


24/11/17

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. ✓
 SIGNATURE
<u>24/11/2017</u> DATE

In the matter between:

CASE NUMBER: 69726/2015

AMBERFIELD GLEN

HOME OWNERS ASSOCIATION (NPC)

PLAINTIFF

And

THE BODY CORPORATE OF ONYX PARK

DEFENDANT

JUDGEMENT

COX AJ

1. The Plaintiff is a registered non-profit company.
2. The Defendant is a body corporate which is incorporated and registered in terms of the Sectional Titles Act 95 of 1986, as amended.
3. The Defendant is a member of the Plaintiff as per the Memorandum of Incorporation of the Plaintiff.
4. The Plaintiff claims from the Defendant payment in an amount of R 550 691.46 plus interest and costs for levies which the Defendant is allegedly in arrears from September 2012 – 2015.
The claim is for the difference between the amount that the Defendant paid to the Plaintiff to the date of the summons and the amount which the Defendant should have paid according to the Plaintiff.
5. According to the Plaintiff the Defendant was liable to it for the payment of an increased (weighted) levy by virtue of the fact that the Defendant consists of sixty living units on one erf.
6. It is the stance of the Defendant that the Directors of the Plaintiff never resolved that the Defendant was obliged to pay a "weighted" (an increased") levy as a member of the Plaintiff. The Defendant pleaded that as a member the Defendant it was liable for payment of a levy equal to any other member of the Plaintiff, despite the amount of living units which were built on its erf. The Defendant further denied any liability to the Plaintiff. It argued that the Plaintiff levied/charged the individual owners on the erf and invoiced the Defendant for the sake of convenience and therefore the Defendant is not liable to the Plaintiff for payment of its claim.
The court is unable to agree with this view for the reasons stated hereunder.

7. The Defendant defended the action and filed a counterclaim based on the defence of *conditio indebiti*. During argument the Defendant withdrew its counterclaim and tendered costs. No further discussion thereof is thus warranted.
8. The parties referred to numerous documents which are contained in the court bundle which is in excess of 2000 pages.
9. The Plaintiff having closed its case, the Defendant also closed its case without tendering any evidence.
10. The plaintiff based its claim on the evidence of Mr. J H Smith and Mr. J M Venter.
11. In 2002 Mr. J H Smith was a marketing manager and a director of ABSA Development Pty Ltd (DEVCO). DEVCO was responsible for *inter alia* the development of new town development(s) like Amberfield Glen (the Plaintiff, herein referred to as Amberfield). Mr. Smith testified that he was a director of both DEVCO and Amberfield at the inception of the latter. He stated that representatives of DEVCO were appointed to serve on the new Home Owners Association (HOA) until such time that the new HOA is able to conduct its own business. Amberfield Glen Home Owners Association was incorporated in 2002 and registered as such on 23 May of the same year. Mr. Smith was one of the signatories to the Articles of Incorporation of the Plaintiff and its Statutes.
12. I agree with the sentiments of counsel for the Defendant that Mr. Venter was not the best witness. Despite the contradictions in his evidence two aspects remained clear, namely that he invoiced the Plaintiff for 60 living opportunities/units on one erf.
He was lambasted about the contents of an affidavit (not deposed to by him) which was contained in an intended High Court application in 2015. The application was

withdrawn. It is apparent that the contents of the affidavit were based on incorrect legal advice.

It does not take the matter any further and deserves no further discussion.

13. Clause 2 of The Statutes of Amberfield deals with membership of the HOA.

Clause 2.2 reads that if an erf is owned by more than one person, all the registered owners of such erf will be deemed to be a single member of the Plaintiff, and will have joint rights and obligations of one member, provided that they will be both jointly and severally liable to the Plaintiff for fulfilling any obligation to it. In the event that a member subdivides or opens a sectional title register in respect of his erf he will be replaced as a member by either the home owners association or body corporate which comes into being to administer the said erf.

This specific clause renders the argument of the Defendant that the Plaintiff levied/charged the individual owners on the erf, and invoiced the Defendant for payment of the levies for the sake of convenience, toothless, in that it renders the Plaintiff and the occupiers of the 60 living units jointly and severally liable to the Plaintiff for fulfilling any obligation to it.

The Defendant and the 60 owners on erf 2975 would therefore have been jointly and severally liable for payment of levies to the Plaintiff, irrespective of the fact that the invoice was made out in the name of the Defendant.

14. Clause 2.8 makes the Statutes binding on all occupiers of erven in Amberfield.

15. The parties to this matter thus correctly agreed that the Defendant was one member of the Plaintiff despite its consisting of sixty living units.

16. The Amberfield Glen development consists of erven varying in size.

17. The Sectional titles scheme known as Onyx Park was developed and built on one of the erven, erf number 2975, which presently consists of sixty living units.

18. The first meeting of the newly established HOA was held on 31 March 2004.

19. Clause 3 provides for levies and building deposits. It states that the directors of the Plaintiff is entitled to determine the amount(s) payable for levies and that it may determine the interest rate payable on levies which are in arrears. The interest rate is capped at two percentage points above the ABSA prime lending rate.

20. Clause 8.16 states that every member of the Plaintiff would have one vote per erf registered in his name. The effect thereof was that the Defendant only had one vote at the Annual General Meeting of the Plaintiff. This caused unhappiness as the Defendant comprised of sixty living units. These sectional titleholders were aggrieved by the fact that they had one combined vote which vested in the Defendant.

21. It was the uncontested evidence of Mr. Smith that the *pro forma* agreement of sale which appears on page 1592 of court bundle "D" was the contract of sale which DEVCO used, without exception, in its sale of erven in Amberfield. Unfortunately the agreement between the Plaintiff and the Defendant was not disclosed and therefor it was not placed before the court.

22. Paragraph 25.2 of the *pro forma* sale agreement contains the formula which would be used by the directors of the Plaintiff to calculate the levy(s) payable. The formula to be used was: $Rx \times \frac{a}{100} \div 12 \text{ months}$
Where: Rx = the sum total of the annual expenses of the HOA

a = the levy quota awarded to an erf as per the schedule which was supposedly attached to every sale agreement as annexure "A". Annexure "B" to every sale agreement would have been the estimated budget of Amberfield which was dated 1 March 2002 and which was valid for a period of twelve

months. Similarly The Rules of Conduct of the Plaintiff would have been attached as annexure "C"

From a reading of the Statutes it is clear that the amount of the levy which was so determined would be valid for twelve months. It does not refer to the method of calculation.

23. Annexure "A" shows that Amberfield consisted of 664 potential building units. It further provides for the levy quota in respect of all the potential building units as well as the monthly levy.

The estimated budget for twelve months commencing on 1 July 2002 reflects that the 664 potential building units were used to calculate the expected income from levies for the year.

The Defendant is situated on Erf 2975 and is referred to in Annexure "A" as:

Erf No	Description	Extent	Potential Building Units	Levy Quota	Monthly Levy
2975	Groep	2,4705 HA	61	9,214502	7,625.00
2992	Enkel	1207	1	0,015106	125.00

The table shows that there were 61 potential building units on the erf of the Defendant. It was however reduced to 60 as one was used to build a clubhouse.

24. The levy quota for a single building opportunity is indicated as 0,015106 and the levy itself as R 125.00.

25. The aforementioned thus show that levies will be determined by the amount of building opportunities per erf in that the levy for a single building opportunity would be multiplied by the amount of building opportunities on a specific erf in order to calculate the levy for such an erf.

26. This was resolved at the first directors' meeting of the Plaintiff which was held on 17 June 2002. The resolution reads:

" *In terme van die goedgekeurde begroting word 'n maandelikse heffing van R125.00 **per enkel bougeleentheid*** (my emphasis) betaalbaar deur gewone lede vir die tydperk 1 Julie 2002 tot 30 Junie 2003 hiermee goedgekeur en bekragtig."

The levy schedule herein referred to *supra*, was attached to the resolution.

27. The levy schedule was presented to members of the Plaintiff during its first AGM which was held on 31 March 2004. The column with the heading "Levy Quota" was however omitted. The column referring to "Potential Building Units" however remained and it indicates the Defendant as having 61.

28. The levy Schedule which came into effect on 1 October 2004 was the first to change the relevant column heading to "Building Units" and the amount thereof on the erf of the Defendant as 60.

29. The minutes of the directors' meetings of the Defendant constantly refers to living units when deciding on the amount of levies payable.

30. The minutes of a directors' meeting of the Plaintiff which is dated 13 October 2005 in paragraph 6.2 reflects that a Ms. Stokes of erf 2878 applied for a reduction of her levy from R 390.00 to R 195.00. She based her application on the fact that despite the fact that her erf was zoned for two living opportunities only one house was erected on the erf and that there was no intention of building a second one thereon. Her application for the reduction of the levy was denied.

31. Erven with more living units/opportunities were therefor liable to pay an increased levy as per the formula above.

32. From the aforementioned it is apparent that right from the inception of Amberfield it was the intention that levies be levied per building / living unit.
33. Erven with more living units were therefor liable to pay an increased levy as per the formula above.
34. The formula/method of calculation was never changed.
35. Neither the Memorandum of Incorporation nor the Statutes of the Plaintiff contains a provision that the method of calculation of the levies should be approved at the Directors meeting. All that is required is that the budget and the amount of the levies be determined.
36. It can be accepted that a resolution is required should the method of calculation in determining the amount of the levies be changed.
37. The argument of the Defendant on this point is of no merit and is rejected.
38. The court is satisfied that the Plaintiff proved its claim as prayed for
39. The Defendant was thus liable to the Plaintiff for the payment of a single collective levy for 60 living opportunities for the period of this claim.

The court therefore orders:

1. That the Defendant pay the Plaintiff the amount of R550 969.46 , plus interest calculated at 2% above the ABSA Bank prime lending rate, from 28 August 2015 until the date of final payment; and
2. Costs which include the cost of Senior Counsel.



I D COX

**ACTING JUDGE: GAUTENG
DIVISION
PRETORIA**

24 November 2017