

IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF DURBAN
HELD AT DURBAN

CASE NO. 2180/2008

BODY CORPORATE OF PARK AVENUE GARDENS

PLAINTIFF

and

VAUGN DAVID BRICKNELL

DEFENDANT

JUDGMENT

For the Plaintiff: Ms S. Padayachee
For the Defendant: Adv. W. Shapiro

INTRODUCTION

The Plaintiff is a Body Corporate of Park Avenue Gardens a Sectional Title Scheme No. SS 221 of 1989 situated at 100 – 45th Avenue, Sherwood, Durban, and the Defendant is Vaughn David Bricknell, an adult male residing at 12A Hillbrow Road, Kloof, and owning Section 62 of Sectional Plan SS 221 of 1989 known as Park Avenue Gardens. The address of the latter Sectional Unit 62 is regarded as the Defendant's domicilium address in terms of Section 3[3] of Annexure "8" to the Regulations of the Sectional Titles Act 95 of 1986.

The cause of action is the alleged failure by the Defendant to pay his monthly contributions or levies to the Plaintiff as at the 1st of January 2008, allegedly making him to be in arrears to the sum of R14 786,07 which is the capital amount claimed herein,

together with interest on the said amount calculated at the prime overdraft rate applied by Nedcor Bank Ltd plus 7 % per annum compounded monthly from 2 January 2008 until date of payment.

In response to this claim the Defendant has firstly raised a special plea and in the alternative denied the Plaintiff's claim of R14 789,07 and raised his defences which are not relevant for the purposes of this judgment. As would ordinarily happen, this Honourable Court had to hear the special plea first in order to make a determination before entertaining other defences raised in the main plea.

The Defendant's special plea mainly raises a question that has never been decided, at least according to my knowledge and research. The Defendant alleges that the action is premature as there was no compliance with the requirements of Section 129 of the National Credit Act 34 of 2005, as the way in which the Body Corporate calculates its interest of prime overdraft rate of Nedcor Ltd plus 8 % per annum makes the transaction an "incidental credit agreement", and therefore subject to the National Credit Act (NCA).

Mr. Shapiro for the Defendant argued that Section 1 of the National Credit Act defines "incidental credit agreement" and from that definition according to him the services rendered by a Body Corporate are included. The services include the upkeep of common property, providing of water and lights, and other services. He further argued that if services are being provided there is therefore a consumer of these services. On the other hand there is the credit provider, herein being the Body Corporate. He further argued that it doesn't matter whether the obligation to render such services flows from statute or not, but the moment the Body Corporate so renders an account whether in advance or in arrears to pay levies in respect of that account then it is an ... credit agreement. Because this transaction amounts to an ... credit agreement the provisions of Section 129 need to be complied with, which was not done in the present matter hence the argument that the action is premature. On this basis it is the Defendant's argument that the action must be dismissed with costs.

On the contrary, Ms Padayachee for the Plaintiff argues that a claim for levies does not fall under the National Credit Act because it is created specially by Section 37 of the

Sectional Title's Act. "Service" according to the NCA is different from the duties of the Body Corporate as per the Sectional Title's Act.

In respect of an "account", Ms Padayachee argued that in terms of the Sectional Title's Act there is no obligation to give an account to a member of the Body Corporate. She points out that in terms of Section 37[3] the Body Corporate only certifies the contribution to be paid, the manner of payment, the extent of such contribution has been paid by the owner or mortgagee of a unit. This certification or determination by the Body Corporate is made "...on application by such (new) owner or mortgagee...", that means at the behest of the latter committing himself / herself / itself to contribute its portion of the Body Corporate's obligation to pay rates and taxes in terms of Section 51, to the Municipality or whatever authority it is legally obliged to do so.

It was further argued for the Plaintiff that in terms of Management Rule 31[3] of Annexure "8" of the Regulations of the Sectional Title's Act payment becomes due within fourteen days of such being due, and such payment not being an account but payment levied in advance. This is argued to be different from an 'incidental credit agreement' which in terms of Section 5[2][a] of the National Credit Act is deemed to have taken place "...on a date that is twenty (20) business days after the supplier of goods or services that are the subject of that account first charges a late payment fee or interest in respect of that account". Interest in respect of levies is charged in terms of Management Rule 31[6] of Annexure "6" to Regulation 1 of the Sectional Title's Act. Ms Padayachee therefore argued that such interest is claimed as provided for in the Act in respect of levies. It is not as would normally accrue due to 'Mora' flowing from the provision of services or as agreed as contemplated by the NCA.

An article by Tertius Maree published "*Deeltitel Forum*" of Saturday 20th of June 2009 was also used to motivate for a proposition that was based on a directive of the National Credit Regulator that levies should be considered as subject to the National Credit Act.

The decisive factor when addressing the above arguments is enshrined within the legislator's 'purpose' of the promulgation of the NCA as contained in Section 3 of that Act. The intention of the legislature was "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive,

sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.

The main question is if I conclude that this Act applies to levies, how would that be addressing any of the needs or purposes stated above in terms of Section 3 of the NCA? To arrive at a conclusion to the latter question it is imperative for one to look at the nature of a Body Corporate.

A Body Corporate by its nature is formed in terms of Section 36 of the Sectional Title's Act upon any person other than the developer buying a unit in the sectional title scheme. It follows therefore that the Body Corporate comprises of 'consumers', as contemplated by the National Credit Act. This is in light of their joint responsibility to the Municipality in respect of rates, water etc., in which event the Municipality becomes the creditor as contemplated by the NCA. Among the purpose of the NCA, paramount it may appear from section 3 is to protect consumers, obviously against unscrupulous creditors. It follows therefore that the Act does not regulate or protect a consumer from other joint consumers, as there is no contemplated economic abuse among them. It is my view that it is in light of this that bodies of people like 'Stokvels' are excluded from the operation of this Act.

It is my very strong view that to see the Body Corporate, comprising of all consumers, like a 'stokvel', as a creditor would amount to a contradiction in terms. Worst of all, favouring one consumer above other consumers would obviously defeat the very purpose of the NCA, namely, "...to promote a "fair"..."sustainable," "responsible"..."effective"...industry".

Upholding the Defendant's position would not amount to fairness among Body Corporate members who share the same status of a consumer as he does. Such a decision would frustrate the whole institution of Sectional Title Schemes, rendering them dysfunctional, unsustainable, inefficient and ineffective. The irresponsible members of the Body Corporate would easily render the institution bankrupt and easily render the living conditions into a health hazard, as none other members would be willing to sustain the scheme at their own expense while others live freely without carrying the equal burden

of responsibilities flowing from their joint liability to pay their municipal rates and other creditors the members jointly agreed on.

In light of the above, the special plea is therefore dismissed with costs

DATED at DURBAN on this day of



L. MATJELE
ADDITIONAL MAGISTRATE

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