



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

CASE NO.: AR145/22

In the matter between:

105 JAYHOLD PROPRIETARY LIMITED

APPELLANT

and

BODY CORPORATE FALCON CRESCENT

RESPONDENT

ORDER

On appeal from: the Durban Magistrates' Court (sitting as court a quo):

The appeal is dismissed with costs.

JUDGMENT

Chithi AJ (K Pillay J concurring)

Introduction

[1] This is an appeal against the summary judgment which was granted against the appellant on 19 January 2022 by the Magistrates Court for the district of Durban. On 29 March 2021 the respondent instituted an action against the appellant for levies in respect of Section 73 Falcon Crescent (Foyer), Old Main Road, Botha's Hill, KwaZulu-Natal in the sum of R85 446.62 plus interest thereon at the rate of 24% per annum from the date that the levies became due to the date of final payment and costs of suit on an attorney and client scale. The levies as claimed by the respondent were due in terms of s 3 of the Sectional Titles Schemes Management Act¹ ("the STSMA").

[2] On 28 July 2021 the appellant delivered a plea and presumably this must have been after the appellant had delivered its notice of intention to defend which unfortunately did not form part of the appeal record. On 19 August 2021 the respondent applied for summary judgment on the terms as set out above.

[3] The appellant opposed the application for summary judgment with the application consequently set down for hearing on 19 January 2022 on the opposed roll pursuant to which the judgment which is the subject of this appeal was granted. The essence of the defence which was posited by the appellant as I could distil from the appellant's plea is that when the respondent's board of trustees, on 18 October 2016, approved an amending sectional plan SG D300/2016 to sub-divide Section 34 into Sections 66-74 they impliedly alternatively tacitly agreed to purchase Section 73 which comprised a portico, large foyer, and passageway from the appellant and therefore the appellant was not liable for the levies. I will revert later to deal with this defence.

Common cause facts

[4] The following were common cause facts between the appellant and the respondent:

¹ Sectional Titles Schemes Management Act 8 of 2011 ("STSMA").

- (a) The appellant was the owner of Section 34 which consisted of the whole of the ground floor of Manor House and the lower ground floor.
- (b) During October 2016 the appellant applied to the respondent's board of trustees for consent to sub-divide Section 34 to create Sections 66-73 on the ground floor and Section 74 on the lower ground floor.
- (c) On 18 October 2016 the respondent's board of trustees approved the appellant's amending sectional plan to sub-divide Section 34.
- (d) The residential units namely units 66-72 were all sold to individual owners at least by May 2017.
- (e) Section 73 was registered in the appellant's name on 19 May 2017.
- (f) The appellant is currently the lawful owner of Section 73.
- (g) The appellant paid levies for Section 73 from 19 May 2017 until October 2018.

Grounds of appeal

- [5] The appellant seeks to assail the summary judgment on the following grounds:
- (a) The learned Magistrate erred in placing undue emphasis on the registration of the appellant as the owner of the Section and that the appellant had previously made payment of levies to the respondent.
 - (b) The Magistrate erred in placing undue reliance on the application of the Alienation of Land Act² to the effect that a sale of immovable property must be in writing.
 - (c) The Magistrate erred in not concluding that when the respondent approved the appellant's amended sectional plan on 18 October 2016 which created Section 73 a tacit alternatively implied agreement was concluded that the respondent would purchase Section 73.
 - (d) The Magistrate erred in overlooking the fact that since May 2017 the appellant has had no use and enjoyment of the Section in question which had been used exclusively for the benefit and enjoyment of the respondent and with that Section accordingly being *de facto* common property of the respondent.
 - (e) The Magistrate erred in failing to afford the appellant leave to defend the case at trial and instead granting summary judgment against the appellant.

² Alienation of Land Act 68 of 1981.

Issues

[6] The issue is broadly whether the appellant had a bona fide defence to the respondent's claim and therefore whether the Magistrates' Court was wrong to grant summary judgment against the appellant.

Applicable law

[7] Where there has been no misdirection on fact by the trial judge, the presumption is that his conclusion is correct, and the Appellate Court will only reverse it where it is convinced that it is wrong.³

[8] The issue of whether the appellant had a bona fide defence to the respondent's claim and whether the Magistrates' Court judgment was wrong must be considered within the context of the statutory prescripts which regulated the relationship between the appellant and the respondent and relating to the sale of immovable property.

[9] The first of such prescripts is the STSMA. For an owner of a sectional title unit to sub-divide a unit he must make an application to the trustees of the body corporate in terms of s 7(2) of the STSMA which provides that:

- '(a) In addition to the functions contemplated in subsection (1), the trustees of the body corporate must receive and may consent to applications for subdivision of sections or consolidation of sections, made by the owners of sections.
- (b) Such consent must not unreasonably be withheld by the trustees.'

[10] On 18 October 2016 the respondent's board of trustees approved the appellant's subdivisional plan. It is this approval which the appellant contends constituted an implied alternatively tacit agreement between the appellant and the respondent. However, the issue of whether there was any implied alternatively tacit agreement which was concluded between the parties must be considered in the context of the parties conduct pursuant to

³ *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706.

the alleged conclusion of the implied alternatively tacit agreement to which I will refer later.

[11] Section 5 of the STSMA provides:

'(1) In addition to the body corporate's main functions and powers under sections 3 and 4, the body corporate-

...

- (d) may, subject to subsection (2), purchase land to extend the common property, if duly authorised thereto in writing by all the owners;

(2) Land purchased by a body corporate in terms of subsection (1)(d)-

- (a) must be registered in the name of the body corporate in terms of the Sectional Titles Act and Deeds Registries Act, 1937 (Act 47 of 1937); and
- (b) is considered to be owned by the owners of sections in the building concerned in the same proportion as their participation quota as contemplated in section 26 (2) of the Sectional Titles Act.'

[12] The acquisition of land in terms of s 5 (1)(d) of the STSMA in order to extend common property is subject to a proviso that the trustees must be authorised in writing by all the owners to acquire such land. The land as purchased must then be registered in the name of the body corporate with the Registrar of Deeds. The reason why the acquisition of land to extend the common property must be authorised in writing by all owners is because it would affect their participation quota.

[13] The second prescript is the Sectional Titles Act⁴ ("the STA"). Section 21(1) of the STA provides that after the local authority has approved the proposed subdivision of the section or the consolidation of two or more sections, the land surveyor or architect concerned may on behalf of the owner submit the draft sectional plan of subdivision or consolidation, as a case may be, to the Surveyor-General for approval.

⁴ Sectional Titles Act 95 of 1986.

[14] Further s 22(1) of the STA provides that an 'owner may, after approval of a sectional plan of subdivision of a section, apply to the registrar of the deeds registry in which the section is registered, to register the sectional plan of subdivision'.

[15] Furthermore, s 22(2)(d) of the STA provides that an application under subsection (1) shall be accompanied by 'certificates of registered sectional title in the prescribed form for each of the new sections and their undivided shares in the common property created by the subdivision, made out in favour of the owner or, in the case of a partition, in favour of the persons entitled thereto in terms of the partition agreement'.

[16] It is common cause that Section 73 came into existence during 2016 when an amending sectional plan SG D300/2016 to sub-divide Section 34 into Sections 66-74 which was prepared by the appellant's appointed land surveyor, Mark Turnbull of Button & O'Connor Land Surveyors was duly approved by the Surveyor-General in terms of s 21 (1) of the STA. By May 2017 the residential units namely units 66-72 were all sold to individual owners. Subsequently, on 19 May 2017 the appellant registered Section 73 in its name as contemplated in the STA.

[17] The third prescript is the Alienation of Land Act. Section 1(1) of the Alienation of Land Act defines "land" as including any unit or a proposed unit in terms of the STA. Further, s 2(1) provides that no alienation of "land" shall be of any force or effect unless contained in a deed of alienation signed by both the parties or their agents acting on their written authority.

[18] The provisions of the prescripts as referred to above must be considered against the provisions of rule 14(3)(b) of the Magistrates' Court Rules. In terms of rule 14(3)(b) the defendant may:

'satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or, with the leave of the court, by oral evidence of such defendant, or of any other person who can swear positively to the fact that the defendant has a *bona fide*

defence to the action; and such affidavit or evidence shall fully disclose the nature, grounds of defence and the material facts relied upon therefor.’

This is the statutory context within which the appellant’s application was considered by the magistrate and the statutory context within which the appeal must be considered.

[19] In resisting the respondent’s application for summary judgment, the appellant was required to disclose the nature and the grounds of its defence with a sufficient degree of detail and clarity to enable the court to ascertain whether it has deposed to a defence which, if proved at the trial, would constitute a good defence to the action in reference to the plea that was delivered.⁵ The appellant contends that when the respondent approved the appellant’s amended sectional plan on 18 October 2016 which created Section 73 an implied alternatively a tacit agreement was concluded that the respondent would purchase Section 73.

[20] In order to answer the question of whether the respondent’s approval of the appellant’s amended sectional plan constituted the conclusion of an implied alternatively a tacit agreement between the parties it is apposite to have recourse to how the courts have defined “implied” or “tacit” terms in relation to contracts.

[21] In *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*⁶ Corbett AJA stated that an “implied term”:

‘In the first place, it is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual *consensus*...In a sense “implied term” is, in this context, a misnomer in that in content it simply represents a legal duty (giving rise to a correlative duty) imposed by law, unless excluded by the parties, in the case of certain classes of contracts. It is a *naturalium* of the contract

⁵ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd and Another* 1980 (1) SA 929 (SE).

⁶ *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D-H, 532G-533A. See also *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 567A-F; *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D.

in question. In the second place, "implied term" is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances.'

[22] The learned judge further stated that:⁷

'The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term...The Court does not readily import a tacit term...Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.'

[23] A tacit term is distinguishable from a tacit contract, which is where the entire contract is implied from the facts and circumstances. In cases where reliance is placed on a tacit contract (a contract implied from the facts and circumstances), a statement of the facts and circumstances constituting the implied contract relied upon is required. For a party to establish a tacit agreement it is necessary that he must allege and prove unequivocal conduct which is capable of no other reasonable interpretation and that the parties intended to and did in fact contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*.⁸ The facts and circumstances from which such an implied contract is inferred must be set out in the pleadings. In order to comply with the requirement of unequivocal conduct which is capable of no other reasonable interpretation a catalogue of actions and specific conduct must be averred. Every relevant action or specific conduct must be proved.

[24] There is nowhere in the appellant's plea wherein the appellant alleged any conduct on the part of the respondent, facts, and circumstances from which the alleged implied alternatively tacit agreement could be inferred. All that the appellant alleges is that on 18

⁷ *Alfred McAlpine* ibid at 532G-H.

⁸ *66-7ndard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others* 1983 (1) SA 276 (A) at 292; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 (2) SA 261 (W) at 267.

October 2016 when the respondent's board of trustees approved the amending sectional plan SG D300/2016 they impliedly alternatively tacitly agreed that:

- (a) 'Section 73 would be purchased by the respondent for a market-related price;
- (b) from the commencement of Section 73 being used as a portico, foyer, and passageway by the residents of Manor House alternatively upon the sale of the Section to the respondent, the appellant would not be liable for payment of levies in respect of the Section; and
- (c) the respondent would formalise the conversion to common property by zero-rating Section 73 for levies or de-register it.'

[25] I find that the respondent's actions did not demonstrate those of a party from whose conduct an implied alternatively tacit agreement could be inferred. This is so because when the appellant started paying levies the respondent received them and when the appellant ceased paying levies the respondent sued the appellant for such levies.

[26] While contrary to the appellant's assertion I find that the appellant's conduct demonstrates the opposite. When the appellant applied to the registrar of deeds for the registration of the subdivision in terms of s 22 of the STA it never sought to have Section 73 registered in the respondent's name as common property; instead, the appellant sold all the residential units, namely units 66-72 to individual owners except for Section 73. On 19 May 2017 the appellant had Section 73 registered in its name and started paying levies as an owner as it is required in terms of s 3 of the STSMA until October 2018. When the appellant registered Section 73 in its name it must have been aware that as an owner of the unit it would in terms of s 3 of the STSMA be liable for levies in respect thereof. When the appellant paid levies for Section 73 the appellant could not have done this with the full knowledge that in fact there was an implied alternately tacit agreement between the parties.

[27] In addition, when the appellant's land surveyor prepared the amending sectional plan SG D 300/2016 to subdivide Section 34 into Sections 66-74 in terms of s 21 of the STA there is nowhere in the sectional plan where it is indicated that Section 73 was

'common property.'⁹ Even if it was assumed for a moment that the appellant is correct to say that upon the approval of the amending sectional plan on 18 October 2016 there was an implied alternatively tacit agreement which came into existence between the parties such an agreement would not be valid for two reasons. Firstly, by virtue of the provisions of s 5(1)(d) of the STSMA which prohibits the acquisition of property to extend the common property unless authorised in writing by all the owners. Such an implied alternatively tacit agreement would therefore be invalid for want of compliance with s 5(1)(d) of the STSMA.

[28] Secondly s 1 of the Alienation of Land Act defines "land" as including a unit or a proposed unit in terms of the STA, while on the other hand, s 2(1) the Act prohibits any sale of land unless it is contained in a deed of alienation which has been signed by both parties or their agents acting on their written authority. There is no deed of alienation which was signed by parties in relation to Section 73 and therefore the alleged implied or tacit agreement which was allegedly entered into between the parties would be invalid for want of compliance with s 2(1) of the Alienation of Land Act.

[29] In any event when the trustees of the respondent approved the appellant's amended sectional plan on 18 October 2016 which created Section 73, they were merely performing their statutory functions in terms of s 7 of the STSMA. The respondent is a creature of a statute whose functions and powers are confined within the four corners of the enabling legislation and rules. Therefore, the performance of those functions could not possibly be equated to the trustees of the respondent being empowered to bind the respondent to contractual obligations whether expressly, impliedly and/or tacitly which are otherwise not sanctioned by the enabling legislation as doing so would be ultra vires the powers conferred to them in terms of ss 5 and 7 of STSMA.¹⁰

[30] It is indeed correct that a respondent in a summary judgment application is not required to show that it has a defence that is likely to prevail, it is enough that it can

⁹ Record: page 26.

¹⁰ *Zikalala v Body Corporate, Selma Court and Another* 2022 (2) SA 305 (KNP) para 19.

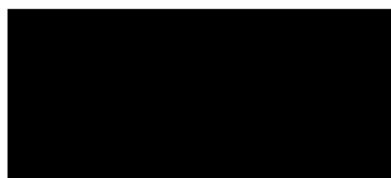
demonstrate that it has a cognisable defence. However, such cognisable defence must be bona fide. In this case I find that as much as the defence which the appellant sought to raise was clear it did not however constitute a good defence and hopelessly fell short of constituting a bona fide defence. In the circumstances, I do not see in which respects is it contended that the magistrate was wrong in granting the summary judgment against the appellant. In my view the appellant's appeal must fail.

Costs

[31] The general rule is that costs follow the event. I do not see why I should deviate from that general rule.

Order

[32] In the result, the appeal is dismissed with costs.



K Pillay J



Chithi AJ

APPEARANCES

Counsel for the Appellant : Adv. J. F. Nicholson

Instructed by : Larratt Law Attorneys

Counsel for the Respondent : Mr. T. K. Pearce

Instructed by : Pearce, Du Toit & Moodie

Date Hearing : 10 February 2023

Date of Judgment : 18 August 2023