IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA) 04/06/2010.

CASE NO: 34386/08

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
04/06/2010 DATE SIGNATURE

MANDY DAVID MITCHELL Applicant

and

DIE BEHEERLIGGAAM RNS MANSIONS Respondent

JUDGMENT

MURPHY J

1. The applicant has applied on notice of motion for various orders pertaining to the right of the respondent, a body corporate in a sectional title scheme, to levy compound interest on arrear levies owing in respect of a unit in the scheme. By way of an amendment to the notice of motion he also seeks the repayment of certain amounts already paid.

2. In the first place the applicant requests a declarator declaring that the respondent is not entitled to levy compound interest on arrears, but may charge only simple interest once its trustees have determined a rate in terms of regulation 31(6) of Annexure 8 of the Regulations GNR 664/1988 in terms of the Sectional Title Act 95 of 1986. Secondly, the applicant seeks a prohibitory interdict restraining the respondent from levying any interest on arrears owing in respect of unit 33 in the scheme. In the alternative, it asks for a prohibitory interdict restraining the respondent from raising interest from 1 June 2007 and a further declarator that the *in duplum* rule is applicable, with the consequence of reducing the interest payable.

3. On 13 May 2008 the applicant, an attorney, purchased Unit 33 in the scheme at an auction sale in execution. Clause 5(a) of the conditions of sale provided that the purchaser shall pay, *inter alia*, "any amount which must be paid in law, levies due to a Body Corporate ....." Not long after the sale the applicant received a reconciliation reflecting an amount of R180 579,26 owing as at June 2008. It appears from the statement that interest had been capitalised and thus that compound interest had been levied.

4. The applicant addressed a letter to the property administrator in which he stated:

> "Skrywer bevestig dat die heffings, spesiale heffings en regskoste beloop die bedrag van R55 061.75 welke u kapitale bedrag verteenwoordig. U het rente gehef op voormelde bedrag ten bedrae van R128 012.00 welke onreëlmatig is, aangesien dit in stryd is met die gemeenregtelike *in duplum* reël. Derhalwe kan die rente slegs loop tot en met die kapitale bedrag wat R55 061.75 beloop en behoort u heffingsertifikaat gewysig te word tot 'n bedrag van R110 123,50."

5. The letter generated an exchange of correspondence in which the parties took up the respective positions that led to the present litigation. In the interim the applicant has paid the amount the respondent claims was owing, and has subsequently re-sold the unit to a third party.

6. The applicant's position has crystallised into a claim that the respondent is only entitled to charge simple interest at a rate determined from time to time by the trustees. He contended in his founding affidavit that the trustees did not in fact take the appropriate resolutions and accordingly that no interest is payable. In addition, he submitted, in the event of the court finding that the trustees had properly determined a rate and that they were authorised to charge compound interest, that such interest would be in contravention with the provisions of the National Credit Act 34 of 2005.

7. The respondent has raised various defences: firstly that the respondent had no *locus standi* regarding the unit because the calculations were done prior to his purchasing the property and he has now sold it on; that the

declarator should have been sought by way of action in view of the foreseeable disputes of fact; and that the applicant agreed at the auction to pay the outstanding amount of levies as determined by the body corporate and assumed that risk. It also took the position that it was entitled in law to charge compound interest; that the trustees had determined a rate; that the effect of the *in duplum* rule should be restricted; and that the National Credit Act finds no application.

8. I propose first to deal with the primary question whether a body corporate may charge compound interest on arrear levies, and if so under what circumstances. There have been various judicial pronouncements on the subject of compound interest in general. In *Davehill (Pty) Ltd and Others v Community Development Board* 1988(1) SA 290 (A) the court was concerned with section 12(3) of the Expropriation Act 63 of 1975 which provides for interest to be paid by the expropriating authority from the date of taking possession of the property on any outstanding portion of the compensation payable ("statutory interest"). It held that it was implicit in the provisions of section 12(3) that the obligation to pay statutory interest due arises on the same date as the final payment of compensation is made. It held further that there is, in principle, no objection to a claim for *mora* interest on outstanding statutory interest. At 298 Smalberger JA stated the legal position to be as follows:

> "In the course of argument *Mr Burger*, for the respondent, raised the question whether it was permissible in the absence of agreement, to award interest on interest .... Interest on interest (compound interest) could not be claimed in Roman and Roman-Dutch law ... In our modern law this principle has become obsolete, having been abrogated by disuse .... Compound interest may be expressly stipulated for by agreement, is commonplace today in commercial and financial dealings and has been sanctioned by our Courts for many years. In principle there appears to be no reason why the right to claim interest on interest should be confined to instances regulated by agreement, and why it should not extend to the right to claim *mora* interest (which is a species of damages) on unpaid interest which is due and payable ..... Subject to what has been said above, it is not necessary in this judgment to attempt to define under what circumstances and within what limits a claim for interest on interest will lie. Suffice it to say that in principle there can be no objection to a claim for *mora* interest on outstanding statutory interest, bearing in mind that statutory interest is, in essence, compensation for loss of possession and fruits."

9. It follows from these *dicta* that an agreement may not be necessary to claim compound interest (*mora* interest is quasi-delictual), and the charging of compound interest may also expressly or implicitly be authorised by statute. In *Central Africa Building Society v Pierce N.O.* 1969 (1) SA 445 (RAD) the court was concerned with section 88(1) of the Insolvency Act which provided that the proceeds of any property, subject to a special mortgage, pledge or right of retention, shall be applied in payment of the claims thereby secured in the legal order of preference, with interest from the date of sequestration to the date of payment. One of

the questions before the court was whether the applicant was entitled to compound interest on arrear interest in respect of interest accruing after the date of sequestration. Beadle CJ (at 455 D-G) expressed the following view:

> "So far as interest accruing after the date of sequestration is concerned, however, the position here is the same as that relating to the appropriation of interim payments. If the Act is silent on it, the common law rule must prevail. If, therefore, compound interest is to be paid on it, there must be something in the Act which specifically provides for the payment of such interest. The relevant sections are section 88(1) and section 88(3), and there is nothing in these sub-sections to indicate that interest which may be due "from the date of sequestration to the date of payment" may be compounded. The Act is, therefore, silent on this matter and that being so, one must look again to the common law to see what the creditor's rights are. It is trite law that, unless there is some special provision in either a statute or an agreement to pay compound interest, compound interest is not payable."

10. The applicant has seized upon these *dicta* to bolster his submission that before a body corporate may charge compound interest it requires specific authorisation in terms of the Sectional Titles Act to do so. I doubt, in the light of the later ruling in *Davehill*, that such can be entirely right. The latter decision unequivocally allowed *mora* interest on interest when there was no express provision to that effect in the Expropriation Act. To that extent the *dicta* of Beadle CJ may no longer be a complete and authoritative statement of the current law. Nevertheless, I am prepared to

proceed on the assumption that there is merit in the assertion that "there must be something in the Act which specifically provides for the payment of such interest".

11. Section 36 of the Act provides for the establishment of a body corporate for a sectional title scheme, which is made up of the owners of units as members. A body corporate is a legal person with concomitant rights and obligations. In terms of section 37 of the Act, the functions of a body corporate include establishing a fund for administrative expenses which is "*sufficient* in the opinion of the body corporate" for the repair, up-keep, control, management and administration of the common property - section 37(1)(a). To this end its functions include requiring the owners "to make contributions to such fund for the purposes of satisfying any claims against the body corporate" - section 37(1)(b); determining from time to time the amounts to be raised for the purposes aforesaid - section 37(1)(c); to raise the amounts so determined by levying contributions on the owners in proportion to the quotas of their respective sections - section 37(1)(d); to open and operate banking accounts - section 37(1)(e); and "in general, to control, manage and administer the common property for the benefit of all owners" - section 37(1)(r). Section 37(2) provides:

> "Any contributions levied under any provisions of subsection (1), shall be due and payable on the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by action in any court

(including any magistrate's court) of competent jurisdiction from the person who were owners at the time when such resolution was passed."

12. Section 38 of the Act defines the powers of a body corporate which *inter alia* include the power "to do all things reasonably necessary for the enforcement of the rules and for the control, management and administration of the common property" - section 38(j); "to invest any moneys of the fund" - section 38(g); and "to borrow moneys required by it in the performance of its functions or the exercise of its powers" - section 38(e).

13. Section 39(1) provides that the functions and powers of the body corporate shall, subject to the provisions of the Act, the rules and any restriction imposed or direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules. In terms of section 35(1) a scheme shall be controlled and managed, subject to the provisions of the Act, by means of rules. Section 35(2) provides that the rules shall comprise both *management* and *conduct* rules, prescribed by regulation, which may be substituted, added to, amended or repealed on submission of the scheme for approval or later by the body corporate in the circumstances set out on the sub-section. Annexure 8 of the Regulations GNR 664 of 8 April 1988 promulgates the standard management rules contemplated in section 35(2). The rules directly relevant to contributions

and interest are rule 30 and rule 31. Rule 30 provides that it shall be the duty of the trustees to levy and collect contributions from the owners in accordance with the provisions and in the proportions set forth in rule 31. The latter rule sets out in some detail the methodology to be followed in the determining and levying of contributions. Of particular importance for present purposes are sub-rules (5) and (6), which read:

> "(5) An owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, *or any other arrear amounts due and owing* by such owner to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act.
>
> (6) The trustees shall be entitled to charge interest on *arrear amounts* at such rate as they may from time to time determine."

14. It will be noted immediately that rule 31(5) draws a distinction between "arrear levies" on the one hand, and "any other arrear amounts due and owing" on the other; and that rule 31(6) entitles the trustees to charge interest on arrear amounts and not only on arrear levies. The term "arrear" bears its ordinary meaning of "outstanding" or being that which remains unpaid. "Arrear amounts" is thus a broader category of unpaid debts than "arrear levies" and would thus include unpaid interest on levies. Accordingly, rule 31(6), on a literal interpretation, permits the trustees to

charge interest (*mora* interest) on unpaid interest charged on arrear levies, in other words - compound interest. The Act, therefore, specifically provides for the payment of such interest. Considering also the fiduciary duties of the trustees to act in the interest and for the benefit of the body corporate (section 40(2)) and not to negligently cause it loss (section 40(3)(a)), were the trustees not to charge defaulting members compound interest (which they would be able to earn on money invested in a commercial bank). they would possibly fall short of their duties. Rule 43 provides that funds not immediately required for disbursement may be invested in a savings or similar account; and rule 44 allows the body corporate to use such interest for its lawful purposes. And, it should be remembered, in terms of section 37, the fund for administrative expenses must be *sufficient* to enable the body corporate to fulfil its functions.

15. In the result, therefore, I disagree with the applicant's submission that the Act does not authorise the charging of compound interest on unpaid levies and interest. Accordingly the applicant is not entitled to a declarator that the respondent may only charge simple interest and not compound interest.

16. That finding leads me to the next issue: namely, whether the applicant should be granted a prohibitory interdict on the basis that the respondent has not proved that the trustees in fact resolved to charge compound

interest on arrears at the relevant rate. The applicant goes beyond this in a proposed amendment aimed at substituting prayer 1.3 of the notice of motion with a prayer including a request for judgment against the respondent for an amount of money based on his calculations of the interest payable.

17. The respondent contends that relief of this order would not be appropriate on application amongst other reasons because material disputes of fact exist in relation to the relevant issues. In paragraph 4.4 of his founding affidavit the applicant states:

> "My afleiding is dat die trustees geen sodanige besluite geneem het nie en dat die agterstallige heffings gevolglik nie rente dra nie. In die afwesigheid van die besluite van die trustees om telkens teen 'n spesifieke koers rente te hef, is rente nie betaalbaar nie."

The respondent answers this assertion in the opposing affidavit with the averment that on 13 June 2008 it had sent the applicant minutes of the Annual General Meeting of the body corporate where it maintains the decision was taken. The applicant's response is to contend that this constitutes insufficient evidence that the decision was in fact made by the trustees. Whatever the sufficiency of the minutes as evidence, I agree with the respondent that the resultant dispute of fact regarding the nature and circumstances of any decisions regarding the capitalisation and rate

of interest are matters that can only be addressed by way of adducing evidence at trial. Likewise, there is a dispute of fact on the papers about the calculation of the arrear amounts and the capitalised interest, which impacts on the amount allegedly owing and the extent of protection, if any, to be extended by the *in duplum* rule. The latter question can only be satisfactorily resolved once the factual disputes about the applicable rate, the authority to capitalise and the calculations are resolved by evidence. There is also the contested factual issue about whether the applicant through his bid at the auction agreed to pay the amount stipulated as owing by the body corporate at the time of the auction.

18. All these factual disputes were foreseeable and hence I am not inclined to refer them to oral evidence or to trial. The application should rather be dismissed. Because the applicant initially sought only declaratory and interdictory relief, and I propose to disallow the amendment sought on the grounds that it would fundamentally alter the nature of the application, the applicant will remain able to proceed by action should he so wish.

19. Finally, there may be some advantage in commenting at this stage on the applicant's contention that the respondent has acted in contravention of the National Credit Act 34 of 2005. The applicant relies on the provisions of section 101(1)(a) of that Act which provides that a credit agreement must not require payment of interest unless it is expressed in percentage

terms as an annual rate calculated in the prescribed manner and must not exceed the applicable maximum prescribed rate. He contends that the rate levied by the trustees or the body corporate exceeds the maximum and that the levying of interest at the discretion of the trustees violates section 103(4) of the National Credit Act which allows variation of interest rates only by fixed relationship to a reference rate. The argument presupposes that the imposition of sectional title levies and interest by a body corporate is subject to the National Credit Act. The applicant argues that the charging of interest on arrear levies has the consequence and is equivalent to an "incidental credit agreement" as defined in section 1 of the Act as follows:

> "an agreement .... in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time ...."

20. In my opinion, the applicant's argument holds no water principally because levies and interest on them are not payable by members of a body corporate in terms of any agreement. They are payable by virtue of an obligation imposed by the provisions of the Sectional Titles Act and the Regulations promulgated in terms thereof. Moreover, a body corporate does not supply goods or services to its members, nor does it advance money or credit to its members - see L Mills: *Applicability of the National*

Credit Act to sectional title levies (*De Rebus* May 2010. p61) and *TS Dlamini v Body Corporate of Frenoleen* (KZNP - unreported AR611/09).

21. In the premises I make the following orders:

i) The application, including the application for amendment, is dismissed.

ii) The applicant is ordered to pay the respondent's costs, including the costs of the application for amendment

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 10 March 2009
For the Applicant: Adv HJ de Wet, Pretoria
Instructed By: Coetzer Inc., Pretoria
For the Respondent: Adv S Mentz, Pretoria
Instructed By: Kircaldy Perreira Inc., Pretoria