

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

CASE NO: 9015/2014

IN THE MATTER BETWEEN:

EXTRA DIMENSIONS 121 (PTY) LTD

Applicant

And

BODY CORPORATE OF MARINE SANDS

First Respondent

REGISTRAR OF DEEDS, PIETERMARITZBURG

Second Respondent

JUDGMENT

DATE DELIVERED 26 August 2016

MASIPA J:

Introduction

[1] The Applicant seeks leave to appeal against my judgment of 5 February 2016 wherein its application was dismissed with costs.

[2] The order in terms of the judgment, was as follows:

‘1. The Applicant’s application is dismissed with costs.’

[3] The basis for this application is that another court could reasonably have come to a different conclusion and granted an order declaring the special resolution invalid and that there are reasonable prospects that an appeal will succeed.

The Test for Granting Leave to Appeal

[4] The relevant section applicable to this application is set out in s 17(1)(a) of the Superior Courts Act, 2013 (‘the new act’) which provides as follows:

‘Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have reasonable prospects of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;’

[5] Counsel for the Respondents Mr *Boulle* submitted that the Applicant’s application was fatally defective in that it was based on the old test being ‘that another court could reach a different conclusion.’ He argued that there was no application by the Applicants to vary their grounds of appeal and that since the test is now stringent, the application for leave to appeal must be dismissed with costs.

[6] He relied on *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) where the court stated that the threshold for granting leave to appeal against a judgment of the High Court has been raised in the Superior Court Act. The court stated that the use of the word ‘would’ was indicative of the measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. *Mont Chevaux Trust* was followed in *The Daantji Community and others v Crocodile Valley Citrus Company (Pty) Ltd and another* Case no: 75/2008 (Unreported) (LCC) and *Shelton v The Statutory Council for the Print and Newspaper and Packaging Industry and others* Case no: C650/14 (unreported) (LC).

[7] In *S v Kruger* 2014 (1) SACR 647 (SCA) the court stated the following in paragraph 2:

‘Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant’s appeal, the high court concluded that it was ‘possible’ that another court might arrive at a different conclusion and that leave to appeal should not be ‘lightly refused’ where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere ‘possibility’ that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing.’

At Para 3:

‘The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed.’

[8] In her argument Ms *Mills* for the applicant sought to rely on the provisions of s 17(1)(a)(ii). She submitted that it was apparent that leave to appeal could also be granted where there are conflicting decisions. This was of course not one of the applicant’s grounds of appeal. Mr. *Boulle* argued that there were no conflicting decisions

[9] I agree with Mr. *Boulle* that the test followed by the applicant in applying for leave to appeal is incorrect. Despite the defect being raised, there was no application by the applicant to amend its grounds of appeal. Ms *Mills* instead sought to introduce this from the bar. Allowing this would be highly prejudicial to the respondent whose case would reasonably have been prepared on the basis of the grounds raised in the applicant’s papers.

[10] The application for leave to appeal therefore falls to be dismissed on this ground alone. However, should I be incorrect in my conclusion, I proceed to consider the merits of the application.

The Merits

[11] Ms *Mills* submitted that the judgment in paragraph 37 refers to the correct authority of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) which stresses the use of ordinary grammar and syntax of words and phrases. The provision to s 32(4) of the Sectional Titles Act, 1986 required that an owner adversely affected by a decision of the body corporate to make rules attached to the vote or to the liability thereof, such owner must provide written consent. It was common cause that the applicant did not consent.

[12] It was argued further that in their ordinary grammatical application, the phrase ‘adversely affected’ pointed to someone affected adversely by a change in levies. It could have no other meaning than to mean that a person that has to pay more without consenting to this. Ms *Mills* argued further that neither this court nor Theron J in *Algar v Body Corporate of Thistledown & Others* [2010] JOL 26140 (N) stated what the meaning of the phrase was. The ordinary meaning of the phrase in this case leads to someone paying more.

[13] She argued that the judgment in paragraph 38 stated that *Thistledown* took into account that when the legislature drafted the provisions of s 32 (4), it had at its disposal the provisions of s24 (3) of the 1971 Sectional Titles Act which required a unanimous vote of members before changing the levy structure and that the provision made it difficult, if not impossible, for body corporates to change the basis upon which levies could be increased. She referred to 25 (1) *Lawsa* 2 ed para 340 read with para 305 and argued that it is presumed that statute law does not alter existing law more than necessary. Therefore, the legislature could not have sought to deviate excessively from the previous legislation to allow body corporates to amend the levy provision in the absence of consent by owners. In response to this, Mr. *Boulle* referred to his heads of argument during the main hearing where he raised the presumption that the legislature is familiar with the court’s interpretation.

[14] Ms *Mills* argued that the Act provides for precisely that which the judgment says is absurd. In terms of the judgment, the Applicant will have to pay more than before the amendment despite not having consented to this as required by the Act. The judgment states that the Applicant now has to pay for what he benefits from. To interpret adversely affected, one must compare the position before and after the resolution. The sole effect on the applicant is that instead of being liable for 4.3%, he became liable to 10.3% while the benefits he enjoys remained the same. He is clearly adversely affected. The judgment states further that it is unfair for one owner to benefit at the expenses of another contrary to the *Herald Investment Share Block (Pty) Ltd and others v Meer and others; Meer v Body Corporate of Belmont Arcade and another* 2010 (6) SA 599 which states that liability to pay levies is not based on who benefits what. While the judgment states that it could not be the intent of the legislature for one owner to benefit, the legislature intended precisely that by including the requirement of consent by an owner.

[15] The function of the court is to interpret legislation and not make or change law (25(1) *Lawsa* para 403. Ms *Mills* submitted that this judgment and *Thistledown* seemed to re-enact or change the legislation. Legislation allowed for a majority of the owners in the scheme to pass the resolution adversely affecting the right of one owner after he has been heard. The legislature clearly intended to retain the provision since it had an opportunity to delete or omit it in the new act. One cannot simply ignore these provision. She submitted that on a consideration of all her submissions, there is a good chance that another court could reach a different conclusion.

[16] There was therefore a strong probability that another court would come to different conclusion. The *Thistledown* decision by Theron J is bad law and conflicts with Wallis J in *Herald Investments Share block*.

[17] Mr. *Boulle* submitted that if the applicant's argument was to be accepted, this would lead to an interpretation which is not fair and equitable. He argued that the Applicant's view departs from the interpretation approach in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA). He submitted that the starting point in interpretation was

the language, grammar and syntax. Neither the ordinary meaning nor context dominate over the other. The context includes the general ethos of the Sectional Title Act, 1986 to ensure a fair and equitable dispensation. This cannot be achieved if the Applicant's interpretation is followed.

[18] He submitted that the question to ask is would another court come to a different conclusion. In this regard, there are two judgment against the Applicant. Two courts found rightly that one cannot petition against principles of fairness and equity which is the principal purpose of the 1986 act. In addition to the two judgment, *Lawsa* is against the Applicant, PJ Badenhorst *Silberberg & Schoeman's The Law of Property* 5 Ed at 19.5.1 is against the Applicant and Van der Merwe *Sectional Titles, Share Blocks and Time-Sharing* Vol. 1 para 4-10(1)-(3) support the approach in *Thistledown*.

[19] Paragraph 38 of the judgment captures the issue neatly by stating that if the meaning of the phrase 'adversely affected' is given the meaning suggested by the Applicant, the result would be there can never be an increase as one person would block it. Mr. *Boulle* argued that it could not be suggested that the applicant was adversely affected by a change which achieves the purpose of the Act and is not unreasonable. In respect of the reference made to *Herald Investments Share block* he submitted that the facts in that matter are distinguishable as it dealt with a dispute about who is liable to pay for the cost of refurbishing three lifts in a multipurpose building consisting of three floors of commercial premises, three floors of parking and fifteen floors of residential flats. The judgment considers the phrase 'exclusive use' as provided for in s 37(1) of the Act.

[20] In respect of the Applicant's criticism of the judgment on the basis that it does not say what the meaning of 'adversely affected' is, Mr. *Boulle* submitted that there was no requirement to set out what falls within the meaning of 'adversely affected'. The requirement was to determine whether the Applicant was adversely affected which the judgment does. The presumption that statutory provisions are not presumed to alter common law more than is

necessary was followed in *Nedbank and others v National Credit Regulator and another* 2011 (3) SA 581 (SCA) para 38.

[21] The Court in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) stated the law regarding principles of interpretation as follows:

‘[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarises the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paras 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in *Coopers & Lybrand and others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language should a court look to surrounding circumstances, Wallis JA said (para 12 of *Bothma-Botha*):

“That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise [a reference to a statement of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] Lloyd’s Rep 34 (SC) para 21].

[30] Lord Clarke in *Rainy Sky* in turn referred to a passage in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

“Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.”

[22] There is therefore a plethora of relevant authority confirming that the correct interpretation was reached in determining this matter. Therefore there is no possibility that another court would come to a different conclusion.

[23] In the result, the following order is made:

1. The application for leave to appeal is dismissed with costs.

Masipa J

Heard: 16 May 2016

Delivered: 26 August 2016

Appearances:

For the plaintiff:	Ms L Mills
Instructed by:	Richard Evans & Associates
For the interested party:	Mr A J Boule
Instructed by:	B E S Agar and Associates.