IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION: PIETERMARITZBURG
CASE NO: AR214/2021

In the matter between:

S Naidoo Appellant

And

Hawaan Forest Estate Homeowners' Association Respondent

Judgment

Lopes J (ZP Nkosi J concurring):

[1] The appellant seeks to set aside the judgment of the learned magistrate handed down on the 16th March 2021 in the Verulam Magistrates' Court. That judgment was granted against him in favour of the plaintiff, Hawaan Forest Estate Homeowners' Association, for the sum of R85 709.82, interest thereon at the plaintiff's bank's prime rate, and that the defendant was to pay 60% of the plaintiff's costs of the action.

[2] It is common cause that:

(a) the Hawaan Forest Estate is a residential estate in KwaZulu-Natal;

(b) on the 8th February 2005, the appellant purchased a plot of land from the developer, Hawaan Investments (Pty) Ltd, a company incorporated in 2001 ('the 2001 company'). During 2008, the appellant commenced construction of his home, and a 'Certificate of Occupancy' was finally issued to him by the eThekwini Municipality on the 30th March 2015;

(c) in the contract to purchase the property, the appellant accepted that he was bound by the rules, as amended from time-to-time, of the Home Owners' Association, including the monthly payment of levies;

(d) the appellant stopped paying levies due by him from the beginning of 2015 until September 2016 – a year and nine months';

(e) the respondent then issued summons for payment of the arrear levies. The appellant delivered a plea, basically consisting of a bare denial. In the appellant's summary judgment opposing affidavit however, he raised, *inter alia,* the following defences:

(i) the respondent was, in fact, indebted to him in the sum of R90 982.00;

(ii) the levies claimed were imposed upon him because he had chosen a 'non-white building contractor', and consequently he had been 'targeted with fines and imposed harsh rules' (sic);

(iii) other complaints of his having been bullied and harassed by the respondent;

(iv) the respondent failed to pass credits due to him which arose because he had previously overpaid levies which were imposed during the construction of his home, when the delay was the fault of the respondent; and

(v) the amount sued for by the respondent had been levied by an illegal entity, and included a special levy of R25 000, for which members of the respondent were not liable.

[3] The appellant appeals against the judgment granted against him, because the following issues were not established by the respondent:

(a) the identity of the respondent, and its standing to recover the outstanding levies;

(b) the lack of proof of the respondent's Articles of Association; and

(c) the failure of the respondent to prove its quantum.

Standing:

[4] Three witnesses testified for the respondent. They were:

(a) Louise Cowling, the Estate Manager since 2018;

(b) Krishni Naidoo, the Estate Manager until 30th June 2018, having initially worked for the respondent in administration, reception, and accounts, from the 1st August 2008; and

(c) Asheel Gokul, who was employed by Ballito Estates ('Ballito') as an accountant. Ballito, as managing agent of the respondent, issued monthly accounts to home owners, including levies and fines, etc, recovered those levies, and accounted for them to the respondent. Ballito had taken over the Pascal accounting system (started in 2013) from the respondent.

[5] The appellant testified in his defence, and he called one witness, Ms Brijamul, who was employed by him as his assistant. She compiled the table of payments relied upon by the appellant, and annexed to his plea.

[6] From the evidence of the witnesses, the issue of standing was explained as follows:

(a) during or about 2005, whilst the estate was being established, the land was registered in the name of the 2001 company;

(b) as plots were sold by the developer, and houses were constructed, the need arose for the formal establishment of a body corporate to collect

levies, levy fines and arrange for the maintenance and upkeep of the estate, etc. These functions had hitherto been carried out by the 2001 company, run by the developers;

(c) to that end, a company was registered at the end of March 2004, Hawaan Home Owners' Association ('the 2004 company'), with its own conduct rules. The 2001 company handed over the administration of the estate to the 2004 company;

(d) however, as the developer had accumulated tax and other liabilities during its management of the estate, and which potentially exposed home owners to liabilities, the then members of the board decided to incorporate another company ('the 2006 company'), to manage the estate;

(e) the 2006 company was Hawaan Forest Estate Home Owners Association, with its own Constitution – part of the purpose of which was to recover unpaid levies raised on 47 vacant plots which were still owned by the developer. On the 1st January 2009, the developers, who had factually managed the administration of the estate between 2005 and 2008, handed over the administration of the estate to the 2006 company. Pat Naicker and Tony O'Neil, who were the controlling forces behind the developer, also administered the estate up until 2008 under the guise of the 2004 company, of which they were the only directors;

(f) during, or approximately 2009/2010 a problem arose because the Registrar of Deeds would not accept the registration of properties newly sold by the 2006 company, because the consent of the 2004 company was required;

(g) in addition, the 2006 company had been unsuccessful in compelling the developer to pay levies, and a stalemate had been reached;

(h) by the time of the 2012 Annual General Meeting ('the AGM'), the 2006 company was in financial difficulties, and a resolution was passed that the

developers would pay 25% of the outstanding levies, on the condition that the administration of the estate reverted to the 2004 company;

(i) two further resolutions were taken and unanimously passed, with the appellant being present. They were that the 2006 company's assets would be transferred to the 2004 company, and that the 2006 company would be liquidated. However, the two companies eventually merged, and from 2012, the estate was administered under the control of the 2004 company.;

(j) although different companies purportedly administered the estate at different times, apropos the home owners, the administration of the estate was controlled by the Home Owners' Association, which had continued unabated, and levies were always paid into the same current account. In addition, whichever of the legal entities was administering the affairs of the estate, the home owners all viewed their participation in that administration as seamlessly continuing under the Home Owners' Association;

(k) when the appellant purchased his property in 2005, he received a 'sale pack', including the sale agreement, the conduct rules, the certificate of incorporation of the 2004 company and a layout plan of the estate;

(l) from then until 2015, he paid levies to both companies under the guise of the Home Owners' Association. His complaint is that, notwithstanding that the funds went into the same current account as all the levies paid by other home owners, the 2006 company was not entitled to recover levies, and he was entitled to set off the amounts paid to it, against the claim of the respondent;

(m) in 2008 the levies were increased from R500 to R2 000. The levies were invoiced in the name of the 2004 company from the 1st January 2009 until May 2012. At the time of the merger of the two companies in 2012, levies

were raised from R5 000 to R 12 000 per month. The 2006 company had no authority to raise levies, and had not done so; and

(n) the appellant alleges that in the circumstances, the respondent has not established its standing to sue for any levies outstanding by him.

[7] The appellant accepted in his evidence that he was bound, as were all other home owners, to pay the applicable levies from time-to-time. He accepted that he had known of the increased levies at the time of the AGM, but had only begun to withhold levies in 2015 – allegedly because by then he read the evidence of a court case where a document evidencing the identity of the 2006 company surfaced. The period when he began setting-off what he considered to be the illegal levies, coincided with the fact that he had run out of money because his building project was completed. He qualified this by saying he had no money to pay excess levies. This defence of set-off was not reflected in the appellant's summary judgment opposing affidavit, and neither in his plea nor his examination-in-chief, and it was not put to the respondent's witnesses.

[8] The matter of the correct citation of the respondent had been raised in argument in the court *a quo*, and Mr *Ploos van Amstel*, who appeared for the respondent, as he does in this court, moved an amendment to the respondent's particulars of claim to reflect the name of the respondent as 'Hawaan Owners' Association'. The amendment was opposed by Ms *Bodasing*, who appeared for the appellant, as she does in this court. Curiously, in his order, the learned magistrate did not deal with that application.

[9] That he did not do so is of no consequence, because we have the power to amend the citation of the respondent on appeal. This is because the evidence led during the trial demonstrated the correct citation of the respondent. Ms *Bodasing* conceded, correctly in our view, that we had the power to do so. There is accordingly no merit in the appellant's submission that the identity of the respondent was not established.

[10] The standing of the respondent to recover outstanding levies is also established on the evidence. The complaint of the appellant concerns only levies allegedly imposed by the 2006 company. The evidence established that it did not raise levies. Whichever company may have raised levies at different times, the following was also established in the evidence:

(a) from the outset of the establishment of the estate, owners were liable for levies, albeit that the amount of the levies may have differed depending on whether the construction of a particular home had been completed;

(c) the appellant was unquestionably aware of this, and agreed to pay levies when he purchased the plot;

(d) the Home Owners' Association, under whichever guise it operated, continued as an uninterrupted entity from approximately 2005;

(e) the appellant agreed to the passing of the two resolutions in 2012 – which was clearly an attempt by the home owners to regulate their affairs, and place them on a firm footing under the 2004 company – the respondent. The appellant was one of the unanimous voters in favour of passing the resolutions;

(f) it was more than co-incidental that the appellant stopped paying levies during the 2015-2016 years', when, on his own admission, he had run out of money – his qualification that he never had money for excess levies does not have the ring of truth; and

(f) the learned magistrate correctly, in my view, found that the appellant had failed to plead or establish his defence of set-off, raised for the first time in the evidence of the appellant.

[11] It became common cause during the appeal hearing that the 2006 company did not, in fact, impose any levies. Ms *Bodasing* conceded in argument that:

(a) the appellant's action was based upon his belief that the 2006 company had unlawfully imposed the levies he allegedly sought to set-off;

(b) that defence was not raised in the appellant's summary judgment opposing affidavit, nor in his plea. Ms *Bodasing* submitted that this was because the appellant believed the respondent to be the 2006 company which acted illegally, and accordingly he had pleaded a bare denial;

(c) the board resolution of 2008 to increase levies from R500 to R2 000 was taken by the Home Owners' Association as part of the 2004 company; and

(d) the defence of set-off was not put to the respondent's witnesses.

[12] Significantly, in an email of the 9th December 2014, the appellant claimed that he had over-paid his levies in error since the respondent deregistered for VAT, and that those amounts would equate to the excess portions of payments 'for the future monthly levies'. This was not mentioned in the appellant's plea, and not pursued by the appellant. In his summary judgment opposing affidavit he alleged that he had overpaid levies imposed during the construction of his home, the finalization of which was delayed because of the wrongful conduct of the respondent. No claim-in-reconvention was brought by the appellant for this, or any other debt allegedly owed by the respondent to him.

The Articles of Association:

[13] It is not clear to us that the Articles of Association of the 2004 company were a necessary element for the respondent to have proved in establishing its claim for outstanding levies. As a matter of routine, companies daily sue in our courts for outstanding debts, without ever disclosing, or referring to their articles of association (or memorandum of incorporation). It is not normally required to establish a cause of action for the payment of a money debt, and the pleading of it falls in the category of a *plus petitio*. In any event the 2004 companies' Articles of Association and the conduct rules issued by the 2004 company were in the papers.

Interest:

[14] Regarding the respondent's claim for the payment of interest, prayer 2 in its particulars of claim seeks:

> '*interest on the said amount at prime +5% compounded monthly from date of service of the Summons to date of final payment;'*

In his submissions before the court *a quo*, Mr *Ploos van Amstel* stated that the word 'prime' could be equated to the respondent's prime bank rate. He conceded that it would have been better had the respondent identified its bank, because different banks may have different prime rates. The learned magistrate, correctly in my view, queried the wisdom of claiming interest in the manner that the respondent had done. He also reflected that corporate bodies should be advised not to use the term 'prime', because that raises the need to establish the 'prime' rate. The learned magistrate then simply granted '*interest at the plaintiff's bank prime rate (sic) . . . from the date of service of the summons'*.

[15] The difficulty with the grant of that order is:

(a) the submission of Mr *Ploos van Amstel* that the court could simply assume that what the respondent intended to claim, was interest at a rate calculated according to its own banker's prime rate;

(b) accepting that that was what the respondent intended to do, no evidence was led to demonstrate what that rate was (and, historically after service of the summons, how it may have varied); and

(c) the learned magistrate did not require such evidence prior to granting the order for interest.

How then, was the order capable of execution? It is not incumbent upon the Sheriff to determine the prime rate/s. The order must be certain and capable of execution upon a plain reading of it, which, in this matter, it is not. Before us, Mr *Ploos van Amstel* referred to a Notice of Payment document (dated in 2013) in the record, demonstrating that the respondent's bankers were ABSA Bank. He then referred us

to *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA). Here, at page 836C, the court granted an order awarding interest '*at the agreed rate of 2 per cent per annum above the plaintiff's ruling prime rate of interest from time to time.'*

[16] A distinction between the order in *Oneanate* and the proposed order in this action, is that in *Oneanate*, the plaintiff itself was the bank charging the prime rate. In discussing the order sought, Zulman JA stated at 835I:

> '*The parties were also agreed as to what the plaintiff's prime rate of interest was from time to time.'*

In this action it is the prime rate of the respondent's banker, presumably ABSA, and there was no agreement as to the respondent's banker's prime rate of interest. However, because the date of payment was unknown, the prime rates in *Oneanate* for the future were not agreed, because they were not yet in existence.

[17] Absent the necessary evidence as to the prime rate of interest, what could or should have been done? The date of the service of the summons appears to have been the 20th September 2016. The rate of interest applicable at that date, in terms of the regulations pursuant to the Prescribed Rate of Interest Act, 1975 ('the Act'), was 10.5% per annum. Mr *Ploos van Amstel* referred us to clause 11.11 of the Memorandum of Incorporation of the 2004 company, which provides for the payment of interest on overdue levies, but describes the rate as '*5% above the prime overdraft rate of interest levied by the major banks from time to time'*.

[18] Notionally, as the interest rate was contractually agreed, the provisions of the Prescribed Rate of Interest Act, 1975 are not applicable (s 1(1) of the Act). No evidence was led as to the prime rates of interest levied by major banks at any time. In addition, it is entirely unclear which of the many banking institutions would or could describe themselves as 'major'. And then, how many 'major' banks are to be considered, and are their rates to be averaged?

[19] In *Mutual and Federal Ltd v Rumdel Construction (Pty) Ltd* 2005 (2) SA 179 (SCA), para 17, the court recorded that:

> '*We, however, are at large to order interest to run on the amount awarded, although the issue of interest was not dealt with in the Court a quo, if we are of the view that the contractor is entitled to it.'*

In my view, the respondent is entitled to interest, but the rate was not proved, and the calculation of such rate as may have been agreed, was so vague as to be unenforceable without evidence. The rate of interest is, accordingly not '*governed by any other law or by an agreement or a trade custom or in any other manner,'* in which case, *'such interest shall be calculated at the rate contemplated in subsection 2(a) as at the time when such interest begins to run . . .'*. Interest is therefore payable at the rate of 10.5% *per annum* from the 20th September 2016 to date of payment.

Costs:

[20] The learned magistrate awarded the respondent 60% of its costs because the appellant reduced its claim at trial from R142 522.50 to R85 709.82. There was no cross-appeal on the award of costs, and there is no basis for this Court to interfere with the exercise by the learned magistrate, of his discretion in awarding costs.

[21] There are two matters of procedure to which we need to refer. The first is that after the respondent had delivered its heads of argument, the appellant caused to be delivered what was described as 'Appellant's response to respondent's heads of argument'. This is a new trend which has been followed by some legal practitioners. There is no provision for the delivery of such a document in terms of the Uniform Rules of Court, nor in terms of the Practice Directives, nor in the practice of this court. It is a trend to be deprecated, because it is unnecessary, and can only lead to an increase in the work-load of judges, and of costs to litigants. It also opens-up the prospect of the respondent wanting to deliver a further reply, etc. The rules provide for finality in the documents to be produced on appeal or in applications, and to expand upon them without a proper substantive application to do so, is an abuse. Any such application, in any event, is not contemplated in our practice. In my view the costs of those replying heads of argument fall to be disallowed.

[22] The second matter is the inordinate size of the record. It comprises some 1310 pages over 14 volumes, excluding the heads of argument. In the appellant's practice note, it recorded that it was necessary for the court to read 'The whole of the record and a cursory reading of the hearing transcripts'. The respondent's practice note set out the pages which it was necessary for the court to read in the cited bundles, and those included 37 pages in Volume 1, seven pages in Volume 2, seven pages in Volume 3, two pages in Volume 4, one page in Volume 5, none in Volumes 6,7,8 and 9, 100 pages in Volume 10, all of Volumes 11,12 and 14, and 26 pages in Volume 13. We agree with the respondent's legal representatives' assessment of what was necessary for the Court to read. Clearly the appellant's legal representatives were simply not bothered to ensure compliance with the practice directives of this Court.

[23] In the circumstances, we make the following order:

(a) the name of the respondent is amended to read 'Hawaan Home Owners' Association';

(b) the appeal is upheld to the extent that the order in the *court a quo* is amended to read that interest, calculated at the rate of 10.5 per cent *per annum*, is to run on the sum of R85 709. 82 from the 20th September 2016 to date of payment;

(c) the appeal is otherwise dismissed with costs;

(d) the appellant's legal representatives may not recover any fees from their client:

(i) for the preparation and filing of the document entitled 'Appellant's response to the Respondent's Heads of Argument', and the annexed 'Appellant's Heads of Argument in Reply';

(ii) for the preparation and filing of the appellant's Practice Note; and

(iii) for the costs of the copying and preparation of the appeal bundle, save for 180 pages and Volumes 11,12 and 14.

Lopes J

ZP Nkosi J

Date of hearing: 26th May 2023.

Date of judgment: 23rd June 2023.

For the appellant: Ms I Bodasing (instructed by Roshika Maharaj Law Offices).

For the respondent: Mr JA Ploos van Amstel (instructed by Livingston Leandy Inc).