).
3. The applicants are directed to pay the costs of this application jointly and severally the one paying the other to be absolved.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the first and second applicants: Adv AJ Swanepoel

Instructed by:

Vogel Incorporated

For the first respondent:

AG South SC

Instructed by:

MacRobert Inc.

[1] Act 95 of 1986.

[2] Act 8 of 2011.

[3] 1999 (3) SA 480 (W) at 485B-486A.

[4] My emphasis.

[5] At 458C - 485 A.

[6] 2010 JDR 0596 (SCA) at par 24.

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