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IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

AR: 403/11

In the matter between:

PGP BODY CORP ADMINISTRATION CC Appellant

and

THE TRUSTEES OF THE BODY CORPORATE CLUB KERKIRA Respondent

JUDGMENT

Delivered on: : 26 OCTOBER 2012

PATEL JP

Background

[1] On 12 July 2011 the Supreme Court of Appeal, on petition by PGP Body Corp Administration CC ('the appellant'), granted the appellant leave to appeal. The respondent is cited as The Trustees of the Body Corporate Club Kerkira ('the respondent'). In granting leave the Supreme Court of Appeal ordered that 'the costs order of the court *a quo* in dismissing the application for leave to appeal is set aside

and the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal'.

[2] The brief history of the matter is as follows:

2.1 The appellant was the managing agent of the Body Corporate Club Kerkira. On 22 December 2008, at the Annual General Meeting ('the AGM'), it was decided that all service contracts were to be reviewed. At that meeting, the following members representing the appellant were present, namely, Mr G Smit, the Sectional Title Manager, Ms C Ronne, Portfolio Manager and Mr G Wolmarens, the Junior Portfolio Manager. In their representative capacity they thus had knowledge that the respondent acting through its trustees had been duly authorised by the Body Corporate to review all contracts. Such review would ineluctably also mean the termination of contracts. It is thus clear that the AGM had given a clear mandate to the Trustees to review contracts and if necessary terminate them. On 30 January 2009 the respondent resolved to terminate the appellant's services. On 2 March 2009 the Chairman of the Body Corporate informed the appellant that its services had been terminated. On the same day the appellant was notified of the Body Corporate's new banking details, in order for the Body Corporate monies to be transferred into the new account. On 3 March 2009 the Chairman collected the Body Corporate's books of account and financial records from the appellant's office, which were handed over without demur; however the appellant, represented by Mrs Porteous, refused to transfer the monies until a trust account had been opened.

2.2 On 9 March 2009 the respondent brought an urgent application against the appellant seeking a transfer of the Body Corporate's monies from the appellant's banking account into the newly opened savings account which had been opened in the name of the respondent. On 16 March 2009, that is the day of the hearing of the urgent application, the

appellant undertook to transfer the monies into the respondent's attorney's trust account and the matter was adjourned *sine die* with costs reserved. The question of costs was heard by Sishi J on 31 August 2009.

2.3 On 26 April 2010 judgment was handed down and Sishi J found that the respondent was compelled to bring the urgent application and that the respondent had been substantially successful since it had obtained the payment of the monies. Furthermore at no stage was the matter set down for argument on the merits. It was for these reasons that costs were granted in favour of the respondent. Leave to appeal was subsequently refused.

Appellant's case

[3] Appellant's submissions can be summed up as follows:

3.1 It refused to transfer the monies because of the concerns it had with regards to the validity of the initial resolution of 30 January 2009, and indicated that the monies would be held in trust until it had seen the minutes of that meeting.

3.2 The meeting which was held on 30 January 2009 was invalid because the appellant was not given notice of it and the respondent failed to comply with Management Rule 49(1) in Annexure 8 of the Sectional Title Regulations (GNR.664 of 8 April 1988). As managing agent, the appellant ought to have been given notice of all trustee's meetings.

3.3 When the appellant requested a copy of the minutes of the meeting in accordance with Management Rule 49(2) the respondent failed to provide same and only complied after the appellant filed notices in terms of Uniform Rule 35(12) and (14) on 13 March 2009.

3.4 The initial resolution, being brought about by a round robin telephonic conversation, was invalid because it failed to comply with Management Rule 24. Hence there could be no valid ratification thereof. Even if it is found that there was ratification, it only took place on 14 March 2009. This meant that ratification only took place after the launch of the urgent application.

3.5 The court *a quo*, per Sishi J, erred in finding the following:

(a) that there could be subsequent ratification of the initial resolution even though the initial resolution, which was brought about by the round robin telephonic conversation, was found to be invalid;

(b) that the handing over of books was an acceptance by the appellant of its termination of contract;

(c) that reliance could be placed on the minority judgment of Nicholas AJA in *Neugarten & others v Standard Bank of South Africa Ltd* 1989 (1) SA 797 (A); and in ignoring *Baeck & Co SA (Pty) Ltd v Van Zummeren & another* 1982 (2) SA 112 (W); and

(d) that the respondent was successful, since from the outset the appellant, did not want to have anything to do with the money.

3.6 At the end of the day the appellant chose to adopt a cautious approach in dealing with the monies and therefore it should not be saddled with a costs order made against it.

Meeting, Notice and Minutes of Meeting

[4] A managing agent is, in terms of the Management Rules 49(1) and (2), entitled to be given reasonable prior notice of meetings of the trustees and from time to time to be furnished with copies of the minutes of meetings of the trustees. With

regards to attendance at meetings Management Rule 49(1) provides that a managing agent can only attend the meetings of trustees with their consent. It must be remembered that this round robin meeting was held to terminate the mandate of the appellant. It is improbable that the trustees, even if they had given notice, would have given the appellant permission to attend.

[5] When the appellant initially requested a copy of the minutes for the meeting of 30 January 2009, the respondent said that the appellant was not entitled to same. At the time of requesting the minutes the appellant was still the managing agent since its mandate was to be terminated as of 28 February 2009. However since the meeting was to discuss the termination of appellant's contract, it would not have made sense for the appellant to have been given the minutes of the meeting.

Validity of resolution

[6] The functions and powers of a Body Corporate are subject to the provisions of the Sectional Titles Act 95 of 1986 ('the Sectional Titles Act') and the Rules which govern sectional title developments. Various duties are imposed upon trustees by the Management Rules set out in Annexure 8 of the Regulations to the Sectional Titles Act. These powers contained in the Sectional Titles Act, must be read with the powers given to the Trustees by the general members or the general body of the Body Corporate provided these powers are not inconsistent with the Sectional Titles Act.

[7] Save as provided in the rules, the trustees can exercise the powers and perform the duties entrusted to them in the Sectional Titles Act and the rules only by means of resolutions taken at a duly constituted meeting of the board of trustees. The two main methods by which the rules authorise a departure from this basic

principle are, firstly, a rule empowering the trustees to delegate their powers and duties to one or more of their number, and secondly by using Management Rule 24.

[8] Therefore if trustees wish to make a decision in respect of a matter but do not wish to hold a meeting, they may avail themselves of the procedure provided by Management Rule 24, which provides:

> 'A resolution in writing signed by all the trustees for the time being present in the Republic and being not less than are sufficient to form a quorum, shall be as valid and effective as if it had been passed at a meeting of the trustees duly convened and held.'

This Rule has to be read with Rule 16(1) which provides:

> 'At a meeting of the trustees; 50 percent of the number of trustees but not less than two, shall form a quorum.'

[9] *In casu* we have five trustees, inclusive of the Chairman. The question arises as to whether the resolution dated 30 January 2009, because it has just two signatures of the trustees, renders the resolution invalid on the grounds that it is contrary to Management Rule 24. The appellant has in paragraph 66 of its answering affidavit "established that on the 30th January 2009, Mirinda Louw was in New Zealand". Thus, in determining the validity of the resolution in terms of Rule 24 and on the appellant's version, the reckoning of the quorum cannot take into account Mirinda Louw. Quorum is not defined in Rule 24 nor in the definitions section of the Act, hence my earlier statement that Rule 24 must be read with Rule 16 (1), if for no other purpose then to determine the number of trustees who will form a quorum. On a literal interpretation of Rule 24 any resolution has to be in writing and signed by all of the trustees present at the time in the Republic. Thus Rule 24 is clear in providing in express terms that the written resolution must be signed by all the trustees for the time being present in the Republic. Thus, the resolution dated the 30th January 2009 is invalid. See *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another*

2006 (3) SA 369 (W). However, for the reasons mentioned hereinbelow the invalidity of the resolution dated the 30th January 2009 cannot lead to the conclusion that the learned Judge *a quo* was wrong in coming to the conclusion that the Respondent was entitled to be awarded costs because it was substantially successful.

[10] Regarding whether a round robin telephonic conversation can result in a valid resolution the respondent submitted that all trustees meetings were held by either telephonic conference or round robin telephonic discussions. It had always been done that way because of the fact that the trustees lived in different parts of the country. The resolution dated 13 March 2009 therefore provides the following:

> 'We further record that it has always been custom for the Board of Trustees of the applicant to pass resolutions necessary for the effective running of the business activities of the Body Corporate to be effective and binding by way of a **round robin telephonic authorisation** and approval by all the Trustees.' (my emphasis)

The appellant in its answering affidavit concedes that it is aware that this was the extant practice because the South Coast, like the North Coast of KwaZulu-Natal, has many properties like Club Kerkira where people living in all parts of South Africa buy holiday homes. It is thus inevitable that to hold meetings of trustees *inter praesentes* is impractical.

Ratification

[11] If the initial resolution is invalid, the next question that arises is whether ratification is nonetheless permissible in this case. *In casu* the trustees at the AGM, in December 2008, were mandated to review all contracts and this as pointed out earlier would also include the termination of contracts, a fact well known by the appellant through its aforesaid representatives. During the round robin telephonic conversation it was decided that the appellant's contract would be terminated. There is no illegality here as was in the case of *Cape Dairy and General Livestock Auctioneers v Sim* 1924 AD 167. Hence ratification is permissible.

[12] The Supreme Court of Appeal in *Lynn NO & another v Coreejes & another* 2011 (6) SA 507 (SCA) discussed the decision of *Neugarten & others v Standard Bank of SA supra* and stated the following at para 13:

> 'In *Neugarten and Others v Standard Bank of South Africa Ltd* the absence of consent by all the members of a company for security furnished by that company for an obligation of another company controlled by one or more of the directors of the first-mentioned company, in contravention of s 226(2)(*a*) of the Act, was considered and resolved as follows:
>
> > "The transactions set out in ss (1) of s 226 are prohibited and illegal only in the absence of the consent of all the members. The question in any specific case is whether such consent has been given: if it has, the transaction is not prohibited or illegal. Consequently, to postulate that the transaction is prohibited and illegal is to beg the question. If the requisite consent is given to the transaction *in initio*, it is a valid transaction. If the transaction is subsequently ratified by the non-consenting members, the ratification relates back to the original transaction and the position is the same as if consent had originally been given."'

From the above it is clear that the full bench of the SCA gave its imprimatur to the aforesaid dicta. Therefore the appellant's submission that Sishi J relied on a minority decision holds no water.

[13] The appellant further submitted that ratification was only raised in the respondent's replying affidavit. Harms JA in *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para 15 summarised the position as follows:

> 'In *South African Milling* (at 436F–437C) the matter was also approached from a procedural point, namely that a party is not entitled to make out a case in reply and that a ratification relied upon in reply infringes this rule. This part of the *ratio* is strictly speaking not apposite to the present case because the issue here was decided upon a stated case which did not raise this point. It remains, however, in view of persistent difficulties in this regard, necessary to emphasise that this Court in *Moosa and Cassim NNO* has clearly adopted as correct the refutation in *Baeck & Co* (at 114E–119B) of the approach and to state that I fully subscribe to that view. The rule against

new matter in reply is not absolute (cf *Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 499 (T) at 511F) and should be applied with a fair measure of common sense.'

Trust account

[14] Management Rule 42 provides that –

> '[t]he trustees may authorise the managing agent to administer and operate the accounts referred to in rule 41 and 43: Provided that where the managing agent is an estate agent as defined in the Estate Agents' Act (Act 112 of 1976), the trustees **may authorise** such managing agent to deposit moneys contemplated in rule 41 in a trust account as contemplated in section 32 (3) of the Estate Agents' Act, 1976, which moneys shall only be withdrawn for the purposes contemplated in rule 41.' (my emphasis)

[15] According to the appellant the Body Corporate's account was a section 32 account. Section 32(2)(e) of the Estate Agency Affairs Act 112 of 1976 provides:

> 'Trust money in an account invested in terms of paragraph *(a)* or deposited in terms of subsection (1) shall be retained by the estate agent in question in that account until the estate agent is lawfully entitled to it or instructed to make payment therefrom to any person.'

[16] From a reading of the Estate Agency Affairs Act it becomes clear that the Act specifically regulates the conduct of an estate agent and not trustees of a Body Corporate. Neither is there a requirement in the Sectional Titles Act for the Body Corporate to have opened a trust account. The appellant appeared to act as more of an estate agent than a managing agent, and Mrs Porteous even states the following in her opposing affidavit at para 5:

> 'I make this submission not as a result of being managing agent but rather as a consequence of being a registered estate agent…'

[17] One of the points raised by the appellant relates to Glen Smit ('Smit'), a previous employee of the appellant. Smit left the appellant's employ in January 2009, whereupon the appellant cancelled his Estate Agency Affairs Board Fidelity Fund Certificate. At the time of this application there was a dispute pending at the CCMA, between the appellant and Smit. After the respondent terminated the appellant's contract it subsequently appointed Smit as its new managing agent. Appellant submitted that Smit was a Board Member of the National Association of Managing Agents (NAMA) which required managing agents to be estate agents. This meant that Smit was going to be the managing agent of the Body Corporate of Club Kerkira contrary to the provisions of the society of which he was a Board Member. It also meant that the savings account opened by the Body Corporate was not covered by a section 32 Fidelity Fund Cover. Thus there was a greater need for the monies to be transferred into a trust account. The respondent however submitted that the problems between Smit and the appellant had no bearing on the current application. I agree. It appears that the only reason as to why the appellant demanded the opening of a trust account was because it knew that Smit was no longer an estate agent. Such insistence in my view was untenable because the respondent had opened an account in its name and transfer was demanded into this account.

Fiduciary duty

[18] It is not entirely clear from the provisions of Management Rule 46 whether the managing agent's contract of appointment is regarded as a contract of service or a mandate which creates a fiduciary relationship between the Body Corporate and the managing agent. But in CE van der Merwe 'Sectional Titles' in *Lawsa* 2 ed vol 24 (2010) para 466 the following is observed:

> 'Since the managing agent is managing the affairs of the body corporate, it is submitted that he or she stands in a fiduciary relationship to the body corporate. An executive organ of the body corporate, namely the trustees, appoints him or her. The managing agent would thus owe both a duty of trust as well as a duty of care and skill towards the body corporate.'

[19] On 11 March 2009 Mrs Porteous sent a letter to the owners of units in the complex. Mrs Porteous, however, appears to have misled the owners in her letter. In the letter it is stated that Body Corporate monies must be held in trust and that the managing agent must be an estate agent. These statements are incorrect. One does not know if there were any responses received. Whatever fiduciary duties the appellant may have had towards the Body Corporate, were 'discharged' with the sending of the letter as well as by informing the Chairman of the possible risks involved in transferring the monies into a savings account. Having thus informed the members of the Body Corporate and unless she received a letter to the contrary from the members of the Body Corporate of the Respondent, the Respondent could not hold the Appellant liable if the Appellant had then transferred the monies to the Trustees in an account opened for the running of the affairs of the Respondent.

Findings and the issue of costs

[20] The Body Corporate is only governed by the Sectional Titles Act. Therefore the Estate Agents Act was not applicable and there was no need for the monies to be transferred into a trust account. Mrs Porteous's conduct, by handing over the books and records to the Chairman, amounted to an acceptance of the termination of contract and the initial resolution. She was willing to hand over the books and documents but still hold on to the money. This does not make sense. Why do one and not the other? Furthermore the appellant did not seem to have any problems with any of the respondent's previous resolutions, but only now that it is affected it cries foul. The Appellant having had knowledge of the mandate given to the Trustees of the Respondent had opened to it the further defence afforded by the presumption of regularity namely *omnia praesumuntur rite esse atca*. The presumption although often applied when the validity of official acts are brought into question, it also has a similar application by way of the *Turquand* Rule namely that persons dealing with a company in good faith may assume that acts within its constitutions and powers have been properly and duly performed. Such persons are not bound to enquire

whether acts of internal management have been regular. See *Royal British Bank v Turquand* (1856) 6 E & B 327 (119 ER 886).

[21] Whether an inference may be drawn in favour of the presumption depends on all the circumstances of the case and the applicable standard of proof. (See *Odendaalrus Municipality v Odendaalrus Gold, General Investment and Extensions Ltd* 1959 1 SA 374 (A) 382 – 383). The appellant was at all material times aware that the Trustees of the respondent had been given the necessary powers by the AGM held on 22 December 2008.

[22] The Chairman provided the appellant with letters regarding the termination of contract and the Body Corporate's new banking account details. If the appellant was concerned about any potential fraudulent activity she was covered not only by the documents, but the action she had taken in informing members of the Body Corporate and also the resolution taken at the AGM.

[23] It is clear from the papers that there were unresolved issues between the appellant and the respondent. However the monies did not belong to the appellant and it should have transferred the monies when asked to by the respondent. The appellant tried to take over the powers of the trustees and even wanted to question some of the decisions made, for example the purchasing of the bakkie. This was a proper case for referral to oral evidence in order to make a considered determination on the question of costs. I hazard to guess that Mrs Porteous or members of the appellant would not have shown the same zeal in questioning their own appointment as Managing Agents for the Respondent.

[24] Mrs Porteous in para 3 of her answering affidavit states categorically that "the First Respondent has no interest in the Applicant's monies and is prepared to transfer the said monies together with a complete accounting in respect of same

over to any person in trust". This claim rings hollow when one considers the event immediately preceding the urgent application. From Annexure "D" and "E" dated the 3rd March 2009, it is evident that Mrs Porteous if it was indeed her intent to hand over the money to any person in "trust" could have handed the monies to the Respondents' attorneys and would have thus obviated the urgent application and safeguarded her own position. The appellant's attorneys response dated the 4th March 2009, gainsays Mrs Porteous aforesaid position. The entire application could have been avoided if monies had been handed over to the Respondent's attorney, to be held in a trust account until a proper resolution was furnished.

[25] It is a trite principle of our law that the award of costs is a matter within the discretion of the trial court to be exercised judiciously on consideration of all the facts and as a matter of fairness to the parties concerned (see *Rondalia Assurance Corporation of SA Ltd v Page & others* 1975 (1) SA 708 (A) at 720C-D). Regarding a court of appeal's role Corbett JA in *Attorney-General, Eastern Cape v Blom & others* 1988 (4) SA 645 (A) at 670D–E, held that:

> 'In awarding costs the Court of first instance exercises a judicial discretion and a Court of appeal will not readily interfere with the exercise of that discretion. The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order.'

[26] Wallis J in *Thusi v Minister of Home Affairs & another and 71 Other Cases* 2011 (2) SA 561 (KZP) para 64 stated that 'where a decision on the merits of an application is no longer necessary or permissible, for whatever reason, the question of costs is not determined in isolation from the merits'. As I mentioned before, ideally this matter should have been referred to trial for hearing of oral evidence to determine costs. The parties chose not to do so.

[27] According to Cilliers

> '[w]here a disputed application is settled on a basis which disposes of the merits except in so far as costs are concerned, the court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the court has, with the material at its disposal, to make a proper allocation as to costs' (see A C Cilliers *Law of Costs* (Issue 12) para 2.20). See also *Gans v Society for the Prevention of Cruelty to Animals* 1962 (4) SA 543 (W) at 545; *Gamlan Investments (Pty) Ltd & another v Trilion Cape (Pty) Ltd & another* 1996 (3) SA 692 (C) at 703I-704C.

[28] In *Mashaoane v Mashaoane & another* 1962 (2) SA 684 (D), Harcourt J pointed out at 687G-H that:

> 'when a case has to all intents and purposes been settled, apart from the question of costs, it is undesirable to permit the question of such costs to become an occasion for incurring a great many further costs and, incidentally, to occupy the time of the Court…'

The learned judge then went on to state that:

> 'the interests of the litigating public are superior to those of the Court in this but the interests of the public and the Court probably coincide in this regard and may best be indicated by repeating the latin phrase: '*interest rei publicae ut sit finis litium'.*

[29] An appeal court will only interfere with discretionary orders granted by a lower court where it is shown that

> 'the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles' (see *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11).

[30] The question which arises is whether it is fair under the circumstances for the trial court to have awarded costs. In *Van der Merwe & another v Taylor NO & others* 2008 (1) SA 1 (CC) the court stated at para 137:

> 'The applicants have succeeded in part in their vindicatory claim. That part relates to our finding that they have established ownership of the €20 865. However, the applicants have not shown that they are the owners of the €109 135 and, what is more, they have not shown that the respondents are not entitled to hold the amount seized pending an order of disposal at the end of the criminal trial. In these circumstances, **a just and equitable outcome relating to costs is, in our view, not to burden the applicants with costs. We would rather make no order as to costs.**' (my emphasis)

[31] Trustees are more often than not just ordinary owners who have taken on the responsibility of becoming a trustee. There must be numerous difficulties experienced in managing a Body Corporate where the trustees are scattered around the country. Therefore Management Rule 12(1)(a) provides a wide indemnity to trustees. It reads as follows:

> '…every trustee, agent or other officer or servant of the body corporate shall be indemnified by the body corporate against all costs, losses, expenses and claims which he may incur or become liable to by reason of any act done by him in the discharge of his duties, unless such costs, losses, expenses or claims are caused by the *mala fide* or grossly negligent act or omission of such person.'

[32] The respondent had no other option but to launch an urgent application. Even though the matter was not heard on the merits the respondent was successful in that it received payment. In *Fleming v Johnson & Richardson* 1903 TS 319 Innes CJ said at 325:

> 'It is a sound rule that where a plaintiff is compelled to come to Court, and recovers a substantial sum which he would not have recovered had he not come to Court, then he should be awarded his costs'.

[33] Thus, having regard to the conduct of the parties, the manner in which settlement was reached obviating the hearing of the application, the merits of the case and the dictates of fairness, it must be found that the court *a quo* did not misdirect itself when awarding costs.

Order

[34] Accordingly, I make the following order:

34.1 The appeal is dismissed.

34.2 The appellant is ordered to bear all costs.

PATEL JP

I agree

MNGUNI J

Date of Hearing:	Friday, 30 March 2012
Date of Judgment:	Friday, 26 October 2012
For the Appellant:	ADV. G M HARRISON
Instructed by:	V CHETTY INCORPORATED 206 MOORE ROAD GLENWOOD DURBAN (REF.: Ms Rajkumar/MC/P6317) (TEL.: 031 – 2013191) (FAX: 031 – 2013194) **c/o KISHORE RAMKARAN & COMPANY** **368 BURGER STREET** **PIETERMARITZBURG**
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