

SOUTH AFRICA / JUDGMENT

Willow Acres Homeowners Association v Olatejo & Sons Trading Enterprises CC (33400/2016) [2017] ZAGPPHC 786 (3 November 2017) [2017] ZAGPPHC 786

COURT

North Gauteng High Court, Pretoria

BEFORE

Strydom AJ

CASE / FILE NUMBER

33400/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO.33200/2016

Not

reportable

Not

of interest to other judges

Revised

3/11/2017

In

the Matter between:

Willow

Acres Homeowners Association

(Registration

No.2003/018683/08) Appellant

and

Olatejo

& Sons Trading Enterprises CC

(Registration

No.2007/102684/23) Respondent

JUDGMENT**STRYDOM AJ**

[1] This is an application for the winding up of the respondent. The respondent is a homeowner in the housing complex of which the

applicant is the homeowners association. The respondent is contractually bound by the rules of the applicant. The respondent filed a counterclaim for statement a debatement of account.

[2] The applicant, in its capacity as creditor of the respondent, relies on the respondent's inability to pay its debts to the applicant,

alternatively, on the ground that it is just and equitable that the respondent be wound up.

[3] The applicant made it clear in the founding affidavit that, as far as the outstanding debt is concerned, the applicant only relies on a taxed bill of costs.

[4] In paragraphs 8.2 and 8.3 of the founding affidavit, the following was stated in this regard:

"8.2 Further legal costs were taxed by the applicant's current attorney of record as agreed with the respondent's third set of attorneys of record on 21st October 2014 as evident from the allocator annexed hereto annexure WAOG.

8.3 For the basis of this application, applicant will rely on the taxed bill dated 21st October 2014 and taxed bill alone as proving the indebtedness of the respondent to the applicant."

[5] Considering that the applicant also relies on just and equitable grounds for the winding up and that the respondent's case is that he disputes the debt, the court will have to consider the sequence of events that ultimately led to the taxed bill of costs dated 21 October 2014. This factual matrix will have relevance as far as the counterclaim is concerned.

[6] During or about 2009, the respondent fell into arrears with its monthly payments due to the applicant. During January 2009, the applicant issued a summons in the Magistrates Court for the collection of arrear levies in an amount of R5, 272.26. The applicant

obtained a default judgment.

[7] During or about July 2010, the applicant brought a liquidation application now alleging that the outstanding debt was approximately

R29, 000. This amount must have included legal costs as the levies and other charges could not have escalated from the R5, 272.26 to this amount over the relatively short period.

[8] During or about January 2011, this liquidation application was settled.

[9]The correspondence that led to the settlement of the previous application should be considered to decide whether the settlement included settlement of the costs of the previous liquidation application. In a letter from the applicant's attorneys at the time it was stated as follows:

"Met verwysing na bovermelde aangeleentheid erken ons ontvangs van u skrywe gedateer 7 Desember 2010.

1. Ons klient is bereid om R7 000 terug te skryf op u klient se rekening;
2. U klient die agterstallige bedrag betaal in drie gelyke paaielemente aan die einde van Januarie 2011, Februarie 2011 en Mart 2011.
3. Oat u klient betaling van sy normale heffings in stand hou."

[10] In the reply thereto, the respondent's then attorney stated:

"Ons verwys na u skrywe van 13 deser en is die saak nou geskik op die basis soos uiteengesit in u bovermelde skrywe."

[11] Nothing was said regarding the cost incurred to summons the respondent, to obtain default judgment and to launch the previous

liquidation application.

[12] According to the statement of account attached by the applicant as annexure WA07, legal fees in the amount of R7,000 was written-off on 27 January 2011. At that stage, according to the statement of account, the legal fees had not yet been debited pertaining to the liquidation application.

[13] For purposes of this judgment, no further detail concerning the settlement is required, suffice to say that the respondent over a longer period as was agreed between the parties paid the settlement amount. The respondent thereafter paid his monthly levies by way of debit order.

[14] By 12 March 2012, the respondent's account had a "nil" balance after the respondent paid a lump sum in the amount of R9 779.81 which, according to his letter dated 20 March 2012, included payment for legal costs.

[15] On 19 March 2012, a debit was made on respondent's statement debiting the account with R21,710.71 in relation to "Legal Charge Recovery (attorney payment)". The respondent declared a dispute and wrote to the applicant that the payment he made in the amount of R9 779.81 settled costs as well.

[16] It is the respondent's version that the January 2011 settlement included a settlement of the legal costs. I do not have to decide this issue as the applicant does not rely on this debt for purposes of its liquidation application. I will note, however that after the settlement, the respondent's attorney, after receiving a notice of intention to tax a bill of costs, participated

in the taxing process. This will militate against a version that the costs of the liquidation was also settled in January 2011. Important for the decision in this matter is to note the contents of two letters:

[16.1] On 15 August 2013 the respondent attorney, Van der Merwe, wrote to applicant's current attorney, De Lange, that respondent met with De Lange, without legal representation, and after the consultation respondent was provided with De Lange's account in the amount of R11 381.70. It was noted that according to respondent this account was excessive.

[16.2] On 20 August 2013 Van Der Merwe again wrote to De Lange after he has met with De Lange. He noted as follows: "We confirm the agreement that your account as well as the account of Stuart van der Merwe Incorporated will be taxed before the Registrar under the same case number as the liquidation application. We further confirm that the notice of the taxation can be send to writer hereof at (...)and that the account will be taxed on an attorney and client scale.

[17] The notice of taxation was delivered to Van Der Merwe on 25 Oktober 2013 but only in relation to the bill of attorney Stuart van der Merwe. The taxation was attended by Albert Dreyer from Couzyn Hertzog en Horak, acting for respondent on 4 February 2014. The bill was tax in the amount of R18 474.56. This figure differ from the amount of R21 710.71 previously debited against the respondent's account.

[18] This dispute regarding the addition to the account of these legal costs occasioned the account of the respondent to remain in arrears, despite a lump sum payment during April 2014 in the amount of R17, 926.79.

[19] On 21 August 2014, an attorney's invoice of R43, 882.50 was debited on the account but it was, on 27 February 2015, reversed.

[20] On 27 February 2015, an amount of R15, 494.25 was debited in respect of an attorneys invoice. On the same day "fees as taxed on 12 October 2014" was added to the account in the amount of R28, 388.25. These two amounts added up to the figure of R43, 882.50 previously reversed on the account. It is clear what happened here. Only R28, 388.25 could be taxed and another attorney's invoice was also debited to the account. This was in conflict with the agreement referred to above. Why agree to have an attorney's bill taxed if the full amount of the account is debited against the account? It goes further, it was agreed between the attorneys that notice will be given of taxation. Notice of taxation was provided as far as the first taxation is concerned. The applicant has provided no evidence that a further notice of taxation was given in relation to the taxation of the account of Attorney Eduard De Lange.

[21] On 6 March 2015, a further R19, 098, 87 was debited pertaining to another attorney's invoice.

- [22] From the above, it is clear that the bulk of the outstanding amount on the respondent's account is in relation to legal costs. The arrears on the account of the respondent escalated from the original R5, 272.26 to an amount of R104, 000 as at 30 March 2016. This happened despite the fact that after the first liquidation application was brought the respondent's monthly levies were paid by way of debit order.
- [23] As indicated above, the applicant placed sole reliance on the taxed bill of October 2014 to prove the indebtedness of the respondent to the applicant and for the allegation that the respondent is unable to pay its debts.
- [24] From a reading of the taxed bill it is unclear in relation to what legal work this bill was compiled. The respondent denied being liable for this bill, hereinafter referred to the "second taxed bill". The respondent stated that there was no agreement with any one of the respondent's attorneys that any further account could be taxed. The respondent further questioned the taxed bill which had the same case number and a number as the liquidation application, the account of which was already settled, and generally on the basis that he was not aware that further legal costs were incurred.
- [25] The applicant explained that the second taxed bill came about as the first taxed bill was not paid and that further legal action had to be proceeded with whereby further legal costs had been incurred by the applicant. No detail regarding this further legal costs which amounted to R43, 882.50 is provided. This amount comprises of the second taxed bill in the amount of R28, 388.25 and another attorney's account in the amount of R15, 494.25.
- [26] The applicant further avers that as the further legal costs were disputed by the respondent, the parties' legal representatives, in a further effort to settle the issue between the parties, agreed that these further legal costs be taxed, which was subsequently done. This is in line with the correspondence but on the papers I cannot find that notice of taxation, as was agreed between the parties, was given in relation the second bill of costs. The probabilities favours the version that such notice was not given as if it was, one will expect that attorney De Lange would have had such notice and would have attached it to the papers in this matter.
- [27] The court was referred to the written Rules of the applicant which is binding on the respondent. This was not in dispute. In terms of the rules the association can take legal action against members in arrears and will be liable for all legal costs incurred in connection with legal action on an attorney and client scale, together with relevant disbursements. It will be implied in the rules that the legal cost charged will be reasonable and not exorbitant. Not all legal costs charged was taxed. In fact, in some instances a portion of the legal cost were taxed but a further portion was levied against the account of respondent.

[28] In casu, the applicant and the respondent agreed that the legal bills will be taxed after notice was given. Implied in such an agreement will be that the taxed amounts will be the amounts charged by the applicant and included in the account of respondent. This was

not done. Apart from the many debits for legal costs which is disputed the second tax bill is also a disputed debt. This issue

cannot be decided on paper and the debt upon which the applicant relies for the liquidation of the respondent remains a disputed debt. That being the case, the applicant failed to prove a debt on which it could rely for purposes of this liquidation application.

[29] The applicant also relied on just and equitable grounds for the liquidation of the respondent. The applicant failed to make out a case in this regard. In paragraph of applicant's replying affidavit it admitted that the accounts of the applicant was disputed

pertaining to legal fees. In such circumstance it will not be equitable to liquidate the respondent as I find that the dispute is bona tide and the applicant was aware of the existence of the dispute.

[30] On behalf of the respondent it was argued that it was an abuse of court process to launch a winding up application against a property owning company for a debt of R28 388, 50. It was argued that notwithstanding the fact that the applicant was made aware of the fact that the debt is disputed on bona tide and reasonable grounds, the applicant still persisted with the application. I agree with this argument advanced by the respondent. I was referred to the case of *GAP v Goal Reach Trading* 2016 (1) SA 261 (WCC) at para 20:

"The rule that winding up proceedings should not be resorted to as a means of enforcing payment of a debt, the existence of which is bona fide disputed on reasonable grounds, is part of the broader principle that the court's processes should not be abused. Liquidation proceedings are not intended as a means of deciding claims which are genuinely and reasonably disputed. The rule is generally known as the 'Badenhorst rule', after one of the leading cases on the subject, *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956

(2) SA 346 (D) at 347H-348C."

[31] The respondent owns a property in the complex. If the applicant was so convinced of the existence of the debt it could have obtained a judgment against the respondent and could have executed against the respondent's immovable property. This was not done but the applicant rather opted to use the liquidation proceedings which really is not meant to be used to collect relatively small amounts of money, at a cost which is out of proportion to the alleged debt; especially not in cases where the debt is disputed on reasonable and bona fide grounds.

- [32] The respondent also brought a counter application against the applicant seeking an order that the applicant renders a full account, supported by vouchers, of all of the invoices, penalties, levies and attorneys accounts imposed as reflected on the respondent's statement and debatement of account. Payment was further claimed of whatever amounts appear to be due to the respondent after debatement of the account.
- [33] The applicant averred that it provided the respondent with monthly statements which was never disputed. It is stated that save for the attorney's accounts and the taxed bill of costs no other supporting document exists. All document have been provided.
- [34] Considering that the applicant is the respondent in the counter application the court must accept this version. Moreover, these

documents referred to were attached to the papers. The respondent failed to make out a case for the relief it is seeking in the counter application.

[35] The following order is made:

The applicant's application for the winding up of the respondent is dismissed with costs. The respondent's counter application is dismissed, with costs.

Date of hearing 23 October 2017

Date of judgment 13 November 2017

For the applicant: Adv Coetsee

Instructed by: Eduard De Lange Attorneys

For the respondent: Adv APJ Eis

Instructed by: E Beyers Attorneys

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