THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1082/2018

In the matter between:

BODY CORPORATE OF MARINE SANDS **APPELLANT**

and

EXTRA DIMENSIONS 121 (PTY) LTD **FIRST RESPONDENT**

REGISTRAR OF DEEDS, PIETERMARITZBURG **SECOND RESPONDENT**

Neutral citation: *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* (1082/2018) [2019] ZASCA 161 (28 November 2019)

Bench: Ponnan and Mocumie JJA and Tsoka, Koen and Weiner AJJA

Heard: 15 November 2019

Delivered: 28 November 2019

Summary: Statute – interpretation of the expression 'adversely affected' in s 32(4) of the Sectional Titles Act 95 of 1986.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Steyn J with Van Zyl and Ploos van Amstel JJ concurring, sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Ponnan JA (Mocumie JA and Tsoka, Koen and Weiner AJA concurring):

[1] This is an application for special leave to appeal and, if granted, the determination of the appeal itself. The two judges who considered the application referred it for oral argument in terms of the provisions of s 17(2)(d) of the Superior Courts Act 10 of 2013. Different considerations come into play when considering an application for leave to appeal as compared to adjudicating the appeal itself. As to the former, it is for the applicant to convince the court that it has a reasonable prospect of success on appeal. Success in an application for leave to appeal does not necessarily lead to success in the appeal. Because the success of the application for leave to appeal depends, *inter alia*, on the prospects of eventual success of the appeal itself, the argument on the application would, to a large extent, have to address the merits of the appeal. Here, inasmuch as the appeal raises a point of statutory interpretation, the application had to succeed. On that score, the high court has spoken and, absent an appeal, those judgments will continue to apply. Future litigants are entitled to the benefit of this court's view on the question. In the circumstances we considered it appropriate, at the hearing of the application, to grant leave to the applicant, who will henceforth be referred to as 'the appellant', to proceed with the appeal. That opens the door to a full consideration of the merits of the appeal itself.

[2] The appellant, the Body Corporate of Marine Sands, is a body corporate duly constituted in terms of s 36 of the Sectional Titles Act 95 of 1986 (the STA) for a sectional scheme known as Marine Sands, a 19-storey building in a prime beachfront location on Durban's Marine Parade. The scheme is partly residential and partly non-residential. The ground and first floors consist of non-residential sections, the basement is utilised for parking and storage and the remainder of the building comprises residential sections.

[3] When the scheme was registered on 24 June 1993, the developer made a determination in terms of s 32(2) of the STA that the levies payable by the non-residential sections would differ from those of the residential sections. The determination had the effect that the non-residential sections, which represented 11.68% of the floor space of all the sections in the building, would be liable for 6% of the aggregate levies. In 1997, by carving out 133 m² of the common property on the ground and first floors, the scheme was extended by the addition of a new non-residential section. This necessitated an amendment to the sectional plan and an adjustment of the participation quota of each of the non-residential sections.

[4] Since 18 December 2002, the first respondent, Extra Dimensions 121 (Pty) Ltd (the respondent), had owned six of the nine non-residential units in the scheme. Prior to the extension of the scheme, the participation quota of those units was 5,4979%. Thereafter it reduced to 4,8409%. According to the respondent, for some time after it had acquired the six non-residential units, which it used for business purposes, it had been overcharged because the managing agent of the scheme had incorrectly assessed the levies due. Eventually, in June 2012 the managing agent commenced charging levies in accordance with the participation quota percentage of each section. The result was that the monthly basic levy of the respondent reduced from R16 201,36 in May 2012 to R9 134,15 in June of that year. That, obtained until the end of 2012.

[5] In January 2013 the appellant commenced charging the respondent a basic monthly levy of R19 878,17. It did so on the basis of a special resolution that was adopted at the annual general meeting of the members of the body corporate on 23 August 2012. The effect of the adoption of the resolution and the subsequent amendment of the conduct

rules, was that the respondent began to be charged levies amounting to 10,5349% of the total levies for the scheme, whereas its total registered participation quota was unchanged at 4,8409%. This had the effect that the respondent's levies more than doubled in January 2013 to R19 879,17 from R9 134,15 the previous month.

[6] Consequently, on 31 July 2014 the respondent applied to the KwaZulu-Natal Division of the High Court, Durban, for an order in the following terms:

'1. **THAT** the special resolution passed by the First Respondent on 23 August 2012 resolving to modify the members' liability for levy contributions of the Marine Sands Sectional Scheme and to amend that scheme's conduct rules accordingly be and is hereby declared to be invalid.

2. **THAT** the following amendments to the conduct rules of the scheme, pursuant to the resolution referred to paragraph 1 of this order, be and are hereby declared to be invalid and of no force and effect:

(a) Conduct Rule 26 in its entirety; and

(b) Annexure B to the amended conduct rules

. . . .'

The Registrar of Deeds, who took no part in the proceedings, was cited as the second respondent.

[7] In support of the application, the sole director of the respondent, who deposed to the founding affidavit, stated:

'38. In terms of section 32(4) of the Act the basis for the liability of owners for levy contributions cannot be modified without the written consent of any owner who is adversely affected by such modification.

. . .

40. As the effect of the first respondent's modification of levy contributions is to increase the applicant's levies by more than 100%, I submit that the applicant is "adversely affected" by such modification, within the meaning of the first proviso to Section 32(4) of the Act. Legal argument will be addressed at the hearing in this regard.

41. The Applicant did not give its written consent to the special resolution to modify the liability for levy contributions or to amend the conduct rules in this regard. In fact it was not even asked to give such consent, and my representative at the annual general meeting objected, which objection was minuted. . . .

42. I therefore submit that the special resolution passed on 23 August 2012 modifying the levy contributions and amending the conduct rules of the scheme in this regard, is invalid for want of compliance with Section 32(4) of the Act, and consequently is of no force or effect.'

[8] The application failed before Masipa AJ, who dismissed it with costs. With the leave of this court, the respondent appealed to the Full Court of that Division, Pietermaritzburg. The judgment of the full court[1] records that after the hearing of the appeal the parties were directed to file supplementary heads of argument to address certain issues that had been identified by the court.[2] Although both parties complied with the directive of the full court, the appellant did assert that it was impermissible for a court, particularly one sitting on appeal, to *mero motu* identify new issues not foreshadowed on the papers or addressed by the parties during the hearing of the appeal.

[9] The full court (per Steyn J, Van Zyl and Ploos Van Amstel JJ concurring), however, took the view that:

'The central issue on which this court was tasked to decide is whether the resolution passed modifying the owner's liability for levies, was *ultra vires* the Act and therefore void. This issue is not a new issue that was raised, it was the appellant's case throughout the proceedings that the resolution is invalid. The invitation to both parties to consider the distinction between conduct rules and management rules was based on the established facts on record and since both parties

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[1] See *Extra Dimensions 121 (Pty) Limited v Body Corporate of Marine Sands & another* (AR121/2017) [2018] ZAKZPHC 69 (*Extra Dimensions*).

[2] Those issues being the following:

'(a) In terms of s 32(4) of the Sectional Titles Act 95 of 1986 the body corporate had the power to make a rule under s 35 by which the liability of an owner to make contributions to the levy fund is modified.

(b) The special resolution at page 55 of the papers includes the following: '. . . and that the new conduct rule would allow levies to be based on the new Participation Quota Schedule based on the area of each section.' Annexure B to the new conduct rules reflects a "Modified Participation Quota Percentage" in respect of each section in the scheme.

(c) The following references to the answering affidavit suggest that the trustees intended to modify the participation quotas: page 68 para 16; page 82 para 46, 47; page 83 para 54.

(d) What the trustees could have done was to make a rule to the effect that in future the liability of owners to make contributions to the levy fund would be based on the floor areas and not on their participation quotas. However, according to the special resolution they appear to have amended the participation quotas. Did the body corporate have the power under s 32(4) to modify the participation quotas? If not, is the special resolution ultra vires and invalid?

(e) The liability of owners to make contributions, and the proportions in which the owners shall make contributions for the purposes of s 37(1), was prescribed by rule 31 of the management rules referred to in s 35(2)(a). Was it competent for the body corporate to modify the liability of owners to make contributions by amending the conduct rules as opposed to the management rules? If not, is the special resolution not also invalid for this reason?'

had been given an opportunity to file supplementary heads, there could not be any unfairness in the procedure adopted.'[3]

It concluded:

'Accordingly, the "conduct rule" introduced by the body corporate which modified the liability of the sectional owners to contribute towards the levies of the scheme is not in accordance with the statutory powers of the body corporate in terms of the Act. It is in conflict with s 37(1)(*d*) and accordingly invalid. In light of the conclusion reached it is not necessary for this court to determine whether the resolution passed affected the appellant adversely.'[4]

[10] The full court consequently upheld the appeal, set aside the order of Masipa AJ and substituted it with the order prayed in the notice of motion. The appellant thereupon petitioned this court for special leave to appeal the judgment of the full court. It is that application that was referred by the two judges who considered it, to this court for argument pursuant to s 17(2)(d) of the Superior Courts Act. The appellant persists in its contention that the full court ought to have restricted itself, as the court of first instance had done, to the issue foreshadowed on the papers, namely, whether the resolution 'adversely affected' the respondent as contemplated by s 32(4) of the STA. For the present, I shall confine myself to a consideration of that issue, which, in my view, is dispositive of the appeal against the appellant. In so doing, I express no view on the correctness of the approach or the reasoning of the full court. Those questions, which need not now detain me, remain for another day.

[11] The resolution of the appellant was made in terms of s 32(4) of the STA, which provides:

'Subject to the provisions of section 37(1)(*b*), the developer may, when submitting an application for the opening of a sectional title register, or the members of the body corporate may by special resolution, make rules under section 35 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 37(1)(*a*) or 47(1) is modified: Provided that where an owner is adversely affected by such a decision of the body corporate, his written consent must be obtained: Provided further that no such change may be made by a special resolution of the body corporate until such

[3] *Extra Dimensions* fn 1 para 13.
[4] *Extra Dimensions* fn 1 para 24.

time as there are owners, other than the developer, of at least 30 per cent of the units in the scheme: Provided further that, in the case where the developer alienates a unit before submitting an application for the opening of a sectional title register no exercise of power to make a change conferred on the developer by this subsection shall be valid unless the intended change is disclosed in the deed of alienation in question'.

[12] According to the first proviso, where an owner is adversely affected by such a decision, the written consent of such owner must be obtained. It is common cause that the respondent did not consent to the resolution. If anything, it opposed it. Masipa J held that the fact that the resolution increased the respondent's liability for levies did not mean that it was adversely affected thereby. The reasoning of the learned judge appears to have been: (i) no person would consent to paying more, so the proviso cannot be interpreted to require this; (ii) the predecessor to the current legislation, the 1971 Sectional Titles Act, required a unanimous resolution, which was difficult if not impossible to achieve, and the change in the new STA must have been intended to address this and (iii) the resolution was passed to remedy an inequitable levy dispensation, and the respondent was not adversely affected as it now pays for the benefit it receives.

[13] In concluding that the respondent was not 'adversely affected' by the resolution, Masipa AJ followed the decision of Theron J in *Algar v Body Corporate of Thistledown* (*Thistledown*),[5] to this effect:

'Section 24(3) of the Sectional Titles Act, 66 of 1971 required a unanimous resolution of the members of a body corporate in order to vary members' voting rights and the liability of members to make contributions to the levy fund. Thus a member of a body corporate could act capriciously and without reason in blocking a change in the basis upon which levies were calculated. Section 32(4) of the 1986 Act reduced the requirement to that of a special resolution which required a 75% majority, and the consent of an owner who was adversely affected by the resolution.

In my view, the applicant has adopted a narrow construction of the section. He has reduced its interpretation to the proposition that simply because he must pay more in the way of a monthly

[5] *Algar v Body Corporate of Thistledown and others* [2010] JOL 26140 (N) at 3.

levy, he is *ipso facto* a person who is adversely affected by the resolution. If this was the interpretation to be placed on the words "adversely affected" it is difficult to envisage any special resolution changing the basis upon which levies were calculated and charged that would not require the written consent of a member of the body corporate. In effect, the situation would be the same as existed under the 1971 Act which required a unanimous resolution of members of the body corporate. This would render the provisions of sections 32(4) nugatory and could hardly have been the intention of the legislature.

The trite principle of interpretation of statutes is that the language in the legislation should be read in its ordinary sense and that the words must be given their ordinary, literal, grammatical meaning. Furthermore, words in a statute must be given their ordinary meaning in accordance with the context in which they are found. [*Bellevue Motors CC v Johannesburg City Council* 1994 (4) SA 339 (W) 342F-G].

In my view, the philosophy underlying the Act is that owners of units should be treated fairly. This is reflected in the scheme of the Act, the legislature, in section 32(4) has recognised that when it comes to the determination of levies payable by members, each scheme may be different.'

[14] *Thistledown*, which in effect altered the statutory provision rather than interpreting it, cannot be supported. Although the judgment alluded to the trite principle of interpretation, it failed to give the words 'their ordinary, literal, grammatical meaning' or for that matter, any meaning. In effect, it simply put a red line through the proviso, thereby rendering it nugatory. 'Once the meaning of a statutory provision is clear and unambiguous it is the function of a court to give effect thereto. It is not then permissible to have recourse to pre-existing legislation for the purpose of construing the statutory provision.'[6] Nor, can subsequent amendments of the Act be relied upon as an aid to the construction of the section.[7] It bears reiteration that it is for a court to consider the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears and the apparent purpose to which it is directed.[8] It is not for a court to substitute what it regards as reasonable, sensible or businesslike for the words actually used, as this would cross the divide between interpretation and legislation.[9]

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[6] *Ebrahim v Minister of the Interior* 1977 (1) SA 665 (A) at 680A-B.
[7] Ibid at 680B-C.
[8] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[9] Ibid.

'Courts are not entitled, under the guise of absurdity, to avoid the legislature's clear intention because they regard the particular consequences to be harsh or unwise.'[10] Moreover, once the intention of the legislature is clearly established, it can be dangerous to speculate as to why the legislature would have intended a particular result.[11]

[15] Here, the task of the interpreter is to ascertain the meaning of the expression 'adversely affected' in the particular context of the statute in which it appears.[12] The purpose of the STA is to establish a framework for sectional ownership. As it was put in *Mobile Telephone Networks (Pty) Ltd and another v Spilhaus Property Holdings (Pty) Ltd & others*:[13]

'Sectional title ownership consists of three elements, namely individual ownership of a section, joint ownership of the common parts of the sectional title scheme and membership of a body corporate. The registered title-holder of a unit is the owner of the section, joint owner of the common parts of the scheme and a member of the body corporate. Thus, a person, buying into a sectional title scheme, enters into a series of interlocking relationships. The [STA] introduced several new concepts into our law. By providing for the division of land and buildings comprising a development scheme into sections and common property, it created an entirely new composite *res*, called a unit, which consists of a section and an undivided share in the common property. The section is considered the principal component, with the undivided share in the land and other common property inextricably linked thereto as an accessory. The Act also created an entirely new form of composite ownership, namely separate ownership of a section coupled with joint ownership of the common property. Sectional owners own the common property collectively in undivided shares in accordance with the provisions of the Act.'

[16] Because none of the elements can be disposed of separately, the real rights created pursuant to the STA must be clearly defined and discernible by all. In that regard the STA provides for a system of registration. In certain respects, sectional owners must sacrifice their independence and individual decision-making and submit to the collective decision-making of the body corporate. All sectional owners become members of the

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[10] *Geue & another v van der Lith & another* 2004 (3) SA 333 (SCA) para 15.
[11] Ibid.
[12] *Fundtrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726J.
[13] *Mobile Telephone Networks (Pty) Ltd and another v Spilhaus Property Holdings (Pty) Ltd* [2018] ZASCA 16; 2018 (3) SA 396 (SCA) para 1 (footnotes omitted).

body corporate upon registration of a unit in their name. The body corporate is charged with the responsibility of enforcing the rules and the control, administration and management of the common property of the scheme for the benefit of all members.[14] But the rights and proprietary interests of an owner will not have to always necessarily yield to the will of the majority. The body corporate generally governs by way of resolutions. Some resolutions require unanimity, others a 75% majority and yet others a simple majority, whilst some, such as the resolution in question here, require the consent of specific owners.[15] It is thus not for a court to substitute what has been ordained by the legislature with what it considers fair. After all, notions of fairness must be sourced within the four corners of the Act. A disregard of the words used by the legislature, on the basis of a general principle of 'fairness' leads not only to uncertainty but also a failure to observe the separation of powers doctrine.[16]

[17] If one considers the proviso in the context of the STA as a whole, the following considerations are pertinent: The STA draws a distinction between residential and non-residential schemes with regard to the calculation of the participation quota. In a scheme for residential purposes only, the STA has adopted the floor area of a section as the basis for calculating the participation quota.[17] Since the formula of relative floor area was considered too rigid for calculating the participation quotas for sections in schemes not used solely for residential purposes, the STA provides that the determination of the participation quotas of non-residential sections should be left to the discretion of the developer.[18] The importance of the participation quota is that it determines the extent of the undivided share of a sectional owner in the common property and therefore forms an indivisible part of the ownership of a sectional title unit.[19] The participation quota as determined in accordance with ss 32(1) and (2) is included in a schedule to the registered

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[14] Section 36(4).
[15] GJ Pienaar *Sectional Titles and other fragmented property schemes* (2010) para 2.5.3 and 4.2.3 (GJ Pienaar).
[16] *SAA (Pty) Ltd v Aviation Union of South Africa & others* [2011] ZASCA 1; 2011 (3) SA 148 (SCA) para 19.
[17] Section 32(1).
[18] Section 32(2). CG van der Merwe *Sectional Titles, Share Block and Time-sharing* LAWSA Volume 1 (loose-leaf) para 333 at 3-19.
[19] GJ Pienaar at 81.

sectional plan. The schedule specifies the quota of each section as well as the total of the quotas of all sections.[20]

[18] The participation quota determines the following: (i) the value of the vote of the owner of the unit in a case where the vote is to be reckoned in value; (ii) the unit owner's undivided share in the common property; and (iii) the proportion in which the owner has to contribute to the levy fund of the sectional title scheme or be held liable for the payment of a judgment debt of the body corporate of which he is a member.[21] If levies are charged otherwise than in accordance with the participation quota, the rule which provides for this must be registered in the Deeds Office before it comes into effect.[22]

[19] I now pass to consider the ordinary meaning of the expression 'adversely affected' – which it bears in 'ordinary colloquial speech'.[23] 'The normal and permissible method available to a court to ascertain the ordinary meaning of words is to turn to authoritative dictionaries – the most reliable sources of information in regard to the general accepted usage of words – for aid'.[24] According to the Oxford & Cambridge English Dictionaries, the meaning of 'adverse' is 'unfavourable, disadvantageous, to the detriment of, having a negative effect'. And 'affect' means 'to make a difference to' or 'to cause something to change'. Here, the difference or change to the respondent is that its proportional liability for the total levies of the scheme has more than doubled. This is unfavourable, not only because it pays more but also because the increased levy liability, which attaches to the ownership of the units, makes them less attractive investments. This interpretation is consistent with the general requirement imposed by s 1(3)(c) of the STA for any unanimous resolution. This sub-section provides: 'for the purposes of the definition of "unanimous resolution" in subsection 1(1) - where the resolution in question adversely

[20] Sections 5(3)(g).
[21] GJ Pienaar para 2.4.
[22] Section 32(4) read with s 35.
[23] Per Lord Atkinson in *Falkiner v Whitton* 1917 AC 106 at 110, cited with approval by Kotze JA in A*ssociation of Amusement and Novelty Machine Operators & another v Minister of Justice & another* 1980 (2) SA 636 (A) at 660F.
[24] *Association of Amusement and Novelty Machine Operators & another v Minister of Justice & another* 1980 (2) SA 636 (A) at 660F.

affects the proprietary rights or powers of any member as owner, the resolution shall not be regarded as having been passed unless such member consents in writing thereto'.

[20] The STA is thus designed to ensure that, before purchasing a sectional title unit, the prospective purchaser will be aware of the participation quota attaching to that unit and the levy liability. The liability for levies is an incident of ownership of a sectional title unit and is a burden that attaches to such ownership. An increase in that levy burden is accordingly a diminution of his rights of ownership. The appellant alleges that the previous levy regime 'grossly discriminated' against residential sections, because those owners had to pay higher levies. This contradicts the thrust of its own argument that having to pay higher levies does not in and of itself constitute an 'adverse effect'. The high court's judgment was premised on the fallacious assumption that the prior levy dispensation was unfair and the legislature could not have intended this. The STA clearly provides that in a mixed use scheme such as this, levies do not have to be charged in proportion to the floor area ratio. In terms of s 32(2) of the STA, the developer is given an unfettered discretion in this regard. The facts on the record do not show either that the levy regime prior to the resolution was unfair, or that the regime after modification was fair. This was certainly not common cause on the papers. Neither party knew the reasons for the developer's participation quota determination.

[21] The high court approached the matter on the basis that the result of the resolution was fair, and therefore the consent of the appellant was not required. This approach, which ostensibly imports a further proviso that is not expressed in the Act, is clearly wrong. If that had been the intention of the legislature, one imagines, that it would have said so. Such an approach, resting as it does on nebulous notions of fairness, brings uncertainty into the Act. What is more, it disregards the carefully crafted scheme of the Act. It also ignores the plain meaning of the expression and therefore could hardly have been intended by the legislature. Moreover, it assumes that it is unfair for the participation quota not to accord with floor area ratio, yet section 32(2) expressly provides for this in the case of non-residential sections. In the context of a resolution to modify an owner's liability for levies, it seems a simple matter of logic that an owner whose liability for levies increases is adversely affected thereby. It is impossible to conceive of any other meaning of those

words. That being so, the clear intention of the legislature is that the written consent of such a member must be obtained, so as to observe the *audi alteram partem* rule and to prevent a diminution of property rights being imposed on a minority by the majority.

[22] I therefore conclude that the respondent was ‘adversely affected’ within the meaning of that expression by the resolution and that its written consent was required. It follows that the resolution is *ultra vires* the Act and void, and that the consequent amendment to the conduct rules is likewise void. On this basis as well the appeal to the full court by the respondent ought to have succeeded.

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

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	A J Boulle
	Instructed by: John Hudson & Company, Durban Lovius Block, Bloemfontein
For First Respondent:	L M Mills
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