

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 8242/2017

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO THE JUDGES: YES/ NO
(3)	<u>REVISED.</u>
DATE: 2/10/18	
SIGNATURE: 	

In the matter between:

SAMPADA LODGES (PTY) LTD

APPLICANT

And

EUPHORIA HOME OWNERS' ASSOCIATION NPC

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The applicant Sampada Lodges (Pty) Ltd bought Euphoria Golf Estate as a going concern from the liquidators of Euphoria Golf Estate (Pty) Ltd on the 5th April 2016. The sale included all the ervens in the golf estate excluding those already sold to private owners. The ervens on which the golf course and club house are situated were included in the sale. After the property was transferred into the names of the applicant, the applicant became the developer of the golf estate properties consisting of the golf course and 357 ervens.
- [2] The respondent Euphoria Home Owners' Association NPC is a non-profit company the membership of which is limited to the applicant and the owners of the ervens in the Estate. The respondent's main object is to develop, promote, advance and protect the communal interests, the safety and welfare of its members by amongst others, maintaining the infrastructure and open spaces in the Estate. The applicant owns 357 ervens out of a total of 755 ervens in the Estate.
- [3] The respondent has appointed an administrator who handles the day to day administration of the Estate. The administrator is an employee of the respondent.
- [4] The applicant alleges that its relationship with the respondent has become strained over the last year due to the respondent's actions. According to the applicant, during 2016 when it was transferring the properties from the insolvent estate into its names, the board of the respondent refused to issue clearance certificate for the transfer of the

properties to take place, but instead tried to use the issuing of clearance certificate as leverage over it to negotiate certain benefits. The respondent issued the clearance certificates after the applicant had obtained a court order that compelled them to do so.

[5] According to the applicant the second incident took place at the Annual General Meeting (AGM) of the respondent that was held on the 24th June 2017. The applicant alleges that before the meeting it had entered into an agreement with the board of the respondent for payment of golf course levies as provided for by the Memorandum of Incorporation (MOI). However, during the AGM the validity of the said agreement was attacked by one Mr John Stanbury. The members who attended the meeting voted in favour of that agreement. However, on the minutes of the meeting that was later circulated by the administrator the resolution was not correctly captured. There were also other anomalies which appeared in the official minutes which were in direct contradiction of what transpired at that meeting.

[6] According to the applicant the third incident occurred at a meeting that was held on the 19th August 2017. That meeting became chaotic and the applicant was accused of not been in good standing with the association, and was therefore excluded from the meeting. The applicant's representative left the meeting. However the minutes that were circulated by the administrator did not accurately reflect what transpired at the meeting.

- [7] The applicant alleges that after the meeting of the 19th August 2017 it had various interactions with the respondent but that the interaction proved to be fruitless. Thereafter the applicant launched an urgent application in which it succeeded in removing the directors who were irregularly appointed and also interdicting and restraining one Mrs Roos Hawken to act as the chairperson and to appoint directors to the board.
- [8] According to the applicant after it obtained a court order in the urgent application, it called for a special general meeting to be held as directed by the court. The applicant submits that during the notification process, the administrator was not sending correspondence to it and that it seemed as if she was taking instructions from someone.
- [9] The applicant alleges that the special general meeting was held on the 11th November 2017. There was a board meeting that was held before the special general meeting. According to the applicant at the board meeting, the respondent was again pursuing its agenda of trying to extort transfer of certain of its properties in order to force the negotiations. The applicant alleges that the minutes of the special general meeting were not circulated by the administrator.
- [10] According to the applicant, Mrs Roos Hawken and the respondent have caused tremendous damage to its rights as a developer, and the Estate as a whole, especially the golf course levies payable to it. The applicant alleges that although the respondent collects golf course levies from the owners of the ervens in the Estate, it refuses to pay the levies collected over to it. The applicant states that it intends suing the respondent for the outstanding golf course levies due to it as well as for damages caused during the period of non-

payment of these levies which resulted in the applicant using its investors' funds to keep the golf course afloat. The applicant further state that it intends applying for a contempt of court order against both the respondent and Mrs Hawken.

[11] The applicant is of the view that for it to prepare a proper case of contempt of court, a claim for payment of overdue golf course levies and a claim for damages caused by the respondent's unlawful withholding of golf course levies it requires certain items from the respondent. The applicant alleges that it is afraid that if it simply request the said items from the administrator, they might be destroyed or manipulated.

[12] On the 7th December 2017 the applicant launched an ex-parte urgent application seeking an order for the preservation of the items it had listed in its notice of motion in order to enable it to prepare a proper case against the respondent. The applicant obtained an interim relief on the 12th December 2017. The order which applicant obtained permitted the sheriff and the applicant's attorney who was supposed to act in a supervising capacity, to enter the respondent's premises for the purposes of searching and seizing the listed items specified in the court order for safekeeping by the sheriff. The applicant now seeks confirmation of the order, and the respondent is opposing it.

[13] According to the respondent, the applicant has failed to establish the requirements for an Anton Piller's order. The respondents contends that the applicant is not entitled to use its Anton Piller application to gather information in order to prepare a proper case for contempt of court or payment of overdue golf course levies or its alleged claim for damages.

- [14] The requirements for the granting of an Anton Piller orders were summed by in **Universal City Studios Inc v Network Video (Pty) Ltd 1986 (2) 734(A)** at 755 A-D where Corbett JA said:

“In a case where the applicant can establish prima facie that he has a cause of action against the respondent which he intends to pursue, that the respondent has in his possession specific documents of things which constitute vital evidence in substantiation of the applicant’s cause of action (but in respect of which the applicant can claim no real or personal right), that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial, or at any rate to the state of discovery, and the applicant ask the court to make an order designed to preserve the evidence in some way , is the court obliged to adopt a non possumus attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the court were powerless to act.”

- [15] The purpose of Anton Piller’s orders are to preserve evidence to be used in a forthcoming dispute. Such evidence must constitute vital evidence in substantiation of the applicant’s cause of action. (See **Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another, Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995(4) SA 1 (A)** and **Non-Detonating Solutions v Durie 2016 (3) SA 445 (SCA)**).

- [16] The first requirements which must be satisfied is prima facie cause of action. The applicant must show that there is evidence which if accepted will establish

a cause of action. In **Bradbury Gretorex Co. Ltd v Standard Trading Co. Ltd 1953(3) SA 529 (W)** at 53 D-E Steyn J said:

"The requirement of a prima facie cause of action ... is satisfied where there is evidence which if accepted will show a cause of action. The mere fact that such evidence is contradicted would not disentitle the applicant to the remedy. Even where the probabilities are against him, the requirement would still be satisfied. It is only where it is quite clear that he has no action, or cannot succeed, that an attachment should be refused or discharged on the ground here in question."

[17] The applicant's cause of action will be based on alleged claim for payment of overdue levies and alleged damages as a result of the respondent's unlawful withholding of golf course levies. The applicant also intends to prepare a proper case for contempt of court against the respondent.

[18] With regard to levies, the applicant's claim is that the respondent is required to collect levies from the owners of the ervens and pay them over to it. Clause 1.14 of the MIO reads as follows:

"Contributions to the Golf Club means subscriptions for the compulsory member of the Euphoria Golf Club as nominated in accordance with clause 3.7.1 and as agreed between the Euphoria Golf Club and the Association from time to time and any amounts which Association in its sole discretion may pay to the Golf Club from time to time."

[19] Clause 1.22 of the MIO defines "Euphoria Golf Club" or "Golf Club" as a golf club which was established as a voluntary association on 28th January 2012. The applicant under case number **3972/2016** which was instituted by the joint liquidators of Euphoria Lodges (Pty) Ltd in liquidation was the fifth respondent.

The applicant under that case number had deposed an affidavit in opposition to the first respondent (respondent in the present application) counter application. The applicant's opposing affidavit is attached to the respondent's answering affidavit as an annexure JS1. In paragraph 8.4 of annexure JS1 the applicant has stated the following:

"The most important matter in this regard is that Sampada is quite prepared to pay its levies in full and does not require a reduced levy for the erven that it has purchased and wish to become the owner of it."

[20] It is clear that on reading clause 1.14, clause 1.22 of the MIO and paragraph 8.4 of JS1, the applicant and Euphoria Golf Club or Golf Club are two separate entities. The applicant is also required to pay compulsory levies on the ervens it owns to the Golf Club. The levies are due to the Golf Club and not the applicant. Therefore, in my view, there is no duty upon the respondent to collect levies and pay over to the applicant. If indeed the respondent is collecting compulsory levies, they must be paid to the Golf Club and not the applicant. The applicant has no entitlement on the levies. Therefore, with regard to levies, the applicant has failed to establish a prima facie cause of action against the respondent.

[21] With regard to the contempt of court in **Fakie No v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 344 E-F** Cameron JA said:

"...this development of common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-

compliance was wilful and mala fide, the requisite of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt."

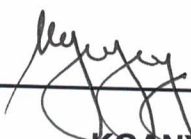
- [22] In a contempt procedure what the applicant need to establish is the order, service and non-compliance of the order. If the applicant is successful in establishing the three requisites the burden shift of the respondent who need only lead evidence that establishes a reasonable doubt. In my view, for the applicant to establish the three requisites, it does not need any documents that are in possession of the respondent. The applicant is in possession of the order, and if the order was served on the respondent, it will be having a return of service. That return of service is sufficient to prove service of the order. If the respondent has failed to comply with the order, it will know in what respect it says there is non-compliance. Therefore, in my view, in relation to the alleged contempt of order, the applicant has failed to show that there are vital documents in possession of the respondent which it needs to commence its contempt proceedings against the respondent.
- [23] In my view, the possibility are very high that the applicant will not succeed with the claim of levies or damages resulting from the alleged withholding of the levies. In relation to the alleged contempt of court order against the respondent, I have already pointed out that the applicant has failed to show that there are vital documents in possession of the respondent which it needs to commence is contempt proceedings against the respondent. The applicant seems to be on a fishing expedition. On these two points alone the rule nisi that was granted

on the 12th December 2017 stand to be discharged. I don't see any need to deal with the other two remaining requisites.

[24] In the result I make the following order.

24.1 The rule nisi granted by this court on 12th December 2017 is discharged.

24.2 The application is dismissed with costs.



KGANYAGO J

JUDGE OF THE HIGH COURT POLOKWANE,
LIMPOPO DIVISION

APPEARANCE:

COUNSEL FOR THE APPLICANT	:	ADV. PL UYS
INSTRUCTED BY	:	MALATJI KANYANE INC
COUNSEL FOR RESPONDENT	:	ADV. TP KRUGER (SC)
INSTRUCTED BY	:	MACROBERT INC

DATE OF HEARING

: 27 AUGUST 2018

DATE OF JUDGEMENT

: 12TH OCTOBER 2018