THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 208/2017

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LTD	**FIRST APPELLANT**
ALPHEN FARM ESTATE IN CONSTANTIA (PTY) LTD	**SECOND APPELLANT**
and	
SPILHAUS PROPERTY HOLDINGS (PTY) LTD	**FIRST RESPONDENT**
JAN ARSEEN JORIS DE DECKER	**SECOND RESPONDENT**
THE TRUSTEES FOR THE TIME BEING OF THE RIETVLEI TRUST	**THIRD RESPONDENT**
MARTIN RYMAN	**FOURTH RESPONDENT**
JADE ANN RYMAN	**FIFTH RESPONDENT**
FRANCES ILSE HILLS	**SIXTH RESPONDENT**
THE TRUSTEES FOR THE TIME BEING OF THE RISTELLE INVESTMENT TRUST	**SEVENTH RESPONDENT**
RENE ADELE LARSEN	**EIGHTH RESPONDENT**
SUSAN MARTIN N.O.	**NINTH RESPONDENT**
MICHAEL BLACK N.O.	**TENTH RESPONDENT**
PAMELA GOLDIE BUCKHAM	**ELEVENTH RESPONDENT**
ALYSON ROSLYNNE RINK	**TWELFTH RESPONDENT**
RAPHAEL UNIT 104 (PTY) LTD	**THIRTEENTH RESPONDENT**

MARC ANDRE PAUL MARIE COSSE	**FOURTEENTH RESPONDENT**
JANE HANDSLEY PORTER	**FIFTEENTH RESPONDENT**
L Y INVESTMENTS (PTY) LTD	**SIXTEENTH RESPONDENT**
JANET BEYER RUSSEL	**SEVENTEENTH RESPONDENT**
QUELLE FOUNDATION	**EIGHTEENTH RESPONDENT**
CHEROKEE ROSE PROPERTIES 199 CC	**NINETEENTH RESPONDENT**
RONALD ALEXANDER RINK	**TWENTIETH RESPONDENT**

Neutral citation: *Mobile Telephone Networks (Pty) Ltd & another v Spilhaus Property Holdings (Pty) Ltd & others* (208/2017) [2018] ZASCA 16 (15 March 2018)

Bench: Ponnan, Saldulker and Swain JJA and Plasket and Makgoka AJJA

Heard: 23 February 2018

Delivered: 15 March 2018

Summary: Sectional title scheme – *locus standi* of unit owners to institute proceedings – matter falling within s 41(1) of the Sectional Titles Act 95 of 1986 – owners obliged to apply for the appointment of a *curator ad litem*.

ORDER

On appeal from: Western Cape Division, Cape Town (Williams AJ sitting as court of first instance):

(1) The appeal is upheld with costs including those consequent upon the employment of two counsel.
(2) The order of court below is set aside and substituted by:
'The application is dismissed with costs, such costs to include those of two counsel.'

JUDGMENT

Ponnan JA (Saldulker and Swain JJA and Plasket and Makgoka AJJA concurring):

[1] Sectional title ownership consists of three elements, namely individual ownership of a section, joint ownership of the common parts of the sectional title scheme and membership of a body corporate.[1] The registered title-holder of a unit is the owner of the section, joint owner of the common parts of the scheme and a member of the body corporate.[2] Thus, a person, buying into a sectional title scheme, enters into a series of interlocking relationships. The Sectional Titles Act No 95 of 1986 (the Act)[3] introduced

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[1] Du Bois *Wille's Principles of South African Law* 9 ed at 564.
[2] *Wille's* at 564
[3] The Act has been substantially amended by the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA), which came into operation before the commencement of these proceedings in the court below on 7 October 2010.

several new concepts into our law. By providing for the division of land and buildings comprising a development scheme into sections and common property, it created an entirely new composite *res*, called a unit, which consists of a section and an undivided share in the common property.[4] The section is considered the principal component, with the undivided share in the land and other common property inextricably linked thereto as an accessory.[5] The Act also created an entirely new form of composite ownership, namely separate ownership of a section coupled with joint ownership of the common property. Sectional owners own the common property collectively in undivided shares in accordance with the provisions of the Act.[6]

[2] The question raised by this appeal is whether the owners in a sectional title scheme had the requisite *locus standi* to seek interdictory relief in relation to the common property. The Western Cape Division, Cape Town (per Williams AJ) answered that question in favour of the owners. The issue arises for determination against the backdrop of the following facts: Until its subdivision in terms of the Act, Erf 377 Constantia was owned by the second appellant, Alphen Farm Estate in Constantia (Pty) Ltd (Alphen). On subdivision, two so-called precincts were established, namely a historic precinct and a residential precinct. The historic precinct, which has remained the property of Alphen, comprises sections 1 and 2 of the sectional title scheme. The residential precinct consists of sections 3 to 19 of the scheme. Between them, the respondents[7] own those 17 units. Located within the historic precinct is the original Alphen Hotel (which has been declared a provincial heritage site in terms of the National Heritage Resources Act No 25 of 1999) and commercial office buildings.

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[4] Van der Merwe *Sectional Titles Share Blocks and Time-Sharing* 2015 para 1.9.
[5] *Willie's* at 564.
[6] Section 2*(c)*.
[7] Spilhaus Property Holdings (Pty) Ltd (1st Respondent); Jan Arseen Joris De Decker (2nd Respondent); The Trustees for the time being of the Rietvlei Trust (3rd Respondent); Martin Ryman (4th Respondent); Jade Ann Ryman (5th Respondent); Frances Ilse Hills (6th Respondent); The Trustees for the time being of the Ristele Investment Trust (7th Respondent); Rene Adele Larsen (8th Respondent); Susan Marin N.O. (9th Respondent); Michael Black N.O. (10th Respondent); Pamela Goldie Buckham (11th Respondent); Alyson Roslynne Rink (12th Respondent); Raphael Unit 104 (Pty) Ltd (13th Respondent); Marc Andre Paul Marie Cosse (14th Respondent); Jane Handsley Porter (15th Responden); L Y Investments (Pty) Ltd (16th Respondent); Janet Beyer Russel (17th Respondent); Quelle Foundation (18th Respondent); Cherokee Rose Properties 199 CC (19th Respondent); Ronald Alexander Rink (20th Respondent).

[3] Shortly after registration of the sectional title scheme, litigation ensued between various owners in the scheme. The litigation was settled and a settlement agreement was made an order of court, in terms of which management rules, conduct rules and guidelines were agreed upon by the parties. According to those rules, the body corporate consists of four trustees – two of whom are elected by the owners of units in the residential precinct (the residential precinct trustees) and two by the owner (Alphen) of the units in the historic precinct (the historic precinct trustees). In the event of any deadlock between the historic and residential precinct trustees, such deadlock must be referred for resolution to a referee, who is obliged to take into account and be guided by the guidelines at all times.

[4] Prior to the subdivision and coming into existence of the sectional title scheme, the first appellant, MTN Mobile Telephone Networks (Pty) Ltd (MTN) and Vodacom (Pty) Ltd (Vodacom), on the one hand, and Alphen, on the other, concluded agreements of lease pursuant to which 2G cellular antennae were installed on a rooftop of one of the buildings, namely the Mill Range building, which is located within the historic precinct. On 10 October 2012 one of the historic precinct trustees sought the consent of the two residential precinct trustees, for MTN and Vodacom to upgrade their existing cellular installations on the Mill Range building from 2 to 3G, which consent was granted on the same day. On or about 1 November 2013 the upgraded antenna was erected, by the installation of a fake chimney some five metres in height. At the same time the base station equipment, which since inception was housed within the hotel building, was also upgraded.

[5] During December 2013 the City of Cape Town (the City) served a notice on Alphen to the effect that the base station had been erected in contravention of the National Building Regulations and Building Standards Act No 103 of 1977 as ‘no prior written approval for the erection of such building [had] been obtained from the [City]’. Alphen was ordered to ‘obtain written approval for the said unauthorised building work, *by submitting and having building plans approved within 60 days*’. Failure to comply, so the notice stated, ‘constitutes a criminal offence in terms of . . . the National Building Regulations’.

[6] On 21 January 2014 Mr Pieter van Staden of Warren Petterson Planning (WPP) wrote to the City:

'[P]lease be informed that we have been appointed by MTN (and the property owner) to prepare and submit the necessary applications. Please be advised that the legislation requires Council's Consent before we would be able to submit the Building Plan.

Once the Consent Use Application has been approved, we will submit the Building Plan. This may take some time, around 6 months, depending if objections are received.'

At a meeting of the trustees of the scheme on 19 February 2014 the residential precinct trustees confirmed that they were withdrawing their consent to the upgrade because, as it was put, 'significant new issues have come to the fore, which they were not aware of at the time'.

[7] On 3 April 2014 WPP lodged an application with the City for '[c]onsent use, council's approval, consent [in terms of] Title Deed, [and] amendment of Title Deed condition to permit existing rooftop cellular communications infrastructure'. In response, on 9 May 2014 the City addressed a letter to WPP pointing out that the application is incomplete and cannot be processed because certain information and documents are missing including 'a Power of Attorney signed by all registered owners (all sectional title unit owners) as the proposal is located on common property'. By then nine of the residential precinct owners or their representatives had already deposed to affidavits objecting to the installation. On 14 May 2014 the attorney for the residential precinct owners wrote to Alphen asserting that the cell-phone mast installation, which had been installed on the common property, was illegal. The letter also pointed out that Alphen's application to the City for land use approval was made without the consent of all owners in the scheme and that this rendered the application defective.

[8] Impasse having been reached, on 1 August 2014 the residential precinct owners (the present respondents) applied to the high court for an order directing: (a) MTN to remove the cellular network base transceiver station together with associated infrastructure, cabling and support structure; and (b) Alphen to co-operate to the extent necessary in the removal of the installation. MTN and Alphen opposed the application.

In addition, they launched a counter application seeking the postponement of the main application pending inter alia: (a) the final determination of the consent use application lodged with the City; (b) the amendment of the title deed; (c) the approval of any required building plans in respect of the infrastructure; and (d) the joinder of Vodacom as a party to the proceedings.

[9] At the commencement of the hearing before Williams AJ, the learned judge was informed that the matter had been settled as between the respondents and Vodacom – the latter having since been joined as a party to the proceedings. In terms of the settlement agreement, Vodacom undertook to 'disconnect its cellular services presently installed on the roof of the Mill Range building' and to 'remove all its equipment, infrastructure, cabling and support structures associated with the cellular network base transreceiver station installed on the roof of the premises at its own expense'.

[10] The application thereafter proceeded as against Alphen and MTN. At the conclusion of those proceedings Williams AJ issued the following order:

'23.1. The first respondent is ordered to remove the cellular network base transceiver station which has being installed on the roof of the Mill Range building in Sectional Title Scheme New Court at Alphen, registered under scheme number 449/2006, situated at remainder erf 377,Constantia, together with associated infrastructure, cabling and support structures (collectively, "*the cellphone mast installation*") and to have completed such removal, including the making-good of the Mill Range building by 3 December 2016;

23.2. The second respondent is ordered to cooperate to the extent necessary in the removal of the cellphone mast installation;

23.3. The respondents' application for a postponement/stay is dismissed with costs;

23.4. The respondents are ordered to pay the applicants' costs of suit in respect of both the main application and the respondents' application for a postponement/stay thereof, such costs to include the costs attendant upon the employment of two counsel;

23.5. The respondents' liability for costs shall be joint and several, the one paying, the other to be absolved.'

[11] The case advanced on the papers by the respondents is that the infrastructure is unlawful in as much as: first, it breaches the zoning scheme regulations in at least two

respects; and second, it was erected in breach of two conditions registered against the title deed of the property. Williams AJ agreed, holding 'from the correspondence exchanged between the City and [WPP], there have clearly been breaches *inter alia of* the zoning scheme and the Title Deed restriction'. But, argue the appellants, unlike conventional owners, sectional title owners are burdened by the provisions of the Act, the rules and the resolutions of the body corporate. That being so, so the argument goes, as the infrastructure is situated on common property, s 41(1) of the Act finds application.

[12] Section 41 of the Act,[8] headed 'Proceedings on behalf of bodies corporate', reads:

'(1) When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of the matter mentioned in section 36(6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2)

(a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the court under paragraph *(b)* will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court to for an order appointing a *curator ad litem* for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The court may on such application, if it is satisfied –

(a) that the body corporate has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified;

[8] Section 41 has been repealed by the STSMA. A similarly worded provision is to be found in s 9 of the STSMA.

appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order ….'

[13] The jurisdictional facts provided for in s 41(1) are that an owner be of the opinion that he, she or it and the body corporate 'have been deprived of any benefit in respect of a matter mentioned in s 36(6)'.[9] Section 36(6) provides:

'The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of –

(a) any contract made by it;

(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.'[10]

[14] The body corporate is constituted in terms of the Act.[11] It is charged with the responsibility of enforcing the rules and the control, administration and management of the common property for the benefit of all members.[12] In *Wimbledon Lodge (Pty) Ltd v Gore NO & others*,[13] Schutz JA pointed out:

'The jurisdictional facts that an owner must establish in order to entitle him to apply for the appointment of a *curator* are set out in s 41(1). They are:

1. The owner must hold an opinion.

2. The opinion must be either (a) that he and the body corporate have suffered damages (again *sic*) or loss or (b) that he and the body corporate have been deprived of a benefit in respect of a matter mentioned in s 36(6).

3. The body corporate has not instituted proceedings for recovery.'

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[9] *Cassim & another v Voyager Property Management (Pty) Ltd & others, Cassim & another v St Moritz Body Corporate (Pty) Ltd & others* 2011 (6) SA 544 (SCA) para 11.

[10] A similarly worded provision is to be found in s 2(7) of the STSMA.

[11] Section 36(1).

[12] Section 36(4).

[13] *Wimbledon Lodge (Pty) Ltd v Gore NO & others* 2003 (5) SA 315 (SCA) at para 13.

[15] Here, the first requirement is uncontentious. So too the third. That the third (which is a purely factual enquiry) should be a requirement, said Schutz JA, is a necessary counterpart to the sections of the Act divesting individual owners of control and vesting it in the body corporate.[14] As Malan JA pointed out in *Oribel Properties 13 (Pty) Ltd & another v Blue Dot Properties 271 (Pty) Ltd & others*:[15]

'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'.

[16] To satisfy s 41(1), the adverse events must be suffered not only by the owner but by the body corporate as well, 'for the reasons that the "and" in "he and the body corporate" not only ordinarily conveys a conjunctive meaning, but that the word is twice succeeded by the plural verb "have", indicating that both he and the body are being referred to. Moreover, one would hardly expect that the legislature would require the body corporate to sue in matters which did not concern it.'[16] Section 41(1) refers in the alternative to matters upon which an opinion may be formed, including the deprivation of a benefit in respect of a matter mentioned in s 36(6). Does the contemplated action fall within any of those subdivisions? Starting with s 36(6)*(c)*, which confers the power to sue in respect of 'any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable'. It is common cause that the Mill Range building and the mast are located on common property. That being so, it seems to me that subsection *(c)* is satisfied. If this be not correct, another basis is provided by s 36(6)*(d)*, which gives the body corporate the power to sue in respect of 'any matter arising out of the exercise of any of its powers or the performance or non-

[14] *Wimbledon Lodge* para 14.
[15] *Oribel Properties 13 (Pty) Ltd & another v Blue Dot Properties 271 (Pty) Ltd & others* [2010] 4 All SA 282 (SCA) para 24.
[16] *Wimbledon Lodge* para 20.

performance of any of its duties under this Act or any rule'. To those provisions may be added s 37(1) which, to the extent here relevant, provides:

'A body corporate referred to in section 36 shall perform the functions entrusted to it by or under this Act or the rules, and such functions shall include –

(k) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the relevant land or building or buildings;

. . . .

(n) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property;

. . . .

(r) in general, to control, manage and administer the common property for the benefit of all owners.'

[17] I am of the opinion that it will be competent for the body corporate to institute action in some or other form in relation to the matters which are the subject of the litigation here. Indeed, such a conclusion accords with the general principle at common law that where a wrong is done to it, only the company (in this case the body corporate) and not the individual members may take proceedings against the wrongdoers.[17] For, as Schutz JA put it 'the body corporate is little more than the aggregation of all the individual owners. Their good is its good. Their ill is its ill. The body corporate is not an island, whatever the law of persons may say.'[18] The conclusion that I therefore reach is that s 41, which provides a comprehensive statutory right to an owner of a sectional title unit aggrieved at the failure of the body corporate to act in respect of a matter mentioned in s 36(6), finds application.[19]

[18] The body corporate has not instituted the proceedings. Nor, has it been called upon by the respondents to do so. However, say the respondents, they can hardly be expected to do so inasmuch as the trustees fall into two divergent camps who are at loggerheads with each other. *Cassim v Voyager Property Management (Pty) Ltd* dealt with a similar contention thus:

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[17] See *Wimbledon Lodge* para 18; see also *Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189).
[18] *Wimbledon Lodge* para 21.
[19] *Cassim* para 16.

'[I]t appears to me that the section finds application precisely when there is disharmony and disunity in the body corporate. The more dysfunctional the body corporate, the greater, I dare say, the need for a curator. On the view that I take of the matter, the argument advanced by and on behalf of the appellants misconstrues the section. The section does not require an owner to cause the body corporate to act in a particular way if the latter is unwilling to do so. All that is envisaged is for an owner to effect service of a notice on the body corporate calling upon it within the stated period to institute the contemplated proceedings. Should it fail to do so the envisaged remedy available to the owner is not to compel compliance with the notice but rather to approach the court for the appointment of a *curator ad litem* for the purposes of instituting and conducting the proceedings on behalf of the body corporate.'[20]

[19] The relief available to an owner in the position of the respondents is to approach the court for the appointment of a *curator ad litem* to the body corporate, so that the curator may investigate the events complained of and, if so advised, take action aimed at somehow remedying the position.[21] Section 41 is an important component of the overall structural scheme. On the one hand it filters out unmeritorious claims by over-zealous individuals. On the other it ensures that individuals complaining should have the advantage of the information and the funds of their corporation in pursuing legitimate claims.[22] As to whether a *curator* ought to be appointed, Schutz JA stated: 'the court has a discretion under s 41(3), having regard to whether it is satisfied that the body corporate has not sued . . . that there are *prima facie* grounds for such proceedings . . . and that an investigation into the desirability of instituting proceedings is justified'.[23] No doubt a *curator ad litem* would obtain proper advice and properly investigate the facts before taking any further legal steps. Even then, the curator would have to first report to the court, which may issue such directions as to it seems meet.[24]

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[20] Ibid para 13.
[21] *Cassim* para 16.
[22] *Cassim* para 17.
[23] *Wimbledon Lodge* para 26
[24] Section 41(4); see *Meridian Bay Restaurant (Pty) Ltd & others v Mitchell NO* 2011 (4) SA 1 (SCA).

[20] In the result the appeal must succeed and it is accordingly upheld with costs including those consequent upon the employment of two counsel. It follows that the order of the court below must be set aside and in its stead must be substituted an order dismissing the application with costs including those of two counsel.

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V M Ponnan

Judge of Appeal

APPEARANCES:

For First Appellant:	M Basslian SC (with him T K Manyage)
	Instructed by: Mashiane Moodley Monama Inc., Cape Town Lovius Block Attorneys, Bloemfontein
For Second Appellant:	R W F MacWilliam SC
	Instructed by: Lawrence Whittaker Attorneys, Constantia Lovius Block Attorneys, Bloemfontein
For Respondents:	B J Manca SC (with him K Reynolds)
	Instructed by: Shepstone Wylie, Cape Town Phatshoane Henney Attorneys, Bloemfontein