

Body Corporate of the Solidatus Scheme No SS23/90 v De Waal and others
[1997] 3 All SA 91 (T)

Transvaal Provincial Division

15 May 1997

Case No: 19899/96

Before: le Roux J

JUDGMENT:

The applicant, a body corporate of a sectional title scheme, seeks a declaratory order in the following terms:

- “1. Declaring the work done and/or to be done to exclusive use areas S1 to S8, B16, B24, B32, B39, B46, B53, B59 and B60 as specified in paragraph 24 of the founding affidavit, to be ‘maintenance’ in terms of the proviso to section 37(1)(b) of the Sectional Titles Act, 95 of 1986;
2. Declaring the first sixteen respondents liable for additional contributions to the levy fund of the Body Corporate of the Solidatus Scheme No SS23/90 in order to defray the cost of the work referred to in paragraph 24 of the founding affidavit;
3. Ordering the first sixteen respondents to contribute the additional contributions to the levy fund of the Body Corporate of the Solidatus Scheme No SS23/90 set out in annexure ‘H’ to the founding affidavit;
4. Ordering the first sixteen respondents to pay the costs of this application.”

The first ten respondents as a group opposed the application and also lodged a counter-application for the following relief:

1. Declaring the problems relating to water penetration and leakage of water in the Solidatus building set out in paragraphs 18, 19.7, 20.4 and 23 of the applicant’s founding affidavit, to be defects due to faulty and poor workmanship, materials and design, and declaring the work done or to be done to the exclusive use areas S1 to S8, B16, B24, B32, B39, B46, B53, B59 and B60, not to constitute “maintenance” in terms of the proviso to section 37(1)(b) of the Sectional Titles Act 96 of 1986.
2. Declaring respondents 1 to 67 liable for additional contributions in order to defray the cost of the work referred to in paragraph 24 of the applicant’s founding affidavit.
3. Ordering respondents 1 to 67 to contribute such additional contributions in accordance with their participation quotas as set out in annexure “D” to the founding affidavit.
4. Ordering the applicant to pay the costs of this application and ordering the applicant not to levy respondents 1 to 10 in respect of such costs.

In addition respondents 12 and 16 have given notice of opposition to the application and have also lodged a counter-application to the same effect as that of the group of ten to whom I have referred above.

The salient facts are common cause between the parties and may be summarised as follows. The Solidatus Sectional Title Scheme consists of sixty units, numbered from one to sixty. The seven additional respondents are owners who sold their units subsequent to the majority resolution taken on 10 November 1993, where the trustees were authorised to accept a quotation from a contractor to perform certain remedial work and to impose a single special levy on owners to defray the costs of the work to be done. The additional respondents are said to be responsible by reason of the fact that they were owners at the time of the resolution. The scheme comprises a residential building as well as parking bays in a separate building, and was built during 1985/86 by Bester Homes (Pty) Ltd

which was also the developer in terms of the Sectional Titles Act 95 of 1986, and which has since gone into liquidation.

After the sectional title register had been opened, certain exclusive-use areas were created on the common property in terms of section 27 of the Act namely –

- seventy-six parking areas;
- eight patios or stoeps, numbered S1 to S8 on the sectional plan; and
- eight balconies, numbered B16, B24, B32, B39, B46, B53, B59 and B60 on the sectional plan.

The rights to the exclusive-use areas were allocated and ceded to the owners of units in the scheme in terms of section 27(1)(b) of the Act. These owners are now respondents 1 to 16 in this application. After the opening of the sectional title register during 1990, a levy fund was established in terms of the provisions of section 37 of the Act, and the contributions due by the owners of all units were levied in accordance with the participation quotas of the owners.

After completion of the building problems arose with the penetration of rainwater through the concrete roofs, patios and face-brick walls of the residential and parking buildings. The building department of the Council for Scientific and Industrial Research (CSIR) was approached to conduct an investigation and to report on its findings during October 1991. It appeared from the subsequent report that the rainwater penetration was mainly the result of faulty workmanship and poor design and construction in regard to the waterproofing and the tiling procedures applied to the building. It was also discovered that the concrete slab underneath each of the balconies was in danger of collapse by reason of the fact that the combined weight of the balustrade wall of approximately 1,5 metres in height and the flower-box when filled with soil exceeded the strength of the cantilever slab. This led to cracking of the waterproofing and the tiles on the balconies and the experts were in agreement that it was an original design fault of the structure.

The recommended remedial work consisted of the following:

1. In respect of the flower-boxes, the removal of plants, soil and waterproofing; the re-sealing with a different bitumen type of sealant with geofabric in the middle and the application of a rubberised compound mixed with cement, as well as the installation of a protective layer on the vertical face of each flower-box.
2. In regard to the leakage problem in the tiled areas on the terraces and balconies it was recommended by all the experts –
 - (a) that the existing tiles and waterproofing be removed;
 - (b) the removal of sufficient screeding to enable the falls to be corrected;
 - (c) the re-screeding to the correct falls;
 - (d) re-waterproofing of the entire area with cold painted bitumen type waterproofing with geofabric in the middle; and
 - (e) replacing of the existing tiles with terrazzo tiles and making provision in the process for proper expansion joints.
3. The experts were also agreed that the only viable solution to the problem relating to the flower-boxes on the balconies was to remove the flower-boxes in their entirety and to lower the balustrade wall considerably to 1100mm.

On 10 November 1993 a meeting of all owners was convened and a full minute was kept of the meeting. The purpose was to authorise the trustees and body corporate to accept a quotation by a contractor to remedy the defects in the above areas and to impose a single special levy on all owners of units in the scheme for the purpose of financing the expenditure thus incurred. This authority was subsequently obtained by a majority vote of thirty nine owners as against six who voted against the resolution. The resolution also authorised the trustees to levy a special contribution from the holders

of rights to exclusive-use areas in respect of the waterproofing and repair of those areas. The special contributions were set out in a special annexure to the application and ranges in extent from R38 703,00 for the owner of unit no 60 (which is the penthouse with an exceptionally large balcony surrounding it) to R8 094,00 for those with lesser expanses comprising with their exclusive-use areas.

The body corporate failed to obtain the co-operation of some of these owners to whom the exclusive rights were allocated. Others paid the additional levy under protest, and the trustees thereupon decided to bring an application for a declaratory order instead of suing each of the recalcitrant owners in a separate action. It must be emphasised that this application was brought as a direct result of the refusal of the exclusive-use owners to pay the special levy in respect of their units. The controversy which has arisen is whether the method adopted by the body corporate of allocating liability for the repairs to the exclusive-use areas was correct in terms of the act and rules. The body corporate contends that it is obliged to apply section 37(1)(b) and that the concept "maintenance" in the proviso thereto includes repairs and remedial work to preserve the structure of the building. The exclusive-use owners object to this interpretation and maintain that the expenses incurred or to be incurred in rectifying the bad workmanship and faulty construction cannot be classified as "maintenance". They contend that as a consequence the whole body of owners must share the burden of these expenses. The crisp question for decision is whether the concept "maintenance" in the proviso to section 37(1)(b) includes the remedial work which the resolution of 10 November 1993 authorised the body corporate to put in hand.

The provisions of section 37(1)(a) and (b) of the Act are relevant to the present dispute. I quote the first two subparagraphs:

"37 (1) A body corporate referred to in section 36 shall perform the functions entrusted to it by or under this Act or the rules and such function shall include –

(a) to establish for administrative expenses a fund sufficient in the opinion of the body corporate for the repair, upkeep, control, management and administration of the common property (including reasonable provision for future maintenance and repairs), for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building or buildings and land, and any premiums of insurance, and for the discharge of any duty or fulfilment of any other obligation of the body corporate;

(b) to require the owners, whenever necessary, to make contributions to such fund for the purposes of satisfying any claims against the body corporate: Provided that the body corporate shall require the owner or owners of a section or sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules made under the Sectional Titles Act, 1971 (Act No 66 of 1971), to make such additional contribution to the fund as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the owners concerned are responsible for such costs."

It will be seen from the proviso to subsection (b) of section (1) of section 37 that the owners of rights to exclusive-use areas are treated differently to owners of ordinary units who have no special use areas attached to their sections.

The question arises what is an exclusive-use area. It is defined in section 1 of the Act as a part of the common property designated for the exclusive use by the owner of the section. A section is the actual building enclosed by walls and shown on the sectional plan (except for those buildings which

are common property). The unit comprises the section plus the owner's share in the common property calculated according to his participation quota, i.e. the percentage represented by the floor area of his section in relation to the total floor areas of all the sections in the scheme, but excluding the exclusive-use areas. The exclusive-use areas, although said to be common property, are set aside for the exclusive use of particular owners and are usually (but not always) attached to the section concerned. The holder of the rights to an exclusive-use area normally acquires those rights by cession from the developer in whom the rights vest after registration of the sectional title scheme and the opening of the sectional title register (section 27(1)(b)). These rights are created by:

- showing them on the sectional plan as such (section 5(3)(f));
- thereafter by including a condition or servitude creating those rights in the schedule referred to in section 11(1)(b) and certified by a conveyancer.

Although exclusive-use areas are technically part of the common property, its use is exclusively reserved for the owner of the section to which it is attached. The other owners have no rights to it as they have in respect of the rest of the common property. Almost all incidents of ownership rest in the holder of these rights: thus he may offer it as security for a bond and these rights are deemed for all purposes to be rights to urban immovable property (section 27(6)). Furthermore, these rights may be sold and transferred to the owner of another section by registration of a notarial deed of cession in favour of the new holder (section 27(4)). All that remains is the nudum dominium which vests in the body corporate and which enables it to enter, inspect, maintain and repair the exclusive-use area (section 44(1)(a)).

It was common cause that the final provision in the proviso to section 37(1)(b) namely “unless in terms of the rules the owners concerned are responsible for such costs” does not apply to the present situation.

The group of ten respondents who oppose this application has contended through their counsel that the word “maintenance” should be given its ordinary or dictionary meaning and reference has been made to various dictionary definitions. Thus the Shorter Oxford English Dictionary s.v. “maintenance” simply states the meaning as “the act of maintaining” and under “maintain” one finds the apposite meaning given as –

“3. to keep in being, to preserve unimpaired.”

It is noteworthy that the idea of preservation runs through most of the relevant meanings. Another dictionary to which reference was made was Webster, Third New International Dictionary, which has a more specific definition, viz.:

“4. The labor [sic] of keeping something (as buildings or equipment) in a state of repair or efficiency.”

The Universal Dictionary of the English Language edited by Henry Cecil Wyld, assigns the following relevant meaning to the word “maintain”:

- “2. a. to support, preserve, keep in certain condition or position ...
- b. to keep up, keep in repair ...”

In the work of Roland Burrows, *Words and Phrases Judicially Defined*, vol 3, the following reference occurs. It is said that Bowen LJ in the case of *Leek Improvement Comrs v Stafford JJ* (1888) 20 QBD 794 (CA) 796 at 797 said the following of the word “maintenance” as it occurred in the Highways and Locomotives (Amendment) Act:

“It seems to me that the term ‘maintenance’ as used in section 13 (of the said act) is equivalent to ‘repair’.”

The Act was signed in Afrikaans by the State President and counsel found it prudent to refer to the

Afrikaans word for maintenance namely “instandhouding” which is defined in the *Woordeboek van die Afrikaanse Taal* (4th vol) as follows:

“... iets in stand te hou, te laat bly bestaan, in sy staat te bewaar, in wese te behou, aan die gang te hou; handeling van iets teen vernietiging, verdwyning, ondergang of verval te bewaar.”

It seems clear from the above that the concept “maintenance” is a general term with no exact or precise meaning in law. It emanates from two Latin words, namely, *manu tenere*, literally “to hold in the hand”. In my view the application of the dictionary meaning of this word does not bring clarity to the question in issue nor does it answer the question of which expenses incurred in the preservation of the building must be charged to the account of the exclusive use owners in terms of the proviso to section 37(1)(b). In order to resolve the problem it becomes necessary to look at the context and the Act as a whole, especially the purpose and position of the exclusive-use owners, and to ask the question: what was the mischief that the legislature tried to combat in enacting the provision, or put differently, what is the object that the legislature had in mind with the provision. This approach to find the true meaning of the legislature has found favour in various decisions of the Appellate Division. I will refer to only a few of these decisions.

In *Olley v Maasdorp* and another 1948 (4) SA 657 (A) at 666, Watermeyer CJ said the following in a matter where the words “any direct or indirect pecuniary interest in any contract with the municipality” had to be interpreted:

“In construing them, when they have no precise or exact meaning, courts of law have very largely followed in certain principles stated as long ago as 1584 in *Heydon’s case* (3 Co Rep 8) viz.:

‘Four things are to be discerned and considered:

1. What was the common law before the making of the Act?
2. What was the mischief and defect for which the common law did not provide?
3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth?
4. The true reason of the remedy. And then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy.’”

[See also the remarks of Innes CJ in the case of *Southern Life Association v Bannink’s Executor* (1920 AD 34 at 41).]

In the case of *Nutton v Wilson* (22 QBD 744) where the court had to interpret the disqualifying words:

‘... in any manner concerned in any bargain or contract.’ LINDLEY LJ, said:

‘To interpret words of this kind which have no very definite meaning, which perhaps were purposely employed for that very reason, we must look to the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise.’”

In similar vein is the case of *Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) where Van den Heever JA had to interpret the word “accommodation”. At 852-853 the following occurs:

“To arrive at the real meaning we have, according to Lord COKE [*Heydon’s case* (3 Co REP 7b)], to consider:

- (1) What was the law before the measure was passed;
- (2) What was the mischief or defect for the which the law had not provided;
- (3) What remedy the Legislature had appointed;
- (4) The reason of the remedy. (See *Olley v Maasdorp* 1948 (4) SA 657 (A) at 666.)”

In *Jaga v Dönges* NO and another 1950 (4) SA 653 (A) at 662, Schreiner JA said the following about the interpretation of words of this kind:

“Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background.”

This approach was followed by Wessels AJA in *Stellenbosch Farmers’ Winery v Distillers Corporation* and another 1962 (1) SA 458 (A) at 474-475. The learned judge quoted with approval from the judgment in *Jaga’s* case where the following occurs at 664 in the words of Schreiner JA:

“Seldom indeed is language so clear that the possibility of differences in meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over the context, and vice versa, the less clear it is the greater the part that is likely to be played by the context.”

Counsel for the first ten respondents has submitted that “maintenance” cannot include structural alterations or major repairs as was executed or envisaged in this case. He refers to section 44(1)(c) of the Act where no higher duty is placed on an owner than to keep such areas “clean and neat”. He also referred me to a dictum by Brandon LJ in the case of *ACT Construction Ltd v Customs and Excise Commissioners* [1981] 1 AER 324 (CA) at 329-330, where the learned judge is reported to have said the following in regard to the interpretation of the word “maintenance”:

“It is possible to take up two extreme positions on the meaning of the expression ‘maintenance’ in note 2. One extreme position is to say that, if the work done involves an improvement to the building, it can never be maintenance. The other extreme position is to say that, if the work has the purpose of remedying an existing defect in the building or preventing a future defect from developing, it must always be maintenance. In my view, neither of these extreme positions is correct. The expression ‘maintenance’ should be given its ordinary and natural meaning. In regard to the first extreme position, there may well be cases where the work done, although it involves some degree of improvement (for instance, because it involves the use of modern or better materials or methods), is nevertheless maintenance in the ordinary and natural meaning of that word. For example, if metal gutters which are liable to decay in time, are replaced with plastic gutters which are not liable to decay however long they remain there, that is an improvement to the building, but I would still regard that work as maintenance. With regard to the second extreme position, there may well be cases where, although the purpose of the work is to remedy existing or to prevent future defects in the building, it is nevertheless not within the expression ‘maintenance’ in the ordinary and natural meaning of that word. For example, if a building has a flat roof which leaks continuously and the owner decides to replace the flat roof with a pitched roof so as to eliminate that defect, then, although that work was designed to eliminate a defect, it would not in my view be maintenance in the ordinary and natural meaning of that word.”

On the strength of this dictum counsel submitted that the rebuilding of the slopes of the patios to provide for, inter alia, better run-off of the water would amount to a construction which is not maintenance.

In my view, however, the example which Brandon LJ quoted in regard to the flat roof being replaced by a pitched roof, goes much further than the facts of the present matter. I am not

convinced either that the application of the principle of purposive interpretation or the mischief approach, would not encompass this last mentioned example given by the learned judge. However, I refrain from expressing any definite opinion thereon. What is clear, however, is that extensive repair work and replacement of materials could fall within the ambit of the concept “maintenance”. In that case it must be remembered that the word “maintenance” was considered with a view to determine whether the expense incurred could be deducted for VAT purposes. Counsel for the applicant has submitted that the concept of “maintenance” used in connection with exclusive-use areas refers to the levy fund instituted under section 37(1)(a) which includes provision for repairs.

In the context of the Act and the then novel concept of exclusive-use areas, these rights are so closely akin to full ownership as to be virtually indistinguishable. As pointed out above, they can be sold and transferred, given as security for a loan and protected presumably by interdict from encroachment. It seems clear that the legislature wanted to place the burden for their upkeep where the benefit lay, namely, on the section owner to which these rights are attached. The fact that the CSIR report indicates that the prime culprits might have been the builders, or architect, for slovenly workmanship and/or poor design, does not in my view detract from the eventual responsibility of the section owner for defects and their correction.

I have accordingly come to the conclusion that the application is well founded and that a declaratory order in terms thereof should be granted.

As far as costs are concerned it was argued by counsel for the group of ten respondents, as well a counsel for the twelfth and sixteenth respondents, that even should the application succeed their clients should not be mulcted in costs as the interpretation sought was for the benefit of all owners of the sectional title scheme Solidatus. It was suggested that at worst for their clients the Court should order the costs of opposition to be paid by the respondents who opposed the application but that the cost of the application should be borne by all owners participating in the sectional title scheme. I must confess that I fail to appreciate this argument. It seems to me that ample opportunity had been given both at the meeting of 10 November 1993 and thereafter for the respondents to consider their position and to decide whether they should oppose the application or not. Had it not been for their opposition there would have been no application to Court and the costs would have been saved. Under these circumstances there is in my view no room for a special order as to costs and costs should follow the event.

Under these circumstances prayers 1, 2 and 3 of the notice of motion will be granted. The first to the tenth and the twelfth and sixteenth respondents will be ordered to pay the costs of the application on an opposed scale.

For the applicant: EC Labuschagne instructed by Rooth & Wessels, Pretoria

For the 1st to 10th respondents: JH Ströh instructed by Stegmanns, Pretoria

For the 12th and 16th respondents: AP Hindley instructed by Löwe & Du Plessis Prokureurs, Pretoria