ORIGINAL

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 11454/2015

In the matter between:

CENTRAL PLAZA INVESTMENTS 85 (PTY) LIMITED Applicant

and

BODY CORPORATE: MANGROVE BEACH CENTRE Respondent

JUDGMENT

Date Delivered: 31 October 2017

MASIPA J:

Background

[1] This is an application for a declaratory order. The Respondent, a body corporate, adopted its own management rules for the scheme ('the Rules') which were adapted from the prescribed rules embodies in Annexure 8 of the Sectional Titles Act, 1986, ('the Act'). The contents of the rules are common cause between the parties. The Respondent's functions are as set out in the Rules and read with the

provisions the Act. These regulate the relationship between owners and that which exists between the Respondent and the owners.

[2] The current matter arises from the application of a provision in the Rules relating to the allocation of expenses. The Applicant contends that the provisions in the Rules are clear, however, despite this, the Respondent is not implementing them which has necessitated that the Applicant approach court for a declaratory relief in respect of the status and the application of the Rules. This contention is of course disputed by the Respondent who opposes the application.

The Facts

[3] The Respondent comprises of a commercial section and a residential section. Commercial units are situated on the ground, first, second and third floors of the low rise of a commercial annexe. The Respondent has 25 floors and residential units occupy 23 floors above the commercial floors. A portion of the building goes up 16 floors and the other 25 floors. There are 11 residential units per floor up to floor 16 and thereafter eight units per floor.

[4] The Applicant owns the commercial section and spent approximately R5 million on repairs and renovations. These improvements, it contends, increased the value of the block as a whole including the value of residential units. Christopher Pearson, who deposed to the Applicant's affidavit, stated that he served as a trustee and sometimes chairman of the Respondent while other directors of the Applicant served as a second trustee. There have always been approximately four trustees, one or two residential trustees and two commercial trustees.

[5] The expenses of the body corporate as set out in the expense allocation schedule in the Rules are categorised in three different ways as follows:

> a) expenses borne by all members of the scheme equally being annual audit fees, insurance premiums, general maintenance, repairs, rates and water which are paid in terms of the members' participation quota;

b) expenses regularly incurred by some members split according to usage; and

c) expenses specific to particular units charged to members who incur them, direct expenses.

[6] The expense schedule was introduced by the developer to ensure that expenses were fairly allocated between the residential and commercial owners. The Applicant contends that the Respondent and its managing agents had consistently applied the expense schedule prior to the present issue arising.

[7] Remedial work to the exterior wall was undertaken in 2012 and allocated as direct expense on a per floor basis. This was following a notice in terms of s12 of the National Building Regulations and Building Standards Act, 1977 issued by eThekwini Municipality for the Respondent to carry out certain remedial work on the western façade. A resolution was passed for a special levy in respect of the remedial work which included the installation of a second lift. The total cost was R687 000. Trustees agreed that the expense would be allocated as a general repair and maintenance which were a direct cost allocated per floor with the commercial section paying for two floors and the residential section paying for 23 floors. There were no costs allocated to the basement. Pursuant to the allocation by trustees, Wakefields, the managing agent of the Respondent, circulated a circular to all scheme members advising them of the special levy. A schedule with a breakdown per section was attached.

[8] There were no objections raised to the special levy, the appointment of a private contractor and the allocation for the expense as a direct cost. Repairs were carried out in 2013. The brick wall cladding on the western façade was removed and replaced with plaster and paint.

[9] During 2014, brick wall on the remaining exterior wall began to fall and the trustees appointed the previous contractor DAFCO to undertake the balance of the façades. A quotation was provided to the Respondent in the amount of R1 320 120 which was accepted by the trustees. In terms of the quotation, a deposit had to be paid together with progress payments until the work was complete.

[10] The Respondent used its existing funds and once they were depleted, borrowed an amount of R150 000 from Wakefields. A portion of the northern façade was repaired and due to urgency, the southern façade attended to. To pay the balance at an estimated amount of R1 million, the four trustees resolved to raise a special levy to be paid over six months. The residential trustees refused to follow the direct method of allocating costs as was done with the western façade. They refused to accept the validity of the Special Rules and argued that the balance of the work should be allocated on participation quota basis.

[11] The issue was raised at the Annual General Meeting of the members held on 21 February 2015 and following disagreements, members were requested to vote on whether the special levy is to be calculated in terms of the participation quota for the scheme or as a direct expense. A majority of the members voted, by a show of hands, in favour of the special levy being allocated by participation quota. The Applicant voted in favour of direct application. Since votes are weighted, commercial owners carry 75 per cent while residential owners 25 per cent. The result was that the vote was in favour of direct allocation. It was however agreed that if in due course, residential owners could prove that commercial owners should have paid more, the shortfall could be recovered.

Points *in limine*

Authority to litigate

[12] Ms *Nicholson* submitted that the answering affidavit was not properly before court since the deponent, Ismail Vahed, was not authorised by the Respondent as provided for in Rule 24 of the management rules as the resolution was only signed by two trustees. She relied *on Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another* 2006 (3) SA 369 (W) where the court found a resolution signed by nine of the twelve trustees to have been incompetent as management rule 24 required that all trustees had to sign the resolution. In *Torgos* the court went further to say that the result was that there was no proper authority to file the opposing affidavit

and that the affidavit had to be disregarded for purposes of adjudicating the application.

[13] Mr *Sardiwalla* argued that it is the institution and prosecution of an action which must be authorised and not the deposition to an affidavit. He relied on the decision of *ANC Umvoti Council Caucus and Others v Umvoti Municipality* 2010 (3) SA 31 (KZP). He argued that the challenge of authority must be raised in terms of Rule 7(1).

[14] The provisions of Rule 7(1) of the Uniform Rules of Court deal with the requirements for a power of attorney given by clients authorising the institution or defending of proceedings. In answer to the question whether an applicant was obliged to prove, on the papers, that authority had been given to initiate litigation where the applicant was an artificial person, Govern J in *ANC Umvoti* para 22 stated that the following:

'It seems to me, therefore, that the legislature intended the authority of 'anyone' who claimed to be acting on behalf of another in initiating proceedings, and not only attorneys, to be dealt with under rule 7(1), and not by way of the application papers.' (my emphasis)

[15] In *ANC Umvoti*, the court found the deponent to an affidavit to be a witness and not the initiator of litigation, leaving the attorney who by signing the notice of motion and issuing the papers suggested that he was authorised to initiate the proceedings. The court went further to say that the question whether or not litigation was authorised by an artificial person should not be dealt with by way of evidence in an application and that clarity must be sought by means of rule 7(1). A similar process was to be followed where the authority of the respondent's attorneys was at issue. In the absence of a challenge in terms of Rule 7(1) the mere signature on a notice of motion by an attorney was sufficient to prove authority. Where the appropriate process is not followed by a party challenging the authority of the other, the court found it unnecessary for authority to be proven.

[16] This court is not bound by *Torgos* although it is of some persuasive value. *ANC Umvoti,* being a decision of the full court in this division, is binding and should be followed. There has been no challenge of the Respondent's authority as envisaged by Rule 7(1). In view of this, Ms *Nicholson's* point must fail and the same applies to the point raised by Mr *Sardiwalla* in respect of the authority of the deponent to the Applicant's application, Mr Pearson. I therefore do not propose to deal with Ms *Nicholson's* response to this issue.

[17] Ms *Nicholson* argued that if he Respondent's affidavit was accepted, it failed to disclose any grounds upon which the current management rules should not be implemented.

Locus Standi and Declaratory relief

[18] In order to properly understand these points *in limine* under this subcategory, it is necessary that the relief sought by the Applicant be set out. The Applicant's relief is as follows:

> '1. That the Management Rules of the Mangrove Beach Centre Sectional Title Scheme are those currently registered in the Deeds Office which include the amended rules adopted by the developer and registered with the Registrar of Deeds in 1994 and Annexures A, B1, B2 & C thereto.
> 2. That a copy of the amended rules, referred to in 1 above, are amended to "BC2", referred to hereafter as "the Special Rules".
> 3. That the repairs to all of the façades of the Mangrove Beach Centre fall under the category of "general" maintenance and hence are a "direct" expenses as provided for in annexure "A" of the Special Rules.
> 4. That the direct method of allocating this expense is by charging the costs per floor.
> 5. Costs of suit as between attorney and client.'

[19] Mr *Sardiwalla* raised a point *in limine* that the Applicant is purportedly the owner of the commercial section in the scheme. On its version, through the exercise of a majority vote at a General meeting of 21 February 2015, it was agreed that the

direct method of allocation as per annexure 'A' to the Scheme Management Rules would apply to the special levy raised for the repair of the façade.

[20] He argued that since the Applicant and the Commercial Trustees are *ad idem* on the issue that the expenses be allocated as a direct expense, the only remedy available to the Applicant as a non-trustee owner was to compel the Respondent to institute proceedings for the recovery of the levy. The Applicant therefore had no *locus standi*. He argued further that section 41 of the Sectional Titles Act, 1986 provided a specific mechanism for this. He submitted that the Applicant misconstrued its cause of action. Based on this, he argued that the application be dismissed with costs on attorney-and-own client scale.

[21] The second point was that in granting a declaratory order, the court exercises a discretion and that the court should decline to grant such relief where the relief sought is academic or abstract and where there is no action dispute. In this regards, he relied on *Ex parte Nell* 1963 (1) SA 754 (A) at 760B and *South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* 1977 (3) SA 642 (A) at 659H. Mr *Sardiwalla* submitted that on the Applicant's version, there was no dispute since the commercial owners and the Respondent had through a majority vote at the General Meeting of 21 February 2015 agreed on the allocation method of the repairs to the façade. There was therefore no dispute and similarly, on this point, the application be dismissed with costs on attorney-and-own client scale.

[22] The Applicant contends that the Respondent refused to implement the rules, alternatively that it has sought to implement them in an inconsistent manner. Further, that Special Rules could not be amended without unanimous resolution. Even if members were allowed to amend the allocation of expenses, the total votes cast at the Annual General Meeting of 21 February 2015 did not support an allocation on participation quota basis.

[23] Ms *Nicholson* argued that the conduct of residential tenants was in breach of the management rules properly construed and the previous implementation. As a result of their conduct, the Applicant was forced to seek recourse from court having

failed to resolve the matter through meetings and correspondence. She argued that courts lean in favour of compliance with body corporate rules and relied on *Body Corporate, Shaftensbury Sectional Title Scheme v Rippert's Estate and Others* 2003 (5) SA 1 (C) at 7g, and *Body Corporate Pinewood Park v Dellis (Pty) Ltd* 2013 (1) SA296 (SCA) at 303H-304A.

[24] Ms *Nicholson*, relying on *Durban City Council v Association of Building Societies* 1942 AD 27 at 32; *Langa CJ and others v Hlophe* 2009 (4) SA 382 (SCA) para 28 and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA), argued that determining whether to grant a declaratory order or not involves a two-stage enquiry being, firstly, that the court must be satisfied that the applicant is a person interested in an existing future or contingent right or obligation, and if satisfied, decide whether the case is a proper one for the exercise of its discretion. As an owner of numerous units in the Mangrove Beach sectional title scheme, the Applicant has an interest in the allocation of expenses, the interpretation of the management rules and the correct and uniform application of such rules.

[25] As to why the court's discretion should be exercised in favour of the Applicants, Ms *Nicholson* argued that there had been an effort by the Applicant to resolve this matter internally and since this failed, there was animosity within the members of the scheme. Some members refused to pay special levies and to comply with other decisions of the body corporate. The court's decision was therefore not limited to the cladding dispute but to all future expenses incurred for similar work done. Also, the Applicant cannot exercise its voting rights in the scheme as they are not recognised by the residential owners. Ms *Nicholson* argued further that the dispute was not academic and that the issue of voting rights has far reaching consequences to the entire scheme. She conceded that the Applicant had other relief but that granting the declaratory order in respect of the management rules would give effect to other eventualities other than levies. The effect of the declaratory is that it would restore order and co-operation in the entire block.

[26] In respect of the point *in limine* relating to *locus standi*, it is common cause that the Applicant is the owner of the commercial section in the scheme. The nature

of the relief sought by the Applicant, however, is not as narrowly stated by Mr *Sardiwalla*. As Ms *Nicholson* correctly stated, the relief sought is a declaratory order. That being the case, it cannot be correct that the only remedy available to the Applicant is the institution of proceedings for the recovery of the levy. Although the outcome of this application could affect such a remedy indirectly, it is not the main intention of the Applicant who seeks to have the management rules be declared as the rules of the Respondent for application and operational purposes. Mr *Sardiwalla* misconstrued the Applicant's case by limiting it to the non-payment of the expenses relating to the façade. The Applicant's case as set out by Ms *Nicholson* relates to the application of the Respondent's management Rules. The first point *in limine* must therefore fail.

[27] Although the meeting of 21 February 2015 determined that the expenses in respect of the repairs to the façade would be through direct allocation and that in terms of the schemes management Rules the special levy could be raised, the Respondent has failed and or refused to implement measures to ensure that the special levy is paid. As appears from Ms *Nicholson's* argument, numerous steps were taken by the Applicant to ensure that the Respondent complied with the provisions of the Management Rules and resolutions taken at the Annual General meeting which turned into futility.

[28] While the Applicant had a mechanism in terms of Section 41 of the Act, as Ms *Nicholson* argued, the issues in this matter are much broader that the Respondent's failure to implements measures relating to special levies. This is because as she argues, some members refused to pay special levies and to comply with other decisions of the body corporate and the Applicant cannot exercise its voting rights in the scheme as they are not recognised by the residential owners. The issue is therefore broader and in effect challenges the Management Rules and the voting powers/rights of owner/members of the Respondent.

[29] It is trite that a declaratory order resolves disputes over the existence of some legal right or obligation which are either existing, prospective or contingent. Further, that no specific consequential relief need be claimed. The two-prone test of

determining whether or not to grant a declaratory application as postulated by Ms *Nicholson* is correct. It is common cause between the parties that the Respondent's management rules regulate the functions of its operations. In fact, Vahed who deposed to the Respondent's affidavit submitted that the Respondent intended launching a counter-application together with summons claiming necessary relief with the appropriate and fuller details to set aside the Management Rules.

[30] Apparent from the first point *in limine* is the fact that the relief sought by the Applicant is broader than was understood by the Applicant. The Respondent defended the application with an understanding that the issue related to the payment of the repairs of the façade. Having found that this is not the case, it is highly likely that the extent of the relief sought is such that it affects the rights of all members to the scheme individually. That being the case, it is necessary that they be afforded opportunity to be heard should they so wish since all interested persons should be joined in an application for the declaration of rights. See *Ex Parte Nell* above. Since the declarator cannot affect the rights of persons who were not party to the proceedings (see *Nguza and others v Minister of Defence* 1996 (3) SA 483 (TkS)), for the court to exercise its discretion judiciously, the Applicant ought to bring this application to the attention of individual scheme members.

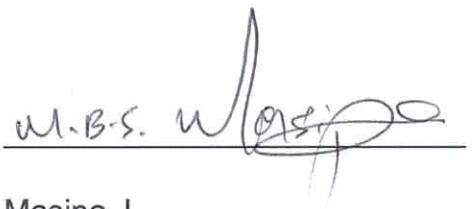
[31] In the premises, I make the following order:

1. The Applicant's point *in limine* on the Respondent's authority is dismissed.
2. The Respondent's point *in limine* on the Applicant's *locus standi* is dismissed.
3. In respect of the main application for a declarator, the Application is directed to serve the papers in this matter including this judgment on individual owners as follows:

   3.1 by posting on the notice board at the premises or placed in a convenient place in the lobby

   3.2 by placing a copy of the papers and this judgment at the offices of the Respondent's Managing Agents (Wakefields).
4. Individual Scheme Members are to submit written representations, if any by 30 November 2017.

5. The Applicant is to file its reply to the Individual Scheme Members representation, if any by 7 December 2017.
6. Costs are reserved.



Masipa J

Details for Appearances

For the Applicant:	Ms J Nicholson
Instructed by:	Shepstone & Wylie Attorneys
For the First Respondent:	Mr I N Sardiwalla
Instructed by:	K Swart & Company
Matter heard on:	24 August 2016
Judgment delivered on:	31 October 2017