

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-APP-AMC-2022/00006

In the matter between:

THE TRAILS BODY CORPORATE

APPELLANT

and

RENETTE SMUTS

RESPONDENT

Neutral citation: *The Trails Body Corporate v Smuts* (HC-MD-CIV-APP-AMC-2022/00006) [2023] NAHCMD 331 (16 June 2023)

Coram: OOSTHUIZEN J *et* PRINSLOO J

Heard: 24 February 2023

Delivered: 16 June 2023

Flynote: **Appeal** – Body Corporate’s Special Levy – Auditor’s Report – Sectional Titles Act 2 of 2009 – Interpretation of Section 39 read with the Regulations and Rule 29 – Appellant and Respondent jointly liable for account rendered by Auditor – Appeal partially successful.

Summary: Serving before this court is an appeal against the judgment and order of the Magistrate's Court of Windhoek, wherein the learned Magistrate dismissed the plaintiff's claim and ordered that each party pay their own costs. The respondent opposes the appeal on the basis that she is not liable for the special levy added to her monthly levy statement.

Held that in the current instance, a discussion was held, and a resolution was passed that members that engage third parties without the appellant's consent do so at their own costs.

Held that the fund is established for administrative expenses sufficient in the opinion of the body corporate for, amongst other things management and administration of the common property. In the court's view, this is very wide, and the 'special levy' for the payment of the audit report under these circumstances would qualify as an administrative expense for the management and administration of the common property.

Held further that during the September 2018 AGM, it was resolved that the respondent would be liable for the account rendered by the auditor. This decision was further confirmed during a meeting of the Board of Trustees on 26 June 2019.

Held that having considered the undisputed facts, the court is of the view that the report came about directly as a result of the intervention of the respondent's agent and therefore, the respondent would have a liability in respect of the payment of the amount levied against her account.

Held furthermore that by its own concession, the appellant used the report for its own benefit and proceeded to distribute it to the benefit of all the owners. Therefore, even if the appellant did not requisition the report, it was content to use it and then held the respondent liable for the payment.

Held – the Court found that in fairness to the respondent, the appellant should be liable to pay half of the costs of the auditor’s report.

ORDER

1. The appeal is partially successful.
 2. The order of the Magistrates Court in respect of claim one is set aside and replaced with the following:
 - a. Each party will be liable for payment in the amount of N\$4 600.
 - b. No order as to costs.
 3. The matter is finalised and removed from the roll.
-

JUDGMENT

Prinsloo J (Oosthuizen J concurring)

Introduction

[1] The matter before us is an appeal against the judgment and order of the magistrate’s court of Windhoek, wherein the learned magistrate dismissed the plaintiff’s claim and ordered that each party pay their own costs.

The parties

[2] The plaintiff is The Trails Body Corporate, a legal entity with limited liability, with Sectional Title Scheme 97/1996, with its physical address at 53 Olof Palme Street, Klein Windhoek, Namibia.

[3] The defendant is Renette Smuts, an adult female and the registered owner of unit 29 at The Trails Complex.

[4] For the sake of convenience, we will refer to the parties as far as possible as they were referred to in the magistrate's court. However, during the discussion, we may interchangeably refer to the plaintiff a quo as the appellant and the defendant a quo as the respondent.

Brief background

[5] An Annual General Meeting (AGM) was held in November 2017 for the Body Corporate of The Trials for the financial year June 2016 to May 2017, which was attended by the defendant and during which meeting she was represented by Mr Smuts (her husband) by proxy. The defendant authorised Mr Smuts as her agent, to act on her behalf, to request and inspect records, and to attend and participate in meetings of the Body Corporate.

[6] Mr Smuts raised concerns during the AGM regarding the Body Corporate's financial statements for 2017.

[7] Whereas Mr Smuts was not satisfied with the response received during the meeting, he followed it up by addressing correspondence to the Board of Trustees. In June 2018, the plaintiff's legal representative directed a letter to Mr Smuts indicating that his concerns would be addressed to the applicable auditors for consideration and comment.

[8] On 10 July 2018 and 16 July 2018, Mr Smuts met with the auditor, Mr Lourens of Stier Vente Associates. Thereafter, on 19 July 2018, Mr Smuts also sent a two-page email to the auditor for consideration.

[9] Mr Loubser rendered an account to the plaintiff, which was paid, however, it was subsequently repudiated. During the AGM held on 19 September 2018, the Board of Trustees informed the participants at the meeting that Mr Lourens rendered an account

to the Body Corporate in the sum of N\$9 200 for a report to the trustees that was compiled, apparently as a result of the concerns raised by Mr Smuts.

[10] In the meeting referred to earlier, it was decided that if any owner wants to seek advice from a professional contractor of the Body Corporate, they must arrange and cover the costs for the consultation themselves.

[11] It was agreed that the defendant should be liable for the costs of the report as the report was compiled at her (or her agent's) behest, and as a result, the defendant's levy account was debited in the amount of N\$9 200. Mr Smuts responded that he would contact Mr Lourens to determine why he had charged him for the visits.

The proceedings in the court a quo

[12] The plaintiff a quo levelled two claims against the defendant in its particulars of claim, i.e.

a) Claim one: that the defendant breached her obligations as she failed to pay or settle her levies as required in terms of the Sectional Titles 2 of 2009 ('the Act'), to the detriment of the appellant in carrying out its duties in terms of rule 29(1) of the Rules for Sectional Titles Act. The plaintiff averred that the defendant failed to comply with her obligation to pay or settle her charges in the amount of N\$9 200 charged by the body corporate for auditor's fees, which was occasioned by the defendant or her lawful agent, who engaged the auditors directly without the appellant's authorisation. As of 1 February 2020, the amount payable amounted to N\$12 395.40, and;

b) Claim two: payment of monthly levies in the amount of N\$2 906 payable for the month of March 2020 until the arrears levies are up to date.

[13] The defendant advanced a case that the fees levied against her account were not due and payable. In support of this contention, the defendant pleaded that she never requested the auditor to conduct research or prepare a report.

[14] In the calculation of claim one, the defendant further pleaded that the plaintiff erroneously added a levy payment received, which left the disputed charge as N\$9 200 plus interest.

[15] The defendant also raised a special plea of arbitration, but the special plea was not adjudicated during the proceedings in the court below. The reason is not apparent why the special plea was not considered.

Judgment by the magistrate

[16] Having considered the evidence the learned magistrate held as follows in para 24 to 27, which forms the crux of her judgment:

[24] Section 39 of the Act lists the different charges that may encompass levies payable by a sectional title holder in a body corporate.

[25] A body corporate must after approval of the annual budget at the AGM give the members notice of their liability to pay the contribution levied and this notice must include the obligation to pay; specify the due date for payment; state that interest at a rate specified will be payable on any overdue contributions and charges; and include details of the dispute resolution process that applies in respect of disputed contributions and charges. *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd (1082/2018) [2019] ZASCA 161 (28 November 2019)*

[26] In respect of claim one the court finds that the plaintiff's claim is not defined under Section 39 read with the Regulations and Rule 29 of the Sectional Titles Act; "The liability of owners to make contributions". In respect of claim 2 it was paid on 1 March 2020 as per bank statement of the defendant.

Conclusion

[27] Taking all these factors into consideration, I am not satisfied that the plaintiff has made out a case for the relief sought.'

[17] The learned Magistrate did not make any factual findings or do any evaluation of the evidence of her judgment but focused on the interpretation of s 39 of the Act and rule 29 of the Rules for Sectional Titles.¹

Grounds of appeal

[18] The appellant raised the following grounds of appeal:

'1. The learned Magistrate erred in law and or in fact in the exercise of her judicial discretion and thereby misdirected herself when she:

1.1 Found that Section 39 of the Act is a closed list of the different charges that may encompass levies payable by the sectional title holder in a body corporate.

1.2 Found that the Plaintiff's claim is not defined under Section 39 read with Regulations and Rule 29 of the Sectional Title Act. The learned Magistrate narrowly interpreted section 39 to exclude the Plaintiff's claim.

1.3 Found that the Plaintiff has not made out a case on a balance of probabilities for the relief sought.'

Common cause

[19] It appears to be common cause between the parties that the defendant's husband, Mr Smuts, was duly authorised to act on behalf of the defendant and make enquiries and inspect records of the Body Corporate.

[20] It is also common cause that Mr Smuts visited the auditors on at least two different occasions, and an account was rendered to the plaintiff.

[21] Mr Lourens, the auditor, drafted a report dated 3 August 2018 under the heading- 'RE: REPORT TO TRUSTEES', wherein he answered and outlined each query of Mr

¹ No. 224 of 2014 Rules for Sectional Titles: Sectional Titles Act 2 of 2009.

Smuts in detail, and each owner received a copy of the report. It should be noted that Mr Smuts provided the auditor with an extensive report regarding trustee management.

[22] Mr Smuts was not delegated by the plaintiff to visit the auditor or make enquiries on the plaintiff's behalf.

[23] The plaintiff distributed the auditor's report to all the owners of The Trails Complex for their information.

The appellant's case

[24] The appellant submitted that the court a quo erred in three material respects:

- a) Not accepting or considering the evidence of the parties;
- b) Concluding that the Act limits the types of levies to be paid by the respondent;
- c) Concluding that the appellant's decision holds no water in that no provision is made for it in the enabling legislation and by failing to consider documents which the appellant presented as proof of the decisions of the duly constituted general meeting.

[25] The appellant submits that the key issue in the appeal is whether the court a quo had sufficient evidence before it to conclude that the respondent was not liable for the levy and whether, having considered s 39 and rules 28 and 29, the plaintiff's claim does not fall within the confines of the Act and the Rules.

[26] It is the appellant's case that the learned magistrate applied a narrow and restrictive approach to the interpretation of the statute. The appellant submitted that the statute provides for additional and special levies to be attributed at the annual general meeting, further buttressing the above submission, which was the appellant's evidence.

[27] In the current instance, a discussion was held, and a resolution was passed that members that engage third parties without the appellant's consent do so at their own costs.

[28] The appellant is challenging the rationale of the learned magistrate in that the liability to pay the monies to the Body Corporate is stipulated in s 39 read with s 46(1)(h) and rule 29 as pleaded in the particulars of claim.

[29] The appellant further submitted that the liability is allocated at a duly constituted AGM, and no further step is required from the creditor, i.e. the appellant.

The respondent's case

[30] The respondent opposes the appeal and denies liability for the special levy added to her monthly levy statement. The respondent further submitted that the appellant produced no evidence that Mr Smuts requested the report from the auditor.

[31] However, the respondent conceded that her husband, Mr Smuts, visited the auditor twice but submitted that the auditor never informed her husband that he would be liable for any costs or that the appellant would be invoiced.

[32] The respondent submitted that the auditor finalised the requested audit report one year after the issues were raised and delivered the report only to the appellant, and the appellant settled the invoice of N\$9 200. Neither the respondent nor her proxy, Mr Smuts, received the report from the auditor.

[33] It is further the respondent's submission that the amount charged by the auditor, Mr Lourens, was paid by the appellant because the appellant requested the report, which was delivered to the trustees. The respondent further submitted that there are 67 units registered at The Trails, and as a result, the respondent's participation quota is 1/67 resulting in a fee of N\$140 payable towards the report. The respondent, therefore,

submitted that it would be unfair to hold her solely responsible for the payment of the N\$ 9 200 as a special levy.

Discussion

[34] From the onset, it is important to point out that although claim one is alleged to be N\$12 395.40, however, such amount includes an ordinary levy amount of N\$3 195.40, which was due at the time of the issuing of summons but which was subsequently paid. After considering the relevant bank statements, the learned magistrate was satisfied that the respondent was not in arrears with her levy account. Therefore, the special levy claimed from the respondent is only N\$9 200, which is the bone of contention between the parties.

[35] The gist of the findings of the court a quo is that if the charges cannot be fitted in under s 39 read with rule 29 of the Rules for Sectional Titles, then the appellant would not be able to level such charge against the respondent.

[36] Section 39 of the Act sets out the functions of the body corporate. Section 39 of the Act as amended, establishes a fund for purposes of, but not limited to, maintenance, payment of rates and taxes and other local authority charges in respect of the common property, the payment of local authority charges, the payment of any premiums of insurance that may become due and payable.

[37] The following is of relevance for the matter before us:

- a) Section 39(1)(a) expressly states that the appellant may establish for administrative expenses a fund sufficient to discharge any other duty or fulfilment of any other obligation of the body corporate.
- b) Section 39(1)(b) further provides that the body corporate may require the owners of the sections to make contributions to the fund for the purpose of satisfying any claims against the body corporate.

- c) Section 39(1)(c) provide that the body corporate may determine from time to time the amounts to be raised for purposes of ss 1(a) and (b).
- d) Section 39(2)(a) and (b) provides as follows:

‘(2) Any contributions levied in terms of subsection (1) –

- (a) are due and payable on the passing of a resolution to that effect by the trustees of the body corporate; and
- (b) may be recovered by the body corporate by action in any court (including a magistrate’s court) of competent jurisdiction from the persons who were the owners of sections at the time when the contributions became due and payable.’

[38] Rules 28 and 29 set out the liabilities of owners to make contributions. Inter alia, rule 29(1) provides for owners of sections to make contributions, and the proportions in which the owners must make contributions for the purposes of s 39(2) of the Act or may in terms of s 49 of the Act be held liable for the payment of a judgment debt of the body corporate must be borne by the owners with effect from the date upon which the body corporate is considered to be established, in accordance with (a) the participation quotas attaching to their respective sections; or (b) a determination made by the members of the body corporate by unanimous decision in terms of s 24(3) of the Act.

[39] In considering the enabling legislation in respect of the Act, as amended, with accompanying Rules and the Regulations we must agree with the argument advanced on behalf of the appellant that the Act and Rules should not be interpreted as to strictly limit the charges that may be encompassed in levies payable by owners.

[40] It is clear from the wording of s 39 that owners may be required to make contributions to the fund to satisfy any claims against the body corporate. The list enumerated in s 39 is not a numerus clauses in respect of what charges can be levelled in respect of owners. In fact, the fund is established for administrative expenses sufficient in the opinion of the body corporate for, amongst other things management and administration of the common property. In our view, this is very wide, and the ‘special levy’ for the payment of the audit report under these circumstances would

qualify as an administrative expense for the management and administration of the common property.

[41] During the September 2018 AGM, it was resolved that the respondent would be liable for the account rendered by the auditor. This decision was further confirmed during a meeting of the Board of Trustees on 26 June 2019.

[42] Undoubtedly, the report drafted by the auditor, Mr Lourens, was at the behest of the respondent's agent. Mr Smuts submitted a report to Mr Lourens consisting of ten pages wherein he raised various concerns. The pursuant report drafted by Mr Lourens throughout refers to the comments of Mr Smuts. In fact, as an introduction to the report, Mr Lourens states:

'We were provided with a report of Mr J Smuts addressed to the Body Corporate Members, and entertained various discussions and meetings with Mr Smuts, which is not normal audit procedure. It cannot be realistically expected of us as the new external auditor to attend to every query of all unit holders in each complex. The fees will become astronomical as we bill hourly rates which need to be recovered somehow.'

[43] The respondent attempted to convince the court that the visits by Mr Smuts to the auditor's offices were quick and that Mr Smuts never requested a report. However, the invoice rendered tells a different story and reflects as follows:

'10 July 2018- meeting with Mr J Lourens at the SVA offices- no arranged appointment- 1 hour;
16 July 2018- meeting with Mr J Lourens at SVA offices – no arranged appointment -1.25 hours;
1 August 2018- analyse the previous year financial statements and restating presentable items with regards to allegations by J Smuts;
2 August 2018 – write a report to the trustees with finding and explanations'.

[44] It is unclear what the respondent or her representative expected from extensive consultations with a professional like Mr Lourens. They must have anticipated that costs

would be incurred as a result of such consultations. However, the process wouldn't end there as the report from Mr Smuts needed to be analysed and considered, and the auditor had to take action based on the information received, ultimately resulting in a report.

[45] Having considered the undisputed facts, we are of the view that the report came about directly as a result of the intervention of the respondent's agent and therefore, the respondent would have a liability in respect of the payment of the amount levied against her account.

[46] The question is, however, whether the respondent should be solely responsible for the account so rendered. By its own concession, the appellant used the report for its own benefit and proceeded to distribute it to the benefit of all the owners. Therefore, even if the appellant did not requisition the report, it was happy to use it and then held the respondent liable for the payment.

[47] In fairness to the respondent, the appellant should be liable to pay half of the auditor's report's costs.

Order

[48] Our order is, therefore, as follows:

1. The appeal is partially successful.
2. The order of the Magistrates Court in respect of claim one is set aside and replaced with the following:
 - a. Each party will be liable for payment in the amount of N\$4 600.
 - b. No order as to costs.
3. The matter is finalised and removed from the roll.

GH Oosthuizen

JS Prinsloo

Appearances:

For the appellant:

E Shighweda

Of Dr Weder, Kauta & Hoveka

Inc.

Windhoek

For the respondent:

In person