REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 47219/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED. NO

6 June 2022 .....

DATE SIGNATURE

In the matter between

THE BODY CORPORATE OF CANDICE GLADES Applicant

And

DERROCKS ATTORNEYS First Respondent

VERNOL KEVIN DERROCKS Second Respondent

JUDGMENT

SIWENDU J

Introduction

[1] The applicant is the Body Corporate of Candice Glades, a Sectional Title Scheme established by virtue of the registration of the Sectional Title with SS 714/2004 as is required under the Sectional Titles Management Act 8 of 2011.

It has its principal place of business at 18 Maple Drive, Northwold, Ext 62, Randburg, Gauteng.

[2] The first respondent is Derrocks Incorporated Attorneys, with registration number 2015/294773/21, a company duly registered and incorporated in terms of the company laws of the Republic of South Africa having its principal place of business situated at Aspen Business Park, Chicago House 1" Floor, 3 Madison, Aspen Lakes, Gauteng.

[3] The second respondent is Vernol Kevin Derrocks an adult male attorney and a director alternatively a shareholder of the first respondent currently residing at 7 Losberg Street, Glenvista, Johannesburg, Gauteng.

[4] The applicant seeks an order for the payment of an amount of R270 219.02 plus interest at the mora interest rate from the 20 of February 2019 being the date of registration of the property to date of final payment jointly and severally from the respondents.

[5] It claims that the second respondent is liable, jointly and severally, with the first respondent for the debts and liabilities of the first respondent as are or were contracted for during his period of office in terms of Section 34(7)(c)(i) of the Legal Practice Act 28 of 2014., The second respondent's liability stems from Section 34(7)(c)(i) of the Legal Practice Act 28 of 2014 as a director of the law firm.

Background

[6] On 28 November 2018, the first respondent represented by the second respondent provided the applicant with an irrevocable guarantee to pay to the applicant R270 219.02 in respect of outstanding levies due to the applicant.

[7] The undertaking was made in the context of a transfer of Unit 11 then jointly owned by the late Lungelo Gregory Magubane and Thembinkosi Themba Ronnie Shabangu in equal shares. Lungelo Magubane passed away on the 3 January 2014. It is common cause that as at March 2014, arrear levies were due and owing to the applicant in the sum of R 13 941.88. The property was sold to a third party for a purchase price of R700 000.00 on the 3rd of October 2018. An email from Nedbank dated 3 March 2014 reveals that the home loan

over the property which appears to have been secured bys bond was settled and the account stood in credit.

[8] The executrix of his estate appointed the first respondent to assist in the administration, liquidation and distribution of the deceased's late estate. The first respondent was appointed as a conveyancer to register and transfer of the property to the new owner.

[9] Transfer of the property could not pass to the new purchaser. The applicant was required to issue a levy clearance certificate in terms of Section 15B(3)(a)(1)(aa) of the Sectional Titles Act 95 of 1986. It is common cause that the applicant withheld the levy clearance certificate until the outstanding levies were paid.

[10] During November 2018, the first respondent approached the applicant to provide the levy clearance figures. Angor Property Specialists (Pty) Ltd (Angor) the applicant's property management agent, furnished the levy clearance figures provided to the first respondent on the 22 November 2018. The relevance of their role features later in the judgment.

The Undertaking

[11] In a letter dated the 26 of November 2018, the first respondent represented by the second respondent provided the applicant through the managing agents, Angor with the following letter:

> *"We wish to inform you that we are the attorneys attending to the transfer of the above property, as well as the estate. We received levy clearance figures in the amount of R270 639.02 for the provision of a levy certificate /rates certificate for transfer purposes. We are prepared to provide you with an irrevocable undertaking to make payment in the amount of R270 639.02 (which includes an additional amount of R580.00) on date of registration. We expect the registration to be around the 14"of December 2018.*
>
> *Kindly advise whether this undertaking is acceptable."*

[12] On 28 November 2018 at 09:15 Angor informed the first respondent that the applicant was prepared to accept the undertaking, but the full amount must be paid upon registration. On 28 November 09:24 the first respondent informed Angor that:

"We will pay the total outstanding on the day of registration."

[13] As already stated above, the property was transferred and registered on 19 February 2019. The applicant claims that the respondents issued an irrevocable undertaking to pay the levies due. It contends that the aforementioned undertaking created a binding agreement between the applicant and first respondent, as well as a personal obligation on the first respondents' part to pay the applicant.

[14] The first respondent breached the agreement and failed to pay on registration of the property on 19 February 2019. Instead, months after the registration of the property, the first respondent presented the applicant with a settlement offer on 9 July 2019 which read as follows:

> *"My instructions from client is that we present a full and final settlement offer in the amount of R50 000,00"*

[15] When confronted with the undertaking the first respondent stated that:

> *"The estate does not have sufficient cash to cover the expense. I will send you the Liquidation and Distribution Account, then the Body Corporate can decide whether they want to proceed or not."*

[16] In opposition, the respondents categorically deny that the correspondence of 28 November 2018 created a binding obligation on them to pay the R270 219.02 claimed. They say the applicant's claim against them is based on a misconstruction of the correspondence because at all times, the applicants were alive to the fact that the respondents acted as agents of the Estate Late Magubane**.** The subject matter of the correspondence between the applicant and the respondents expressly related Estate Late Magubane's account for levies.

[17] Over and above this, the respondents raise two interrelated defences, namely a misjoinder and a misrepresentation to dispute liability. It is contended that the applicant, ought to have brought an action against the Estate Late Magubane and/or the co — owner of the sectional title Unit in question, of Themba. The debt was claimable from the Estate Late Magubane and Themba

[18] In addition, as a further defence, they contended that the claim had prescribed.

[19] In so far as the misrepresentation, the respondents claim that apart from the debt not being the debt of the respondents, as at February 2019, the undertaking to settle R270 209.02 had been repudiated and revoked due to misrepresentation on the part of the applicant. The point about the alleged misrepresentation of the amount due, is linked to a call for a debatement of the account after the fact of the undertaking.

[20] The respondents further contend that although the duty to make payment of the debt on behalf of the Estate Late Magubane remained, the obligation to pay the amount of R270 209.02 fell away because there was a dispute about the levies there was a misrepresentation and no meeting of the minds. I pause to mention that all this is raised after the fact months after the registration of the property.

[21] The respondents complain that the applicant merely refers to the levy clearance certificate that was provided to the respondents on the 22 of November 2018 attached to the founding affidavit. The breakdown does not substantiate the amounts due in any way. They contend applicants have not denied the misrepresentation therefore no amount of money could be regarded as due by the Estate Late until the debatement of the account. They say their request for the debatement of the levies account was met with material discrepancies in the levies account.

Issues

[22] The questions are whether there is a biding undertaking, if it is found there is –

- Can the terms be construed as an assumption of personal liability either by the first or second respondent?
- whether the respondents can resile from it on account of an alleged misrepresentation and a lack of debatement of the account.
- the application of section 34(7)(c)(i) of the Legal Practice Act to the matter; and

[23] The starting point is the terms of the undertaking itself. Mr Carstens (for the applicant) contends in considering the undertaking, the court must consider the

express intention from its express wording. I agree. The undertaking is embodied in two letters which state:

"We are prepared to provide you with an irrevocable undertaking to make payment in the amount of R270 639.02 (which includes an additional amount of R580.00) on date of registration.

and

"We will pay the total outstanding on the day of registration."

[24] Over and above the consideration of the express terms of the undertaking, the principle that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also to give it a commercially sensible meaning applies to the case. [1]

[25] The letter of undertaking was issued pursuant to the transaction to transfer the property. It is clear from the wording that the undertaking is to effect payment upon an occurrence of an event, namely the registration of transfer of the property. It is unequivocal that payment would be effected on registration from the receipt of the proceeds of the sales.

[26] The argument by Mr Liphosa (for the respondents) in opposition is that (1) the undertaking is based on an inference that the first respondent took personal responsibility to settle the debt of the estate. He contends that (2) the express terms are *"we are prepared to"* do not make the undertaking unconditional. He argues that without the express undertaking that "*I take responsibility",* the first respondent cannot be held personally liable. Furthermore, (3) there was no obligation created because the undertaking was provided on behalf of the Late Estate under administration. He relies on the decision in *Stupel & Berman Inc v Rodel Financial Services Pty*[2]

[27] Mr Carsten (for the applicant) disputes this based on the court's decision in *Steyn v LSA Motors Ltd*[3] where the court notes that part of the consideration is not merely the offerer's implicit intention and states that :

Remaining for consideration is the further and crucial question whether a reasonable man in the position of the offeree would have accepted the offer in the belief that it represented the true intention of the offeror, in accordance with the objective criterion formulated long ago in

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[1] Lewis JA in Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund[1] affirms
[2] *Ltd 2015 (3) SA (SCA) at para.15*
[3] 1994 (1) SA49(A)

the classic dictum of Blackburn J in Smith v Hughes (1871) LR 6 QB 597 at 607. Only if this test is satisfied can the offeror be held contractually liable."

[28] I find favour with the view because the undertaking was by a firm of attorneys. Secondly, as was found by the court in *Enslin v Fourie*[4]*,* the undertaking was not qualified in any way. Contrary to the partial reading of the documents making up the undertaking by Mr Liphosa, the second email which confirms the first says: "*We will pay".* The only condition it was subject to was the registration of the property and that occurred. In any event, the fresh challenge to the letters of undertaking contradicts the answering affidavit. The contents of the letters were admitted and not disputed.

[29] The decision in *Stupe*l*,* does not assist the respondents in this instance. Mr Liphosa confirmed that in *Stupel & Berman*, it was clearly stated that they were acting *"on behalf of"* and the first respondent did not state this. The respondent's mandate was not terminated. Furthermore, the court in *Stupel* did not alter the position confirmed by the court in *Frans Jacobus Kruger h/a Kruger Attorneys v Property Lawyer Services (Edms) Bpk*[5] that the fact that a party acted as the agent of another in giving the undertaking does not mean, that it could not have incurred a personal liability in terms of the letter of undertaking. There is no merit in the defence.

[30] The next issue is whether the respondents could rely on a misrepresentation after the fact to resile from the undertaking. Inherent with this argument is an indirect admission of liability based on the undertaking. This point is connected with the demand for a debatement of the account. I pause to mention that the express words used in the undertaking embodied in the first email are that it was *"irrevocable*".

[31] I am unable to discern from the papers exactly what, by whom and when the misrepresentations were allegedly made. What is clear however is that the applicant's managing agents, Angor presented the respondent the levy statement. The email exchanges between them are annexed to the papers and pleaded by the applicant.

[32] Instead on 9 July 2019 when asked about the payment which had been outstanding for more than two months, the respondent says:

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[4] At para 6, 9 and 10

[5] [2011] JOL 27347 (SCA)

"I was away for a month and only came back today. I discussed the matter with client before going on leave. My instruction from client is that we present a full and final settlement offer in the amount of R50 000.00. Should this offer not be acceptable, client is prepared to face the litigation, as there are clear discrepancies in how the statement is compiled.

[33] In any event, the court in *Novick and Another v Comair Holdings Ltd and Others*[6] Coleman J set out what a party seeking to avoid a contract on the ground of misrepresentation must prove, namely: -

(a) That the representation relied upon was made.

(b) That it was representation as to a fact.

(c) That the representation was false.

(d) That it was material, in the sense that it was such as would have influenced a reasonable man to enter into the contract in issue

(e) That it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided.

(f) That the representation did induce the contract.

[34] Other than a vague allegation of a discrepancy, the respondents do not provide any information or basis on which the discrepancy is based. In *Doyle v Fleet Motors*[7]*and Doyle v Board of Executors*[8]*,* and party seeking a debatement should aver :

(a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought;

(c) the defendant's failure to render an account.

[35] None of these were alleged in the answering affidavit. In addition, it is clear that the respondents were provided with cancellation figures and a full levy statement reflecting the brake down of the amounts due. As the attorneys and conveyancers, it was open to them to request a further break down beyond that evident from the levy statement before providing the undertaking or at the very latest, before effecting the transfer. They failed to do so. They cannot resile from the undertaking after the fact. Once more, there is no merit to the defence.

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[6] 1979 (2) SA 116 (W) at 149 D-H and 150 A-B,
[7] *1971 (3) SA 760 (T)*
[8] 1999 (2) SA 605 (A)

[36] Linked to the argument that the undertaking is based on inferences and hearsay, Mr Liphosa also sought to persuade the court that the application is subject to Rule 6(5)(g) of the High Court Rules. He argued that the relief sought by the applicant could not be granted due to several material disputes of fact. He contended that the letter of undertaking was issued to *Angor* the managing agents and there is no proof that Trustees accepted the undertaking. On this account it was not binding. He argues that the application is best served by hearing of oral evidence and rest of the case is an academic exercise.

[37] None of these issues were raised in the answering affidavit and there is nothing to indicate there is a genuine dispute of facts on the papers. Furthermore, it is not disputed that Angor were managing agents for the applicant. There is nothing to prevent the applicant form taking up the cudgels to prosecute this claim as principal. The argument is misplaced.

[38] Lastly the respondents contend that S37(7)(c)(i) of the Legal Practice Act does not apply in this case. The argument goes as follows: the first respondent could not be held jointly and severally liable at the same time with the second respondent if he had taken personal responsibility. Invoking section 34(7)(c)(i) indicates that the first respondent could have only acted in his professional capacity as agent and administrator.

[39] *Section 34(7)(c)(i) of the Legal Practice Act 28 of 2014 (The Act) provides as follows:*

(7) A commercial juristic entity may be established to conduct legal practice provided that, in terms of its founding documents—

(c) all present and past shareholders, partners or members, as the case may be, are liable jointly and severally together with the commercial juristic entity for—

(i) the debts and liabilities of the commercial juristic entity as are or were contracted during the period of office ..." (emphasis added).

[40] The section mirrors its predecessor in section 23 of the Attorneys Act 53 of 1979

23(1) A private company may, notwithstanding anything to the contrary contained in this Act, conduct a practice if-

(a)such company is incorporated and registered as a private company under the Companies Act, 1973 (Act 61 of 1973), with a share capital, and its memorandum of association provides that all present and past directors of the company shall be liable jointly and severally with the

company for the debts and liabilities of the company contracted during their periods of office;…" [Emphasis added]

[41] Furthermore, Section 53(b) of the Companies Act provides that:-

"(the) memorandum of a company may, in addition to the requirements of s 52 -

(a) . . .

(b) in the case of a private company, provide that the directors and past directors shall be liable jointly and severally, together with the company, for such debts and liabilities of the company as are or were contracted during their periods of office, in which case the said directors and past directors shall be so liable." [Emphasis added]

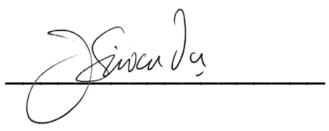
[42] In view of my finding that the undertaking was unqualified and bound the first respondent, there was a contractual debt created by the respondent in favour of the applicant. As already alluded to above, the throughout, the respondent referred to either "I am" and "we" in all the correspondence with the applicant and its agents. The section applies and carters for the first and second respondent's liability for the debt created in terms of the undertaking in this instance.

[44] Not much was made of the defence of prescription which was merely raised on the papers, presumably because Mr Liphosa without abandoning same took the view that it lacked merit.

[43] Accordingly, the applicant succeeds in its claim.

[44] As a result, I make the following order:

a. the Respondents, jointly and severally, in the amount of R270 219,02; 2.
b. Interest on the aforesaid amount at the mora interest rate from the 20 the February 2019 being the date of registration of the property to date of final payment;
c. The costs of the suit which are to be paid jointly and severally by the 1 and 2 Respondent



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JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 2 June 2022.

Heard on: 10 May 2022

Delivered on: 6 June 2022

Counsel for the Applicant : Mr WC Carstens

Instructed by: Ott Krause Inc Attorneys

Counsel for the Respondent: Mr H R Liphosa

Instructed by: JA Bossr Attorneys

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