IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case number: 3979/2016

In the matter between:

GOLDEX 16 (PTY) LTD Applicant

and

THE BODY CORPORATE OF WATERFORD

GOLF AND RIVER ESTATE 1st Respondent

MOGWELE TRADING 291 (PTY) LTD 2nd Respondent

CORAM: DAFFUE, J

HEARD ON: 25 OCTOBER 2018

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 09 NOVEMBER 2018

I **INTRODUCTION**

[1] This is an application in terms of rule 42(1)(b) of the Uniform Rules of Court. The Body Corporate in whose favour I granted relief as long ago as 13 October 2017 seeks a variation of paragraph 4 of my order. On that day I granted several orders, having heard extensive arguments and after being confronted with application papers in excess of 750 pages. I *inter alia* had to deal with a novel issue, *i.e.* the alleged statutory obligation of owners of Real Rights of Extension in sectional title schemes to pay levies. Although I found in favour of the developer and owner of several Real Rights of Extension that it was not obliged in terms of the applicable Statutes to pay levies as required by the Body Corporate, I found that it was contractually bound to pay levies as claimed.

II **THE PARTIES**

[2] The parties are Goldex 16 (Pty) Ltd ("Goldex"), the applicant in the original application, but the respondent in this application and the Body Corporate of Waterford Golf and River Estate SS139/2006 ("the Body Corporate"), the first respondent in the original application, but the applicant in this application. Adv GF Porteous appeared for Goldex in this application as was the case earlier and Adv P Strathern SC appeared for the Body Corporate as in the past.

III THE RELIEF SOUGHT

[3] The Body Corporate seeks a variation of paragraph 4 of the order granted on 13 October 2017 which reads as follows:

> "4. First respondent's monetary claim against applicant is referred to trial, the counter-application to stand as simple summons and further pleadings to be exchanged in terms of the Uniform Rules of Court." (emphasis added).

[4] The words "monetary claim" caused confusion as is apparent from the application papers. The Body Corporate's viewpoint is that a variation of the order is required only insofar as it is necessary to make it clear that it is only the *quantum* of the claim that has been referred to trial, submitting that the amended order will bring it in line with the judgment. According to it the order should read as follows:

> "4.1 The applicant is liable to pay the first respondent levies in respect of all vacant premises held by the applicant, (i.e. the areas of the common property demarcated for future construction of houses), on the same basis as other subsequent owners/developers of vacant stands over which they held and hold real rights of extension, such levies to be calculated and payable on a pro rata basis with owners of other sections.
>
> 4.2 The quantum of first respondent's monetary claim against applicant is referred to trial, the counter-application to stand as simple summons and further pleadings to be exchanged in terms of the Uniform Rules of Court."

Goldex denies that the Body Corporate is entitled to relief and I am again confronted with an opposed application.

IV WHAT SHOULD HAVE TRANSPIRED

[5] In my view and relying on experience as counsel and judge, counsel were expected to approach me as the presiding judge immediately upon reading the judgment containing an order that is perceived to be ambiguous, or containing a patent error or omission. Counsel, or if they are from out of town as *in casu*, the local attorneys on their behalf, will approach the judge in chambers the following day or very soon thereafter and request him or her for clarity and/or amendment of the order to deal with the ambiguity, patent error or omission. It did not happen *in casu.* If it was the case, I might have said: ”Off course, this is what I meant….., or there is a patent error in that…. or I omitted to add …..” I would have responded in accordance with the conclusion to which I arrive herein, notwithstanding a long delay and the litigation that ensued since October 2017.

V LITIGATION SINCE MY ORDERS

[6] An application for leave to appeal was brought by Goldex which I dismissed on 11 December 2017. What amazes me is that not a word is said in either the founding affidavit, Goldex’ answering affidavit and the replying affidavit in the present application pertaining to the arguments raised and my reasons contained in my judgment, dismissing this application. I quote some

paragraphs from that judgment to show what I was called upon to adjudicate:

" [2] In his heads of argument and during his oral submissions Mr Porteous submitted that the court erred in finding that applicant contractually bound itself to pay levies to the Body Corporate. He relied on the well-known authorities applicable to establish whether tacit contracts were concluded. He reiterated that Goldex's willingness to pay levies had nothing to do with any obligation to do so, but because of its vested interest in the success of the Scheme. He referred to the later *dissensus* and the attempts to mediate and submitted that the court erred in coming to the conclusion arrived at as mentioned *supra.*

[3] Mr Porteous submitted with reference to *Wightmann t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para [13] that the Body Corporate, who bore the onus to prove a tacit contract, failed to allege sufficient facts to prove its case.

[8] I agree with Mr Strathern that if the Body Corporate's version in respect of Goldex's contractual undertaking to pay levies cannot be rejected, Goldex was not entitled to the final declaratory and associated relief it sought. It did not seek a referral to oral evidence and its failure to do so is fatal to its application for leave to appeal. See: Law Society, Northern Provinces v Mogami and Others 2010 (1) SA 186 (SCA) at para [23].

[9] I do not intend to repeat my reasons and the conclusions arrived at in my judgment. I merely refer to paragraphs [41] to [53] of the judgment and the contents of the minutes as well as the Body Corporate's allegations in that regard which are not in dispute. If Goldex intended to ensure that the Scheme did not collapse, it would be possible to agree with the Body Corporate to settle any deficit on

the income and expenditure account as and when it arises, or even to pay an amount in advance, but making it clear that it is done *ex gratia* and without any statutory or other obligation. However, it agreed to pay levies as stipulated in the minutes referred to.

[10] I am satisfied that the Body Corporate's defence to Goldex's claim based on the contractual undertaking was pleaded with sufficient clarity, setting out detailed facts, to such an extent that it was not possible to reject the Body Corporate's version as being untenable and/or false, bearing in mind the test in *Plascon-Evans*. In fact, and unlike as suggested on behalf of applicant, the Body Corporate did not rely on a tacit contract, but on an express oral agreement confirmed in various minutes of meetings." (emphasis added).

[7] Goldex did not petition the Supreme Court of Appeal upon dismissal of the application for leave to appeal whereupon the Body Corporate filed a declaration on 7 February 2018 in accordance with my order of 13 October 2017. It took Goldex four months instead of the prescribed twenty days to file its plea and counterclaim on 4 June 2018. On 6 July 2018 the Body Corporate's plea to the counterclaim was filed. No replication was filed and the pleadings closed on 27 July 2018.

[8] When discovery was due the parties apparently considered what was to be adjudicated during the hearing as the extent of the dispute would have a bearing on the extent of documents to be discovered. The dispute in this regard triggered the present application.

VI THE PARTIES' SUBMISSIONS

[9] The application in terms of rule 42(1)(b) is brought by the Body Corporate and therefore I shall firstly deal with Mr Strathern's arguments. He, as Mr Porteous, relied on *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) and the summary by Trollip JA at 304D and further. According to him the essence is firstly, whether there is a congruity between the judgment and the order and secondly, if the matter falls within the ambit of rule 42(1)(b).

[10] He also referred to *Marks v Kotze* 1946 AD 29 where the Appeal Court found, based on several well-known judgments, that a court has the power to clarify its own order. In *Marks v Kotze* the Appeal Court clarified its own order granted on appeal a year earlier on urgent application by the successful respondent. In doing so the court stated at p 30:

> "It was really a clarification of the order of the Cape Provincial Division, as confirmed and amplified on appeal, which was sought."

The Appeal Court clarified its earlier order by declaring which Liquor Licensing Board had to consider the liquor licence.

[11] Based on the *Marks* and *Firestone* judgments Mr Strathern submitted that if my judgment is considered and properly construed, it is clear that I intended only the *quantum* of the Body Corporate's claim to be referred to trial. He referred to several

passages in my judgment to illustrate his point. I shall deal with some of these during my evaluation *infra*.

[12] Finally, Mr Stathern submitted, with reference to *Firestone supra* at 307 and *Thompson v SABC* 2001 (3) SA 746 (SCA) at 748 I-749 C that if the order is amended as requested, "the sense and substance" thereof will not be changed as the order will merely follow the reasoning in the judgment and therefore relief should be granted as prayed for. According to him the order should have been more intelligently worded in explicit language and that will be achieved if relief is granted.

[13] Mr Porteous submitted, based on *Firestone supra,* that an amendment will change the "sense and substance" of the order and therefore the relief should not be granted. He tried to distinguish *Marks v Kotze*, but conceded that a court may clarify its order to give effect to its true intention. He insisted that the court clearly did not separate the merits and *quantum* of the Body Corporate's claim and that no finding was made in favour of the Body Corporate.

[14] Mr Porteous argued with some persuasion that the Body Corporate failed to bring the case within the ambit of rule 42(1)(b). The order as it stands is not ambiguous. The ambiguity must manifest from the order itself and this is not the case. The words "monetary claim" has a definite meaning and are unambiguous. There is also no patent error in the order and no indication of an omission.

[15] He also argued that the Body Corporate cannot now, a year after the order was granted, ask for amendment. It clearly acquiesced in the order and should in any event be penalised for the delay in bringing the application and met by a dismissal of the application. When the application for leave to appeal was refused, the Body Corporate proceeded to file a declaration and also pleaded to Goldex' counterclaim. Mr Porteous submitted that already in its declaration the Body Corporate anticipated that the court may not agree with its viewpoint in respect of a contractual undertaking to pay levies insofar as it pleaded in its declaration in the alternative as follows:

> "….in the event that this court determines that the judgment does not contain or amount to a finding which is binding on the parties (which is denied) the Plaintiff relied on the following:…"

[16] Finally Mr Porteous submitted that, even if the Body Corporate succeeds to show that the relief it seeks falls within the ambit of rule 42(1)(b) which remained vehemently denied, the court should dismiss the application because of the delay of about a year. He argued that Goldex will be severely prejudiced if the relief is granted as it will be prevented from showing at the trial that no agreement was entered into as alleged on the basis that the merits had been adjudicated in favour of the Body Corporate.

VII EVALUATION OF THE SUBMISSIONS

[17] I shall proceed with an evaluation soon, but first of all have to lay a basis for the reader to appreciate the background. I thought I made myself clear in my judgment, but apparently not. I intend to quote extensively from the judgment, indicating my reasoning and conclusions. I refer to the following passages:

> "[39]…….. I cannot see how I could possibly read into any sections of the two Acts words and/or excise words from sections in order to reconcile the legislation with the approach of the Body Corporate. It is the legislature's task to draft legislation.
>
> [40] The <u>next issue</u> to consider <u>is Goldex' possible liability based on contract</u>: ……
>
> **VIII THE BODY CORPORATE'S RELIANCE ON A CONTRACTUAL UNDERTAKING TO PAY LEVIES**
>
> [41] …….
>
> [42] The Body Corporate is of the view that Goldex is contractually bound to pay levies in respect of the vacant stands mentioned in its Certificate of Real Rights of Extension of which it is still the holder on the basis as if it was the owner of sections in terms of the Sectional Titles Act. Goldex, on the other hand, is of the view that no levies or other amounts are due and payable to the Body Corporate in respect of its Real Right of Extension with specific reference to 19 demarcated and numbered areas on the common property.
>
> [43] On Mr Hulme of Goldex' version it has paid an aggregate amount in excess of R4.4m to the Body Corporate between 14 June 2007 and February 2016, which contributions the Body Corporate submits was for nothing else than levies raised and which Goldex contractually agreed to pay. <u>Goldex now claims that many payments were made *ex gratia* and in some instances payments were made under protest. I could not find any indication prior to the filing of the founding application that payments were made *ex gratia.* This was raised for the first time in the founding affidavit.</u>

[44] ……

[45] ……

[46] On 23 August 2007 the Body Corporate held its first special general meeting. Messrs Hulme and Sneech represented Goldex at the meeting. It was agreed in paragraph 12.2 of the minutes that as from 16 June 2007 the Body Corporate would be responsible for maintenance and equipment. I quote the following *verbatim* from paragraph 13.3:

"It was agreed that levies will commence at R2000 per month until 31 December 2007 then will be increased to R2500 per month until the next AGM which should be in August 2008. Payment of the base levies will be monthly in advance by debit or stop order to alleviate body corporate cashflow collection problems. Interest on outstanding levies will be levied at prime plus 2 percentage points. <u>The developer will pay his share of the levies in respect of actual costs incurred of the unsold 48 stands pro rata."</u>

[47] In the light of the budget which was duly approved, the Judin Children's Trust would become liable for levies of about R2m for the year, if Goldex' viewpoint is accepted and also bearing in mind the legislation considered *supra. ….* Clearly, Messrs Hulme and Sneech on behalf of the developer, Goldex, did not believe that it could be expected of the first sectional title owner to pay all expenses of the Body Corporate. It is therefore no surprise that Goldex agreed to pay pro rata in respect of all of the unsold 48 stands. The use of the term "pro rata" can mean nothing else than that Goldex accepted an obligation in respect of each vacant unsold stand measured against the entire costs of the Scheme. The agreed levy is directly in line and reconcilable with the amounts payable by Goldex' purchasers, in particular Mr Cowley referred to in the next paragraph. It is highly probable that the proposed levy of R2 000 per month, to be increased during the 2007/2008 financial year to R2 500, was arrived at by dividing the total expenses by 48, and consequently, it is accepted that it was agreed that a levy was to be paid in respect of each vacant stand or section.

[48] In the deeds of sale entered into between Goldex and various purchasers, provision was made for payment of levies. It escapes any logic that Goldex would be insisting on such payments to be made to the Body Corporate if it had no statutory or contractual obligation towards the Body Corporate……..

[49] Even if Goldex was not statutory obliged to pay levies, nothing prevented it to agree to the payment of levies and also contracting with its purchasers to ensure that they pay levies. The Scheme's very

existence was in danger if nobody was prepared to accept liability. Obviously, the entity that would have suffered the most if the Scheme failed was Goldex. It must have spent a small fortune to develop the Scheme. I reiterate that Goldex must have known that the Scheme would collapse unless it provided financial assistance in the form of levies to ensure that the Body Corporate's books balance.

[50] ……

[51] On 5 October 2012, nearly two years later, Mr Hulme on behalf of Goldex for the first time queried the correct calculation of levies, although Goldex acknowledged its obligation to pay levies…….

[52] ……

[53] I am satisfied that the **golden thread** that emerges from the minutes of meetings is that Goldex agreed to pay levies on the same basis as other subsequent owners/developers of vacant stands over which they held Real Rights of Extension.

X THE BODY CORPORATE'S CLAIM FOR THE PAYMENT OF LEVIES

[57] There is doubt about the correctness of the ***quantum*** of the Body Corporate's claim. I do not accept Mr Porteous' submission that the claim is illiquid as it is not capable of easy proof. Items might have been claimed that the Body Corporate is not entitled to, but that does not mean, in principle, that levies due and payable cannot be ascertained with relative ease.

[58] Mr Strathern, whilst appreciating some difficulty faced by the Body Corporate to prove the claim, suggested that this aspect be referred to trial, that the counter-application shall stand as a simple summons and that further filing of pleadings be allowed to take place in terms of the uniform Rules of Court. Contrary thereto, Mr Porteous submitted that the whole counter-claim shall be dismissed with costs.

[59] …….

XI CONCLUSION

[60] Applicant is not entitled to a declaratory order as sought. Although it is not liable as owner of a Real Right of Extension reserved in terms of s 25(1) of the Sectional Titles Act for the payment to the first respondent of any amounts other than those recoverable in terms of s 3(1)(d) of the Management Act, it has **bound itself contractually** to settle levies charged from time to time by the Body Corporate in respect of all vacant premises, *i.e.* the areas of the common property demarcated for future construction of houses, such levies to be calculated and payable on a pro rata basis with owners of other sections.

> [61] …… The monetary claim – prayer 3 – shall be referred for trial.
>
> [62] …… Although I am satisfied that Goldex contractually bound itself to settle the levies charged by the Body Corporate, ..." (emphasis added)

[18] In *S v Wells* 1990 (1) SA 816 (A) at 820C-F the court dealt with variation of a judgment as follows:

> "The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby….. According to Voet a Judge may also, on the same day, after the pronouncement of his judgment add to it all remaining matters which relate to the consequences of what he has already decided but which are still missing from his judgment. He may also explain what has been obscurely stated in his judgment and thus correct the wording of the record provided that the tenor of the judgment is preserved."

I am mindful of the fact that the judgment, and not the orders, was under discussion, but this does not change the principle.

[19] In *Thompson supra* at para [5] the Supreme Court of Appeal not only echoed the *dicta* in *Firestone*, but adopted with approval the above *dictum* and quotation of the Appeal court in *Wells supra*. *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) is just one further example of the variation of a court order in order to obtain clarity. See paras [17] and [22].

[20] I highlighted several passages in my judgment *supra* to show that I came to a final conclusion that Goldex expressly bound itself contractually to pay levies on the basis set out in the judgment. These will not be repeated. The reference in paragraph [58] of the judgment to Mr Strathern's submission that "this aspect" be referred

to trial is an obvious indication that I expressed doubt about the correctness of the *quantum* of the Body Corporate's claim – the particular aspect - as explained in the previous paragraph, to wit paragraph [57].

[21] In the event of the trial having been allocated to me and after having read the judgment, orders and pleadings, I would most definitely prevent the leading of evidence to prove a contract for the payment of levies. I have reason to believe that anyone of my colleagues would take the same stance. As stated in *Firestone supra* at 306, the general rule, excluding the known and few exceptions, is that once a court has pronounced a final judgment, it has no authority to correct, alter or supplement it as it has become *functus officio*. It has no further jurisdiction over the case and its authority over the issue has ceased. The Constitutional Court referred to a second equally important consideration and that is that there is a public interest in bringing litigation to finality. See: *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at para [28]. It will not be possible for this court to reconsider in the trial to follow whether Goldex is contractually bound to pay levies as I have already found. The passages quoted from my judgment *infra* confirm my viewpoint.

[22] I repeat that I would have expected the parties to approach me in chambers as soon as possible in order for me to clarify what I meant insofar as they interpreted my order differently. I refer to what I stated *supra* and the parties are also directed to the procedure adopted in *Thompson supra* as mentioned in para [2] of that judgment. It became clear to me during the hearing of the

main application that there was serious animosity between the parties which apparently rubbed off on the legal representatives. Apparently all disputes have to be resolved through litigation instead of in a collegial spirit.

[23] Notwithstanding Mr Porteous submissions as to how he interpreted my reasoning, I found that Goldex expressly agreed to pay levies on the basis set out in the judgment. If I was wrong in this regard, it is for a court of appeal to make such finding. This court is *functus officio*. Goldex cannot be prejudiced if relief is granted in the form as requested in order to clarify the order. It has the right to petition the Supreme Court of Appeal. It can do it now and in fact should have done it a long time ago. It may also go through the trial and take any decision made against it on appeal.

[24] I reiterate that I have read the application papers, the written heads of argument and authorities referred to and I also considered the oral submissions. The fact that I do not deal with any specific issue does not mean that it has been ignored. In my view the matter is quite simple. Although I cannot change my judgment or order by altering the "sense and substance" thereof, I may certainly clarify the order to give effect to my true intention.

[25] The use of the words "monetary claim" in paragraph 4 of my order is unfortunate. *Erasmus, Superior Court Practice* 2nd ed at D1-570 points out with reference to authority that the ambiguity, patent error or omission mentioned in rule 42(1)(b) must be attributable to the court itself. If the parties approached me directly after delivery of judgment, I would have told them that I obviously had in mind

that the Body Corporate had to prove the exact amount of levies due and payable, *i.e.* the *quantum* of its claim. No wonder the amended order sought is a mirror image of the conclusion I arrived at in paragraph [60] quoted *supra*.

VIII **CONCLUSION**

[26] I conclude that the Body Corporate is entitled to the relief requested. It might not have been necessary to pronounce the order in such an elaborate way, but it is apparently ideal to do it in such a way to prevent any further misunderstanding. I possibly could have clarified the order by stating that the order as granted in paragraph 4 is subject to and must be read with my conclusion in paragraph [60] of my judgment. Paragraph 4.1 of the notice of motion is directly in line with the explicit finding in paragraph [60] of my judgment.

[27] I am not prepared to grant a costs order in favour of any of the parties. Both parties should be blamed for the delay and not only one of them. Unfortunately, and with the benefit of hindsight, my order should have been worded differently. However, seen in the context of my judgment, there should not have been a difference of opinion, but even so, the parties could have saved unnecessary costs by approaching me on receipt of the judgment. Each party shall be responsible for its own costs.

IX **ORDERS**

[28] The following orders are issued:

1) Paragraph 4 of the order of 13 October 2017 in application number 3979/2016 is varied to read as follows:

"4.1 The applicant is liable to pay the first respondent levies in respect of all vacant premises held by the applicant, (i.e. the areas of the common property demarcated for future construction of houses), on the same basis as other subsequent owners/developers of vacant stands over which they held and hold real rights of extension, such levies to be calculated and payable on a pro rata basis with owners of other sections.

4.2 The quantum of first respondent's monetary claim against applicant is referred to trial, the counter-application to stand as a simple summons and further pleadings to be exchanged in terms of the Uniform Rules of Court."

2) Each party shall be liable for its own costs.

J P DAFFUE, J

On behalf of Applicant : Adv P Strathern SC
Brian Kahn Inc
c/o Claude Reid Inc
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