

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

CASE NO. AR 611/09

In the matter between:

TAMSANQA STANLEY DLAMINI

APPELLANT

and

THE BODY CORPORATE OF FRENOLEEN

RESPONDENT

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**APPEAL JUDGMENT** Delivered on 11 March 2010

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SWAIN J

[1] The appellant appeals against the dismissal by the *Court a quo* of the appellant's application for rescission of a default judgment, granted against the appellant, in favour of the respondent on 23 July 2008.

[2] The Magistrate's reasons for dismissing the application were two-fold:

[2.1] A failure by the appellant to furnish a sufficient and satisfactory explanation for his delay in instituting the application.

[2.2] a failure by the appellant to show that he had a *bona fide* defence to the claim of the respondent.

[3] I propose dealing firstly with the issue of whether the appellant has established a *bona fide* defence to the claim of the respondent. The basis of the appellant's contention is that the respondent has incorrectly reconciled the appellant's account in respect of his sectional title levy obligations. M/s Pillay, who appeared for the appellant, submitted that the amount claimed by the respondent was inaccurate and that the statements of account provided by the respondent were also incorrect.

[4] The respondent conceded in its answering affidavit that certain levy payments made by the appellant, had not been credited to the appellant's account. The respondent averred that the reason for this was that the appellant had used the incorrect file reference number when making payment. Taking into account these payments, the amount owed by the appellant at the time judgment was taken, was the sum of R11,749.70 and not the sum of R15,251.79 for which judgment was granted. M/s Mills, who appeared for the respondent, handed up a notice in terms of Rule 51 (11) (a) of the Magistrates' Court Rules, in terms of which the

respondent on 05 March 2010, abandoned part of the judgment, claiming only payment of the sum of R11,749.70 due as at 12 May 2008.

[5] Therefore the issue is whether the amount of R11,749.70 was due owing and payable by the appellant to the respondent, as at date of judgment. The only defence raised by the appellant in his founding affidavit was that he had paid his levies in full and denied that he was indebted to the respondent at all. The appellant set out no details to support his contention that nothing was owed to the respondent, being content to allege that repeated requests by him for a reconciliation of levies from the respondent fell on deaf ears.

[6] However, what is clear from the answering affidavit of the respondent is that:

[6.1] On 11 December 2008 the appellant sent an email to the respondent's attorneys averring that the levies due by him from March 2007 to November 2008 inclusive, amounted to R14,797.44 and that he had paid R14,224.00 in respect thereof, attaching receipts and proof of payment.

[6.2] In response the respondent's attorneys emailed the appellant a full reconciliation of his levy account, from the time he purchased the unit, setting out the payments he made and the levies debited to his account. The reconciliation demonstrated that there was an amount outstanding as at December 2008.

[6.3] On 21 January 2009 the appellant was furnished with a detailed reconciliation of his account, which showed that the appellant was in arrears with his account when judgment was taken.

[6.4] On 29 January 2009 the respondent's attorneys emailed the appellant a further detailed reconciliation for the period March 2007 until 12 May 2008 showing how the amount of R11,749.70, referred to above, was calculated.

[7] I would have expected the appellant, in his replying affidavit, to set out a detailed reconciliation to support his assertion that no levies were owed to the respondent, but he did not do so and was content simply to allege that he had always disputed the calculation of the amount owing.

[8] I agree with the submission of M/s Mills that the reconciliations of the respondent show that:

[8.1.] The appellant failed to pay his monthly levies for a ten month period between August 2007 and May 2008 and failed to pay the special levy raised on 07 September 2007 for painting.

[8.2] When summons was issued and served during June 2008 the appellant was in arrears. The levies due from March 2007 were R14,158.24 (R704.64 x 16 months = R11,274.24 + R2884.00 special levy). This excluded interest and costs, which the respondent was entitled to charge in accordance with its Management Rules on arrear levies.

[8.3] At that stage the appellant had paid only R3,520.00. According to the payment slips provided by the appellant, the amount of R10,704.00 was paid by the appellant after default judgment was granted.

[9] Before us M/s Pillay was constrained to concede that the appellant did owe money to the respondent as at the date of judgment, and that payments made by the appellant to the respondent after default judgment had been granted, could not be considered in deciding whether to rescind the judgment in question.

[10] A further defence raised by the appellant, albeit only in reply in the *Court a quo*, was the following:

[10.1] The charging of interest by the respondent on the arrear levies had as a consequence that this was deemed to be an "incidental credit agreement" as defined in Section 1 of the National Credit Act No. 34 of 2005 (the Act).

[10.2] The respondent was therefore obliged to comply with Sections 129 (a) and (b) of the Act and give the requisite notice to the appellant, prior to the issue of summons, which the respondent had failed to do.

[11] The Magistrate rejected this argument and I agree with his conclusion for the following reasons, as advanced by M/s Mills:

[11.1] A body corporate does not supply goods or services to its members, nor does it advance money, or credit to its members.

[11.2] Levies charged by a body corporate to its members, do not constitute an incidental agreement because the levies do not constitute an "account tendered for goods or services provided by the body corporate to the consumer".

[11.3] Levies are not payable by members of a body corporate to an agreement, as defined in the Act, but are payable by virtue of the provisions of the Sectional Titles Act No. 95 of 1986.

[12] I am therefore satisfied that the appellant has failed to establish a substantial defence to the appellant's claim. On the evidence before me the appellant has failed to show a *prima facie* case in the sense of setting out averments which, if established at trial would entitle him to the relief asked for.

***Grant v Plumbers (Pty) Ltd.***

***1949 (2) SA 470 (O) at 476 – 477***

It therefore becomes unnecessary to consider whether the applicant furnished a satisfactory explanation for his delay in bringing the application for rescission, whether he furnished a reasonable explanation for his failure to defend the action, or whether he is *bona fide* in wishing to defend the action. The appeal must accordingly fail. In this regard, I agree with the submission of M/s Mills that it matters not that the respondent has abandoned portion

of the judgment because the fact remains that the appellant had no defence to the balance remaining.


[13] Before us M/s Mills submitted that the appellant should be ordered to pay the respondent's costs of the appeal, on the attorney and client scale. She submitted that Rule 31 (5) of the Management Rules as contained in Annexure 8 to the Sectional Title Regulations, which are applicable to the respondent, made provision for the payment of costs on the attorney and client scale, in the event of the respondent having to recover arrear levies or any other arrear amounts due and owing by the applicant to the respondent.

[14] In this regard it appears from the Magistrate's reasons for judgment that the application in the *Court a quo* was dismissed with costs, despite the respondent seeking costs on the attorney and client scale. In addition, M/s Mills in her heads of argument dated 22 February 2010 only sought an order dismissing the appellant's appeal with costs. Due regard being had to the fact that no challenge was raised by the respondent regarding the costs order made by the Magistrate, and until the hearing no claim was raised by the respondent for its costs to be awarded on the attorney and client scale, I consider it would be unfair for the appellant to be mulcted in costs on the attorney and client scale at this stage.

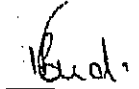
The order I make is the following:

"The appeal is dismissed. The appellant is

ordered to pay the respondent's costs of the appeal".

  
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SWAIN J

I agree

  
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VAHED, H. B. A J

Appearances: /

Appearances:

For the Appellant : Adv. K. Pillay (M/s)

Instructed by : Chamberlain's Attorneys  
C/o Devi Maharaj  
Pietermaritzburg

For the Respondents : Adv. L. M. Mills (M/s)

Instructed by : Lomas Walker Attorneys  
C/o Stowell & Company  
Pietermaritzburg

Date of Hearing : 08 March 2010

Date of Filing of Judgment : 11 March 2010