IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR121/2017

In the matter between:

EXTRA DIMENSIONS 121 (PTY) LIMITED **APPELLANT**

and

BODY CORPORATE OF MARINE SANDS **FIRST RESPONDENT**

REGISTRAR OF DEEDS, PIETERMARITZBURG **SECOND RESPONDENT**

J U D G M E N T

STEYN J (VAN ZÿL et PLOOS VAN AMSTEL JJ concurring)

[1] This appeal is against the judgment of Masipa AJ. Leave to the full court of this division was granted by the Supreme Court of Appeal on 10 November 2016.[1]

[2] In the court a quo the appellant sought an order declaring invalid a resolution passed by the first respondent[2] on 23 August 2012 which changed the way in which levies are imposed on the members of the scheme.

---

[1] The order issued by Pillay and Van der Merwe JJA reads:

'1) Leave to appeal is granted to the Full Court of the KwaZulu-Natal division of the High Court, Pietermaritzburg.

2) The costs order of the court a quo in dismissing the application for leave to appeal is set aside AND the costs of the application for leave to appeal in this court and the court a quo are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay these costs.'

[2] Hereinafter referred to as the 'body corporate'.

[3] The following facts were presented to the court a quo. The appellant, the owner of six units in the Marine Sands Sectional Scheme, obtained these non-residential units in 2002. The participation quota for these non-residential units was determined by the developer when the sectional title register was opened. The non-residential units at that time[3] constituted 6% of the whole scheme. The quota for each unit in the non-residential component was determined by dividing the 6% allocated to the non-residential units between each non-residential section in proportion to their respective floor areas. The Surveyor-General approved the participation quota in the scheme, which resulted in a participation quota of 5.4979% for the appellant for all of its units. An extension to the non-residential section resulted in an amendment to the sectional plan in 1997 and caused an adjustment to the participation quota percentage allocated to each non-residential owner. After the aforesaid extension the appellant's revised participation quota was 4.8409%. In 2011, the managing agent became aware of the fact that the non-residential units' levies were incorrectly charged and the appellant's levy was then revised and reduced from R16 201.36 to R9 134.15.

[4] The court a quo held that the fact that the resolution increased the appellant's liability for levies did not mean that the appellant was adversely affected thereby. The court inter alia found that the resolution was passed to remedy an inequitable levy dispensation and relied on the unreported case of *Algar v Body Corporate of Thistledown & others*.[4]

[5] The appellant challenged the court's decision on the following grounds:

(a) The court erred in placing reliance on the unreported decision of Theron J in *Algar v Body Corporate of Thistledown.*

(b) The court erred when it found that it is equitable to expect of members to pay levies proportional to the floor area ratio.

[3] The scheme was registered in 1992.
[4] *Algar v Body Corporate of Thistledown & others* [2010] JOL 26140 (N).

(c) The court erred in its finding that the appellant was not adversely affected by the resolution and should not have relied on the contextual and purposive approach to the interpretation of s 32(4) of the Act.[5]

(d) The court ought to have held that the special resolution adopted was invalid and issued such a declaration.

[6] Central to this appeal is the special resolution passed by the body corporate on 23 August 2012 at its general meeting. The aforesaid resolution resulted in the modification of the conduct rules of the scheme and the levy contributions. As a result each owner would be charged according to the ratio of the floor area of his/her unit compared to the total floor area of the scheme. In terms of this resolution the levies of the appellant amounted to 10.5349% of the total levies raised whilst its participation quota remained 4.8409%.

[7] Section 32(4) of the Act provides as follows:

'Subject to the provisions of section 37(1)(*b*), the developer may, when submitting an application for the opening of a sectional title register, or the members of the body corporate may by special resolution, make rules under section 35 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 37(1)(*a*) or 47(1) is modified: Provided that where an owner is adversely affected by such a decision of the body corporate, his written consent must be obtained: Provided further that no such change may be made by a special resolution of the body corporate until such time as there are owners, other than the developer, of at least 30 percent of the units in the scheme: Provided further that, in the case where the developer alienates a unit before submitting an application for the opening of a sectional title register, no exercise of power to make a change conferred on the developer by this subsection shall be valid unless the intended change is disclosed in the deed of alienation in question.'[6]

[8] It was submitted on behalf of the appellant that the appellant was adversely affected by the said resolution and since there was no compliance with s 32(4) of the Act, the resolution was *ultra vires* and void. Counsel in argument relied on the literal meaning of the words used by the legislature in the provision and contended that the decision in *Algar supra* was wrong.

[9] It was submitted on behalf of the body corporate that the appellant's interpretation is narrow and fails to consider the context of the provision and the

[5] Sectional Titles Act 95 of 1986 hereinafter referred to as 'the Act'.
[6] This section has been repealed by the Sectional Titles Schemes Management Act 8 of 2011, see s 11 that is substantially the same.

purpose of the Act. In amplification of this submission it was submitted that this court ought to take into account the following factors:

(a) the purpose of the legislation;

(b) the legislative developments; and

(c) interpret the provision in a manner that would not render it absurd.

[10] After hearing the appeal and upon reflection of the oral submissions made to the court, it was directed that both parties needed to supplement their heads of argument. By way of email on 24 April 2018, the parties were invited to deal with the following issues:

'(a) In terms of s 32(4) of the Sectional Titles Act 95 of 1986 the body corporate had the power to make a rule under s 35 by which the liability of an owner to make contributions to the levy fund is modified.
(b) The special resolution at page 55 of the papers includes the following: '… and that the new conduct rule would allow levies to be based on the new Participation Quota Schedule based on the area of each section.' Annexure B to the new conduct rules reflects a 'Modified Participation Quota Percentage' in respect of each section in the scheme.
(c) The following references to the answering affidavit suggest that the trustees intended to modify the participation quotas: page 68 para 16; page 82 para 46, 47; page 83 para 54.
(d) What the trustees could have done was to make a rule to the effect that in future the liability of owners to make contributions to the levy fund would be based on the floor areas and not on their participation quotas. However, according to the special resolution they appear to have amended the participation quotas. Did the body corporate have the power under s 32(4) to modify the participation quotas? If not, is the special resolution ultra vires and invalid?
(e) The liability of owners to make contributions, and the proportions in which the owners shall make contributions for the purposes of s 37(1), was prescribed by rule 31 of the management rules referred to in s 35(2)(a). Was it competent for the body corporate to modify the liability of owners to make contributions by amending the conduct rules as opposed to the management rules? If not, is the special resolution not also invalid for this reason?'

[11] In response both parties filed supplementary heads and dealt with the issues raised. The body corporate submitted that it is impermissible for this court to identify new issues not raised by the parties and relied on *Fischer & another v Ramahlele & others*[7] paras 13-15 in support of its argument. It reads:

[7] *Fischer & another v Ramahlele & others* 2014 (4) SA 614 (SCA).

'[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issued by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

[15] This last point is of great importance because it calls for judicial restraint. As already mentioned Gamble J "required" the parties to argue as a preliminary issue what he described as two issues of legality. Although he added that the parties were amenable to these proposals, counsel who appeared in this court and in the court below confirmed that the judge's own description, that he "required" the points to be argued, was accurate. They were not asked for their submissions on whether this was an appropriate approach to the matter, or even (which was more pertinent) whether either question was in issue in the case. Nor were they asked whether their clients agreed to broaden the issues to encompass these points. The authority on which the judge relied in adopting this approach was not in point. That was a case where the court, *on the application of one of the parties*, held that it could dispense with the hearing of oral evidence, notwithstanding the case having been referred for the hearing of such evidence, because the questions raised on the papers could be determined without hearing such evidence and the evidence could not affect the resolution of those issues. It is a far cry from that for a court to raise issues that do not emerge from the papers and have not been canvassed in the affidavits and require that those be argued instead of hearing oral evidence and deciding the issues raised by the parties.'

(Footnotes omitted.)

It was also submitted that the only way to give meaning to the right conferred by s 32(4) is to construe that the section allows for the right to introduce a conduct rule.

[12] The appellant, on the other hand, submitted to us that the resolution passed purports to amend the participation quota schedule, which appears from the following facts:

(a) it introduces a new conduct rule providing that owners will contribute to levies according to the percentages set out in annexure 'B';

(b) annexure 'B' sets out changed participation quota percentages in a column headed 'modified participation quota percentage';

(c) the minutes of the meeting state that a 'new participation quota schedule' is introduced.

The appellant persisted in its contention that the resolution was *ultra vires* and not in accordance with the Act and remained void. Lastly, in reply to the body corporate's contention that a point of law cannot be raised for the first time on appeal if it is not foreshadowed in the pleadings, it submitted that it was permissible.[8]

[13] The central issue on which this court was tasked to decide is whether the resolution passed modifying the owner's liability for levies, was *ultra vires* the Act and therefore void. This issue is not a new issue that was raised, it was the appellant's case throughout the proceedings that the resolution is invalid. The invitation to both parties to consider the distinction between conduct rules and management rules was based on the established facts on record and since both parties had been given an opportunity to file supplementary heads, there could not be any unfairness in the procedure adopted.

[14] In order to decide on the grounds raised by the appellant, it is necessary to decide firstly, on the powers of a body corporate and secondly, on the rationale for

---

[8] See *Maphango & others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 109 and *Barkhuizen v Napier* 2007 (5) SA 323 (CC). *Barkhuizen* para 39 reads:
'The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason or refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.'
(Footnotes omitted.)

participation quotas in a sectional title scheme and measure the conduct of the body corporate against the various empowering provisions.

[15] The body corporate of every scheme is essential and necessary for the management of a sectional scheme.[9] Body corporates derive their powers from the Act, the regulations and the rules that either expressly or impliedly grant them authority to perform their duties.[10]

[16] The most significant purpose of the participation quota in my view is that it determines a sectional owner's contribution to maintenance and administrative expenses and his proportional liability for the debts of the body corporate.[11] Scholars like Silberberg *et al*, define participation quote as:

'[T]he numerical quantification of a sectional owner's share in common property, and determines the extent of a sectional owner's financial obligations regarding administration and maintenance costs within the scheme, and the influence that the respective sectional owners have in the scheme's management.'[12]
(Original footnotes omitted.)

From the definition it is evident that the participation quota is pivotal to investors who want to invest in a scheme since it impacts on a number of important rights.[13] The participation quota schedule forms part of any sectional plan and when the scheme is registered, the participation quota schedule must be endorsed on or annexed to the draft sectional plan submitted to the Surveyor-General for approval. In addition to all of the functions fulfilled by the participation quota, it determines the part played by a sectional owner in the administration of the scheme.[14]

[17] In terms of the 1986 Act, the determination of the participation quota of non-residential sections is left solely to the discretion of the developer.[15] The developer

---

[9] For a discussion of this legal entity see CG van der Merwe *Sectional Titles, Share Blocks and Time Sharing* Vol 1 at 14-16 *et seq*.
[10] See para 435 for a discussion of the various important powers of a body corporate *Lawsa* Vol 24 (2 ed).
[11] See van der Merwe *Sectional Titles* at 4-10.
[12] See *Silberberg and Schoeman's The Law of Property*, 5 ed (2016), at 459-460.
[13] These rights would inter alia include voting rights, financial participation and the usage of the common property.
[14] See van der Merwe *Sectional Titles* at 4-9. Also J Booysen *A critical analysis of the Financial and Social Obligations imposed on Sectional Owners in Sectional Title Schemes, as well as their enforcement* (unpublished doctoral thesis, Stellenbosch University) 2014.
[15] See s 32(2) that reads:
'Subject to the provisions of section 48, in the case of a scheme other than a scheme referred to in subsection (1), the participation quota of a section shall be a percentage expressed to four decimal places, as determined by the developer: Provided that-

is obliged to indicate the total quotas allocated to the residential sections and the quota must then be divided amongst those sections in accordance with the floor area method.[16]

The resolution

[18] If the special resolution passed by the body corporate amended the participation quota, then it impacted on the validity of the adopted resolution. It is for this very reason that the body corporate's conduct should be evaluated in terms of s 32(4) of the Act. The minutes of the annual general meeting of the owners of Marine Sands reads as follows:

'Special Resolution – Substitution of Conduct Rules including Modification of Contributions:
It was noted that –

- The Trustees were having difficulty in enforcing the Rules, hence the proposed Conduct Rules, which included fines.

- The modification of the contributions was as a result of the Participation Quota schedule having previously been structured for the non-residential (commercial) owners to pay levies at a lesser rate than the residential owners, and that the new Conduct Rule would allow levies to be based on the new Participation Quota Schedule based on the area of each section.

- The Commercial owners objected to the passing of the Special Resolution in respect of the proposed Conduct Rules including the Modification of Contributions as it was felt that the resolution was inadequate in its current form and that they reserved their rights.

- The Special Resolution was passed with the required 75% approval (51 (86.44%) in favour and 8 (13.56%) against as follows:

  RESOLVED AS A SPECIAL RESOLUTION:

  THAT in terms of and by virtue of the authority of Sections 32(4) and 35(2)(*b*) of the Sectional Titles Act No. 95/1986, the Conduct Rules of the Scheme be repealed and substituted by Rules numbered 1 to 26 and Annexures "A" and "B".'[17]

(My emphasis.)

(a) where a scheme is partly residential as defined in any applicable operative town planning scheme, statutory plan or conditions subject to which a development was approved in terms of any law, the total of the quotas allocated by the developer to the residential sections shall be divided among them in proportion to a calculation of their quotas made in terms of subsection (1);
(b) where a developer alienates a unit in such a scheme before the sectional title register is opened, the total of the quotas allocated to the respective sections and the participation quota of that unit must be disclosed in the deed of alienation; and
(c) where such disclosure is not made, the deed of alienation shall be voidable at the option of the purchaser and that the provisions of section 25 (15) (*b)* shall *mutatis mutandis* apply in respect of any such alienation.'

[16] Section 32(2)(*a*). For a further discussion of the participation quota, see 24 Lawsa 2 ed para 319.
[17] See annexure 'J' at 55 lines 13 to 41.

[19] Could the aforementioned special resolution be lawfully adopted in terms of ss 32(4) and 35(2)(*b*) of the Act as averred by the first respondent? Section 32(4) of the Act provides that where an owner has been adversely affected his written consent must be obtained.[18]

Section 35(2)(*b*) of the Act provides:

'(2) The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property, and shall comprise –
(*b*) conduct rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, and which rules may be substituted, added to, amended or repealed from time to time by special resolution of the body corporate: Provided that any conduct rule substituted, added to or amended by the developer, or any substitution, addition to or amendment of the conduct rules by the body corporate, may not be irreconcilable with any prescribed management rule in paragraph (*a*).'

The nature of the rule modified

[20] The answer to the aforesaid question can only be answered when consideration is given to the nature of the rule that was adopted. It is necessary to distinguish between conduct rules and management rules. Conduct rules[19] in general restrict unit owners' use and enjoyment of the unit in pursuance of a greater good, namely peace and harmony in the complex or scheme. It is therefore important that any breach of any conduct rule be sanctioned in an appropriate manner so as to restore the peace in the complex. Scholars like Maree, argue that there is a clear distinction in the nature and content of management rules and conduct rules and to insert provisions about levies in the conduct rules would ignore such distinction.[20] The SCA in *Body Corporate Pinewood Park v Dellis (Pty) Ltd*[21] when it considered the nature of management rules, stated the following:

'[15] In *Wiljay Investments (Pty) Ltd v Body Corporate, Bryanston Crescent and Another* 1984 (2) SA 722 (T) Spoelstra J had occasion to consider the status and nature of rules governing bodies corporate under the Act's predecessor. Section 27(2)(*a*)(ii) of that Act stipulated that the rules-

> "shall provide for the control, management, administration, use and enjoyment of sections and the common property, and shall include … the rules contained in Schedule 2 which may be added to, amended or repealed by special resolution of the members of the body corporate".
> Spoelstra J said the following:

---

[18] See para 7 *supra.*
[19] See Annexure 9 to the Regulations.
[20] See T Maree 'MCS Courier' Issue 47 (July 2014) page 6. See also page 7 where it is concluded that all rules relating to levies which may be adopted by the body corporate belong in management rules. Also see *De Lange v Bell and Others* [2013] ZAKZDHC (6 August 2013) para 8.
[21] 2013 (1) SA 296 (SCA).

> "These rules are clearly not intended to define or limit the ownership of individual owners of sections, units or common property. The rules, read with the provisions of the Act, contain a constitution or the domestic statutes of the body corporate. In this sense it could properly be construed as containing the terms of an agreement between owners inter se and between owners on the one hand and the body corporate on the other hand."

I agree with these dicta, which are equally valid in respect of the management rules made in terms of the regulations, read with the provisions of s 35 of the Act. It is a matter of pure logic that, when a purchaser purchases a unit in a sectional title scheme after a sectional title register has been opened, he or she would be deemed to have consented, or agreed, to be bound by the existing rules relating to that scheme and to future changes to them introduced by unanimous resolution of that scheme's body corporate.'
(My emphasis, footnotes omitted.)

[21] In terms of regulation 30(1) of the Act, the management rules as stipulated in terms of s 35(2)(*a*) of the Act are those rules set out in Annexure 8 to the regulations.[22]

[22] An analysis of the resolution passed reveals that the body corporate, in my view, was not amending the conduct rules but introduced a rule that impacts on the manner in which the owners make financial contributions to the scheme.[23] The table in annexure 'B' contains the section number, the floor area in square metres and the modified participation quota percentage.

[23] The first respondent did not only alter or amend the conduct rules by passing the resolution, it amended the owner's liability to contribute to the scheme by paying levies. Section 35(2)(*a*) of the Act requires that a management rule may be passed by a unanimous resolution.[24] Such resolution is defined in s 1 of the Act as:

'**"unanimous resolution"** means, subject to subsection (3), a resolution-

(*a*) passed unanimously by all the members of a body corporate who are present or represented by proxy or by a representative recognized by law at a general meeting of the body corporate of which at least 30 days' written notice, specifying the proposed unanimous resolution, has been given, and at which meeting at least 80% of all the members of a body corporate (reckoned in number) and at least 80% of all the members (reckoned in value) are present or so represented: Provided that in circumstances determined in the rules, a meeting of the body corporate may be convened for a date 30 days or less after notice of the proposed resolution has been given to all the members of the body corporate; or

---

[22] Since 7 October 2016 the management and conduct rules are dealt with in s 10(2) of The Sectional Titles Schemes Management Act.
[23] See annexure 'B' at 52 of the record.
[24] See s 35(2)(*a*) and (*b*) of the Act.

(*b*) agreed to in writing by all the members of the body personally or by proxy or by a representative of any such member recognized by law;'[25]

The fact that there was no unanimous resolution at the first respondent's meeting is fatal to the body corporate's case. The scheme could not have two different schedules of participation quotas, i.e. one as per the sectional plan and one as per annexure 'B'.

[24] Accordingly, the 'conduct rule' introduced by the body corporate which modified the liability of the sectional owners to contribute towards the levies of the scheme is not in accordance with the statutory powers of the body corporate in terms of the Act. It is in conflict with s 37(1)(*d*) and accordingly invalid. In light of the conclusion reached it is not necessary for this court to determine whether the resolution passed affected the appellant adversely.

Order

[25] Accordingly, I make the following order:

(a) The appeal be upheld with costs.

(b) The order of the court a quo be set aside and substituted with the following order:

'1. The special resolution passed by the first respondent on 23 August 2012 that modified the members' liability for levy contributions of the Marine Sands Sectional Scheme is declared invalid.

2. The amendments to the conduct rule of the scheme effected pursuant to the resolution referred to above are declared invalid and of no force and effect, being:

(i) Conduct Rule 26 in its entirety;

(ii) Annexure 'B' to the amended conduct rules;

3. The first respondent is to pay the costs of this application.'

……..

STEYN J

[25] See s 1 of the Act.

Appeal heard on :	9 March 2018
Supplementary heads filed :	Respondent : 17 May 2018 Appellant : 2 May 2018 and 28 May 2018.
Counsel for the appellant :	Ms LM Mills
Instructed by :	Austen Smith Attorneys c/o Richard Evans & Associates
Counsel for the respondent :	Mr AJ Boulle
Instructed by :	BES Agar & Associates c/o John Hudson & Company
Judgment handed down on :	24 August 2018