IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 403/11

In the matter between:

PGP BODY CORP ADMINISTRATION CC **APPELLANT**

and

THE TRUSTEES OF THE BODY CORPORATE
CLUB KERKIRA **RESPONDENT**

JUDGMENT Delivered on 26 October 2012

SWAIN J

[1] I have had the benefit of reading the Judgment prepared by Patel J P and respectfully agree with the conclusion that the resolution purportedly passed by the respondent on 30 January 2009, was invalid for the reasons set out in the Judgment. I also respectfully agree with the conclusion that this invalid resolution was capable of ratification by the resolution which was taken by the respondent on 14 March 2009.

[2] I however respectfully disagree with the conclusion that Sishi J was correct in concluding that the respondent was entitled to be awarded costs, for the reasons set out below.

[3] The invalid resolution was validly ratified by the respondent in terms of the resolution taken on 14 March 2009. This was two days before the date that the application was set down for hearing on 16 March 2009. However, the resolution ratifying the prior invalid resolution, was taken after the appellant's notice of opposition dated 13 March 2009 was served upon the correspondents of the respondent's attorneys on 13 March 2009.

Record pg 62

The notice of opposition sets out the basis upon which the application is opposed in detail and expressly challenges the validity of the defective resolution relied upon by the respondent. It also alleges that the deponent to the respondent's founding affidavit relies upon the resolution not only for his authority, "but also as the basis for allegedly terminating the first respondent's mandate to act". In addition, the appellant's opposing affidavit was deposed to and signed on 13 March 2009, albeit that the respondent states in reply, that this affidavit was only handed to the respondent at the hearing on 16 March 2009.

[4] In the appellant's answering affidavit the deponentEwaldiniPorteous states the following:

"3.

The First Respondent has no interest in the Applicant's monies and is prepared to hand the said monies together with a complete accounting in respect of same over to any person in trust.

4.

The reason for such tender being directed to a person in trust is as a consequence of what I set out hereunder namely that the purported resolutions by the Applicant and the trustees appear to me to be invalid and in this regard it will be for the person to whom I hand this money in trust to verify that the correct resolutions have indeed been passed.

5.

I make this submission not as a result of being managing agent but rather as a consequence of being a registered estate agent with the Estate Agencies Affair Board and have fiduciary duties not only to the trustees of the Body Corporate but also to all other members of the Body Corporate.

6.

Should the Court direct me to pay monies into any other bank account, such will only be done in the instance of a Court Order to protect the First Respondent from any possibility of it ever being suggested that it did not carry out its fiduciary duties towards any of the other members of the Body Corporate.

7.

I have been advised that prior to the hearing of this matter, my attorneys of record will file various notices in which the authority of the Applicant's attorneys is challenged, as

well as the issue is raised on a point of law that the resolutions relied upon by the Applicant are invalid".

[5] In a letter dated 04 March 2009 written by the appellant's attorneys to the respondent's attorneys, the following was however stated:

"4.

Our client records further that it has requested a copy of the Minutes of the said Trustees meeting to determine the legality of the meeting and whether indeed, the aforesaid decision was properly taken. Our client records further that notwithstanding the Practice Management Rule 49 (2) which provides that our client is entitled to a copy of these Minutes, our client has not been furnished with same.

5.

Our client further has some concern in simply adhering to your demand that the money be handed over for the following reasons:

a) The Chairman of the Body Corporate, Mr. R. Gueffry has requested that the monies be transferred to a Plus Plan Savings Account with Standard Bank. We are instructed that Section 32 (3) of the Estate Agent's Act 1976 (No. 112 of 1976) and Practice Management Rule 42 of the Sectional Titles Act, specifically provide that the Body Corporate monies must be held in a Trust Account and that the Manager therefore must be an Estate Agent as defined in the Estate Agents Act.

b) Quite clearly, the Plus Plan Savings Account is not an account as contemplated within the aforesaid statute of the said Act. Indeed, it is

not even a Current Account which is essential if the management of the Body Corporate is to be conducted properly.

c) .....

d) In light of the aforegoing, there is a legal obligation on our client to discharge its fiduciary duty in ensuring, that the funds are properly maintained and legally transferred into an account, which complies with the requisite legislation and to ensure, that there is proper and effective control by the Trustees of the said funds.

6.

…….

7.

Our client wishes to record that it has no objection to the termination of its services and for the transfer of the funds under its control provided such termination and bank account created by the Body Corporate comply with the aforesaid legislation".

Record pgs 46 - 48

[6] I respectfully agree with the conclusion of Patel J P that the appellant's insistence upon the monies being paid into a trust account, as set out in this letter, was erroneous.

[7] However, the fact that one of the grounds upon which the appellant relied for refusing to hand over the funds, i.e. that they had to be paid into a trust account, was erroneous, does not affect the validity of the

additional ground relied upon by the appellant, namely that the resolution terminating its mandate was not a valid one. As regards the willingness of the appellant to hand over the books of account but not the money, Porteous says the following:

"56.

"It is indeed correct that at that meeting the documents which had been requested by Gueffroy were duly handed over. Whilst I have serious doubts as to the validity of the termination of the First Respondent's mandate, the First Respondent does not wish to be involved in the management of a body corporate where there is a clear dissatisfaction or dispute between the trustee and the managing agents. For this reason, the First Respondent was happy to hand over the books. There was no suggestion of us accepting the termination. It was simply an instance of being requested by the trustees. In any event, the trustees are the persons responsible for the maintenance of all the documents referred to in the document **"DPB"** and there was no reason for the First Respondent to refuse to hand over same.

57.

What I did object to was the handing over of trust monies as Gueffroy had failed to furnish me with copies of the notice or minutes relating to such meeting".

[8] It seems to me that the conduct of the appellant in being prepared to hand over the books of account, but not money which was held in trust, in the absence of the production of a valid resolution terminating their mandate, was reasonable and justifiable. The appellant's attitude is encapsulated in the following statement of Porteous:

"68.

Arising from the aforegoing, it will be noted that I have no problem in paying out the money, but the First Respondent will not do so based on the resolution, annexure **"B"**. Should this Honourable Court exercise its discretion independent of that or alternative arrangements be made, I will have no problem paying out the monies but in light of what I have set out hereinabove, it would seem to me that the resolution which founds this entire application is invalid".(Emphasis mine).

[9] In the light of the fact that the resolution relied upon by the respondent was invalid, how can the appellant's opposition to paying over the money be faulted? This is of particular significance when regard is had to the fact that the resolution ratifying the prior invalid resolution was taken on 14 March 2009, i.e. the day after the appellant had served its notice of opposition upon the correspondents of the respondent's attorneys, being 13 March 2009, in which the validity of the initial resolution was expressly challenged. The appellant thereafter and on the day of the hearing, being 16 March 2009, after the resolution ratifying the original invalid resolution had been taken on 14 March 2009, tendered payment into the trust account of the respondent's attorney.I accordingly respectfully disagree with the conclusion of Sishi J where he states the following:

"[30] What is evident in this case is that the Applicant was compelled to bring an urgent application when the First Respondent unreasonably refused to transfer the money into a designated account. The applicant was successful in that it obtained the payment of the monies requested from the First Respondent".

[10] In my view, Sishi J based his order directing the appellant to pay the costs of the application, upon an erroneous conclusion that the appellant had unreasonably refused to transfer the money into a designated account. Consequently, having misdirected himself on the facts, this Court is entitled to interfere with the costs order made.

[11] In my view, the correct approach to the issue of costs on the facts of this case,is as set out in

Baeck& Company v van Zummeren& Another
1982 (2) SA 112 (WLD) at 122 G

which dealt with retrospective ratification of an unauthorized act on the part of the applicant in reply, where Goldstone J had the following to say:

"As far as the costs are concerned, I am of the view that having regard to the deficiencies in the founding affidavit the applicant has perforce sought an indulgence from the Court. For the reasons I have given, I am of the view that the indulgence should be granted. I am of the view that the first respondent's opposition has been reasonable. In these circumstances the applicant should be ordered to pay the costs of the opposition and I propose to make such an order".

In my view, the following order should be granted:

(a) The appeal succeeds and the order of the Court *a quo* is

set aside and substituted by the following order:

> "The applicant is ordered to pay the first respondent's costs"

(b) The respondent is ordered to pay the costs of all of the appeal proceedings".

_____

SWAIN J

Appearances /..

Appearances:

For the Appellant	**:**	Mr. G. M. Harrison
Instructed by	**:**	V Chetty Incorporated Durban C/o Kishore Ramkaran& Co. Pietermaritzburg
For the Respondent	**:**	Mr. E.Crots
Instructed by	**:**	Louis Hansmeyer Attorneys C/o Johan Oberholzer& Co. Durban
Date of Hearing	:	30 March 2012
Date of Judgment	:	26 October 2012