THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 635/2019

In the matter between:

CENTRAL DEVELOPMENTS TSHWANE (PTY) LTD t/a CENTRAL DEVELOPMENTS PROPERTY GROUP

FIRST APPELLANT

WILCOPROP 202 (PTY) LTD **SECOND APPELLANT**

and

THE BODY CORPORATE OF TWEE RIVIERE AFTREE OORD (SECTIONAL TITLE SCHEME SS0052110

RESPONDENT

Neutral citation: *Central Developments Tshwane (Pty) Ltd and Another v Body Corporate, Twee Riviere Aftree Oord* (635/2019) [2020] ZASCA 107 (21 September 2020)

Coram: WALLIS, MOLEMELA and PLASKET JJA and LEDWABA and UNTERHALTER AJJA

Heard: In terms of s 19(a) of the Superior Courts Act determined without an oral hearing.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court

of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 21 September 2020.

Summary: Action against developer of sectional title development arising from defects in the design and construction of foundations for structures situated on common property – power of body corporate to pursue such a claim – Sectional Title Schemes Management Act 8 of 2011 – body corporate's power to pursue such a claim conferred by s 2(7)(*b)* of Act – no need for a special resolution in terms of s 2(7)(*e*) of Act.

ORDER

On appeal from: Gauteng Division of High Court, Pretoria (Tolmay J sitting as court of first instance):

1 The appeal is dismissed.

2 The order of the High Court is set aside and replaced by the following order:

'1 The special plea is dismissed.

2 Each party is to pay its own costs relating to the preparation and argument of the special plea.'

3 Each party is to pay its own costs of this appeal.

JUDGMENT

Wallis JA and Ledwaba AJA (Molemela and Plasket JJA and Unterhalter AJA concurring)

[1] One or other of the appellants was the developer of the Twee Riviere Aftree Oord, a retirement village consisting of 448 sectional title units. There is no reason to distinguish them for present purposes so we will refer simply to the developer, encompassing both of them. The respondent, the Body Corporate of the sectional title development, alleges that the design and construction of portions of the common property, more specifically the foundations of the courtyard and patio walls, in the retirement village undertaken by the developer was defective as a result of the developer's negligence. It instituted two actions in the Gauteng Division of the High Court, Pretoria, seeking to recover damages calculated by reference to the cost of remedying the alleged defects. In both its cause of action was

primarily couched in delict on the grounds of the developer's negligence, with alternative claims for the same damages based on the existence of latent defects or misrepresentations to purchasers of units in the retirement village. For the purposes of this appeal the parties agreed that the one before us be treated as a test case.

[2] Shortly before the commencement of the trial an amended special plea was delivered, contending that the Body Corporate was precluded from suing, because they had not secured a special resolution of their members as required by s 2(7)(*e*) of the Sectional Title Schemes Management Act 8 of 2011 (the Management Act) before commencing action.[1] The Body Corporate's response was to contend that the failure to obtain a special resolution was capable of subsequent ratification. Sensibly, the parties agreed a stated case to address that issue. The special plea was dismissed in a judgment by Tolmay J. She refused leave to appeal, but on petition to this court such leave was granted.

[3] It is unnecessary to set out the terms of the special case. It was agreed that the Body Corporate had not obtained a special resolution of residents, either before commencing the proceedings or at all. The developer contended that this was fatal to the Body Corporate's action. The Body Corporate contended that this deficiency could be remedied by ratification by the sectional title unit holders. When dismissing the special plea, the judge granted the following additional orders:

[1] As the development and sales of units in the development spanned the operation of that Act and its predecessor, the Sectional Titles Act 95 of 1986, reliance was also placed on s 36(6)(*e*) of its predecessor the Sectional Titles Act 95 of 1986. As the provisions are in identical terms it is unnecessary to differentiate between them.

'42.2 It is declared that the failure to obtain a special resolution, as envisaged in section 2(7)(*e*) of the Sectional Title Scheme Management Act 8 of 2011, before the institution of the actions by the Plaintiff is capable of being ratified.

42.3 The Plaintiff is afforded an opportunity to procure a special resolution ratifying the institution of the actions under case number 89152/2014 and under case number 72462/2016[2] within a period of 6 months of date of this order, provided that it will be open to the Defendants to challenge the procedural validity of such ratification.

42.4 The Defendants are ordered to pay all the costs relating to the special plea, the one paying the other to be absolved.'

[4] In preparation for the appeal it became apparent that there was an antecedent question that the parties had not addressed in their heads of argument, namely whether s 2(7)(*e)* was in truth the source of the Body Corporate's authority to pursue the claim advanced against the developer. Certain questions were then posed to the parties through the registrar of this court. They were invited to deliver supplementary written argument dealing with this question and both parties did so.

The Act

[5] Sectional title schemes were introduced in South Africa by the Sectional Titles Act 66 of 1971 (the 1971 Act) and are now an established part of the legal landscape. The original legislation was replaced in 1986 by the Sectional Titles Act 95 of 1986 (the 1986 Act). Sections 28(6) of the 1971 Act and 36(6) of the 1986 Act empowered a body corporate to sue or be 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;

[2] The present action.

(*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.' (Our emphasis.)

In 1992 section 36(6) was amended[3] by the addition of the following sub-paragraph:

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

[6] When portions of the 1986 Act were repealed and replaced in 2011 by the Management Act, the section, as so amended, was re-enacted as s 2(7) reading as follows:

'The body corporate has perpetual succession and is capable of suing and 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 rules; and

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

[7] The basis for the special plea was that, because the claim lay against the developer, a special resolution was required before the Body Corporate was entitled to commence legal proceedings against the developer. Such a resolution was a pre-requisite to the commencement of proceedings, or, using language from another area of law, a jurisdictional fact, the absence of which meant that the Body Corporate lacked the power or authority to pursue the action against the developer.

[3] By s 9(b) of the Sectional Titles Amendment Act 7 of 1992.

[8] The antecedent question was whether the assumption that the source of the Body Corporate's power to sue the developer lay in s 2(7)(*e*) of the Management Act was correct. That assumption overlooked s 2(7)(*b*), which empowered the Body Corporate to sue in respect of any damage to the common property. The court sought and obtained submissions on whether s 2(7)(*b*) empowered the Body Corporate to bring this action against the developer, without the need to obtain a special resolution by the unit owners.

Discussion

[9] The effect of the provisions of s 36(6) of the 1986 Act was considered by this court in *Oribel Properties*.[4] After quoting the section, Malan JA said:

'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 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. . . . The body corporate is empowered by section 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

[4] *Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd* [2010] ZASCA 78; [2010] 4 All SA 282 (SCA) para 24.

corporate, however, does not detract from this specific right given to the individual or owner under section 25(13).' (Emphasis added.)

[10] The common property in a sectional title development is owned jointly by the section owners in undivided shares.[5] In the present case, that would ordinarily mean that any damage unlawfully caused to the common property could only be recovered in proceedings brought by the owners of the 448 units in the retirement village acting jointly. Such an arrangement would be practically difficult, and possibly unworkable, in most sectional title schemes. Accordingly, s 28(6)(b) of the 1971 Act, s 36(6)(*b*) of the 1986 Act, and s 2(7)(*b*) of the Management Act all empowered bodies corporate of sectional title developments to sue in their own name to recover damages arising from damage caused to any part of the common property.

[11] There is an underlying logic to this provision. Under s 3(1)(*a*)(i) of the Management Act the body corporate is obliged to establish and maintain an administrative fund which is reasonably sufficient, among other matters, to repair and maintain the common property. Under s 3(1)(*i*) the body corporate is obliged to insure the buildings forming part of the development, which would include structures forming part of the common property. Where such structures are damaged by third parties it is appropriate that the body corporate should be entitled to recover those damages. Indeed, if it did not have that power, it might be debatable whether it had an insurable interest in the buildings it was obliged to insure. Be that as it may the power to sue in their own name is vested in all bodies corporate in relation to claims for damage to the common property. It is unnecessary for present purposes to decide whether this is a form of

[5] Section 16(1) of the 1986 Act.

representative action on behalf of owners of sections, or to consider what obligations a successful action may impose upon bodies corporate vis-à-vis the section owners. Those are questions for another day and a very different dispute.

[12] Malan JA correctly said in *Oribel Properties* that s 36(6)(*b*) of the 1986 Act conferred a power to sue for damage to the common property that bodies corporate would not otherwise have enjoyed. He did not refer to its predecessor in the 1971 Act, but the same would have been true of that provision as well. The same power is now derived from s 2(7)(*b*) of the Management Act.

[13] Neither the language nor the context of s 2(7)(*b*) suggests that the power to sue to recover damages arising from damage to the common property is confined to damage caused by parties other than the developer of the sectional title development. Where the damage is occasioned by defects in the original design and construction of the structures on the common property, such as the foundations that are the *casus belli* in the present case, the developer is an obvious target for any claim. Others who may be liable are the architect, the engineer and the builder. There is no question that they can be sued by the body corporate in its own name without the need to obtain a special resolution.

[14] To that extent the decision in *Body Corporate of Greenwood Scheme*[6] was correct, but only coincidentally. The argument on exception in that case was that the architect and a director of the development could

[6] *Body Corporate of Greenwood Scheme v 75/2 Sandown (Pty) Ltd and others* 1999 (3) SA 480 (W) at 485B-E.

not be sued because the developer could not be sued without a special resolution in terms of s 36(6)(*e*). The fallacy in the argument was that s 36(6)(*e*) was irrelevant to the action, whether against the developer or against the architect and the director. The power to sue arose in terms of s 36(6)(*b*). The endeavour by the court to distinguish s 36(6)(*e*) by saying that its requirements were procedural and did not vest the body corporate with powers to sue the developer was incorrect.

[15] It is helpful to consider the issue by looking back at the position before the s 36(6) of the 1986 Act was amended to introduce sub-section (e). The section clearly provided, as its predecessor did and its successor still does, that the body corporate was empowered to sue in its own name in respect of any damage to the common property. The section contained no limitation on the power of the body corporate to sue the developer where the damage to the common property was caused by fault on its part. There is no reason, and none was suggested in the heads of argument, why any limitation should be read into the section to restrict the power to sue contained therein, or to preclude it from being used against the developer.

[16] It follows that the developer's argument in the present case depended upon the proposition that, when s 36(6)(*e*) was introduced in 1992, it had the effect of removing the power that bodies corporate had previously enjoyed to sue developers for damages arising from damage to the common property. The suggestion must be that it removed that power from s 36(6)(*b*) without any amendment to that section and reinstated it in s 36(6)(*e*), subject to the qualification that it could only be exercised if a special resolution had been obtained from the owners of all the sections in the development.

[17] There is nothing to suggest that this was the purpose of the amendment. On its wording it was directed at affording bodies corporate a power to sue developers where the claim was one 'in respect of the scheme'. An obvious example would be a claim to compel performance of an obligation resting on the developer under the scheme. Another would be an application for an interdict to prevent the developer from acting in a manner inconsistent with the terms of the scheme. Nothing in the long title of the amending statute suggests that the purpose of including sub-section (*e*) in s 36(6) was anything other than to vest bodies corporate with powers that they did not otherwise have. It aimed at conferring additional powers, not removing and restricting existing powers by making their exercise more onerous.

[18] In the judgment of the high court it was said that:

'The 1992 amendment therefore entailed a stricter requirement before a body corporate may sue a developer namely a special resolution …'

That led to the conclusion that:

'… a claim by the body corporate can only be instituted if a special resolution to do so is obtained.'

This reasoning was largely based on that in *Body Corporate of Greenwood Scheme*, which is dealt with above, and fell into the same error. The judge recognised the antecedent question but, with respect, answered it incorrectly, no doubt because the arguments to the contrary were not addressed to the court. But a correct answer rendered the further question of the ratification of a failure to secure a special resolution academic.

Result

[19] The inevitable outcome of this analysis is that the Body Corporate in this case did not require the authority of a special resolution in order to pursue the claims advanced by it. The special plea was accordingly bad in law as it proceeded from a misconception as to the Body Corporate's powers. It was correctly dismissed, but not for the reasons given by the learned judge, who was confronted with very different arguments. The appeal must therefore be dismissed but the separate orders quoted in para 3 must be set aside as unnecessary given the terms of this judgment.

[20] The issue on which the case was decided in the high court did not, properly speaking, arise. The conclusion that the absence of a special resolution in the case of an action by a body corporate against a developer in respect of a scheme could be cured by subsequent ratification was based on what was termed a 'purposeful interpretation' of section 2(7)(*e*). However, little consideration was addressed to the background to the introduction of this section or the purpose it served. Nor was reference made to the differing approaches to a problem of this type in the majority and minority judgments in *Neugarten*.[7] When and if a case arises where the ratification of the failure by a body corporate to obtain a special resolution before instituting action against the developer pertinently arises these considerations will no doubt be borne in mind.

[21] That leaves only the issue of costs. While ordinarily these would be borne by the unsuccessful party, the position is that responsibility for the stated case and the arguments before the high court and initially before this court must be shared by the parties. The point was ill-conceived by the

[7] *Neugarten and Others v Standard Bank of South Africa Ltd* 1989 (1) SA 792 (A).

appellants, but the respondent raised the issue of ratification, instead of pointing out that the power to pursue the claim lay in s 2(7)(*b*). In the circumstances the appropriate order is that each party should bear its own costs, both in this court and in the high court.

[22] The following order is made:

1 The appeal is dismissed.

2 The order of the High Court is set aside and replaced by the following order:

'1 The special plea is dismissed.

2 Each party is to pay its own costs relating to the preparation and argument of the special plea.'

3 Each party is to pay its own costs of this appeal.

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M J D WALLIS

JUDGE OF APPEAL

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for A LEDWABA

ACTING JUDGE OF APPEAL

Appearances

For appellant:	F N Erasmus SC (with him C van Eetveldt)
Instructed by:	JDB Incorporated Attorneys, Pretoria;
	Peyper Incorporated Attorneys, Bloemfontein
For respondent:	D K Nigrini
Instructed by:	Erasmus Incorporated Attorneys, Pretoria;
	Phatshoane Henney, Bloemfontein.