

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 52828/09

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

DENMYR BODY CORPORATE

Applicant

and

JAN VAN DEN BOS

First Respondent

DOC J PROPERTIES (PTY) LIMITED

Second Respondent

J U D G M E N T

MEYER, J

[1] The applicant seeks the review and setting aside of a procedural ruling which the first respondent made in his capacity as arbitrator in arbitration proceedings between the applicant and the second respondent. The

applicant is registered and incorporated as a body corporate in terms of the Sectional Titles Act 95 of 1986. The second respondent is the registered owner of six units together with undivided shares in the common property in the sectional titles scheme controlled and managed by the applicant.

[2] The applicant, as claimant, required discovery or inspection of *inter alia* the following documents from the second respondent, as defendant, in the arbitration proceedings:

- (a) '*Copies of all monthly statements and/or accounts for levies and other charges for the period May 2004 to date;*'
- (b) '*Copies of all lease agreements entered into between the Respondent and the various tenants, both current and past, who occupy/occupied the Respondent's units over the period May 2004 to date;*'
- (c) '*Copies of all statements and/or accounts by the Respondent to the various tenants of the Respondent's units relating to rental, operating costs and consumption charges in respect of the Respondent's units for the period May 2004 to date.*'

[3] The second respondent refused to furnish the required documents to the applicant. The arbitrator (first respondent) was accordingly requested to make a ruling on the applicant's entitlement to discovery of *inter alia* the said documents at a preliminary meeting that was held on Wednesday, 18 November 2009.

[4] The ruling made by the first respondent in respect of the required *'monthly statements and/or accounts for levies and other charges'* was that the applicant *'has this information'*, and in respect of the required *'lease agreements'* and *'copies of all statements and/or accounts'* rendered by the second respondent to its various tenants that the arbitrator *"cannot see that this information requested will advance Claimant's case or damage the case of the Respondent, but will only cause further delays"*. The applicant now seeks a review and setting aside of this ruling of the first respondent. A *"report"* dated 14 January 2010 *"on what happened"* at the preliminary meeting on 18 November 2009 was also furnished by the first respondent in which further grounds were set out for his refusal of the applicant's request for discovery of such documents.

[5] A party required to make discovery is obliged to make discovery of documents which may directly or indirectly enable the party requiring the discovery either to advance his or her own case or to damage the case of his or her adversary. See: Erasmus: *Superior Court Practice* at page B1-251. *"What is relevant in an action will be determined by the pleadings."* *Copalcor Manufacturing (Pty) Ltd v GDC Hauliers (Pty) Ltd* 2000 (3) SA 181 (WLD) at 194A.

[6] The applicant in the arbitration proceedings claims payment of the sum of R623,632.67 from the second respondent in respect of alleged arrear levy contributions, electricity charges, and other charges, including legal costs and interest, for the period September 2007 to July 2009. The applicant also

claims that the second respondent restores the *status quo ante* on the grounds that the second respondent allegedly extended the limits of one of the units that it owns with resultant unlawful encroachment on common property to the exclusion of all the other owners.

[7] The second respondent in its statement of defence *inter alia* alleges that the applicant intentionally failed to advise the second respondent in writing, as it is required to do in terms of the applicable management rules, of the amounts payable by the second respondent, and it also, by way of general denial, denies the applicant's claim in respect of arrear levy contributions, electricity and other charges. The second respondent specifically denies that it is indebted to the applicant in the amount claimed or any part thereof. Any unlawful encroachment is denied and a plea of estoppel is raised in the alternative. Various counterclaims are raised against the applicant, *inter alia*, for the alleged overpayment of levy contributions and/or electricity charges in the sum of R175,662.10 during the period May 2004 up to and including June 2009.

[8] I agree with the learned arbitrator that the required lease agreements are not, with reference to the pleadings, relevant. The learned arbitrator, however, was, in my view, clearly wrong in refusing the discovery "*of all monthly statements and/or accounts for levies and other charges*" and of copies "*of all statements and/or accounts*" by the second respondent to its tenants "*relating to rental, operating costs and consumption charges in respect of the respondent's units*". The relevance of these documents

appears from the issues raised on the pleadings. The required documents, at the very least, “*may*” advance the applicant’s own case or damage that of the second respondent in that it may show that the second respondent was made aware and was indeed aware of the various charges levied and it may assist the applicant in proving the quantum of its claims.

[9] This matter, in my view, is an exceptional one where intervention in the course of the arbitration proceedings is warranted prior to an award. The first respondent’s procedural ruling could result in the applicant being prevented “... *from having his case fully and fairly determined*”. *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC), para [262]. See also: *Tuesday Industries v Condor Industries and Another* 1978 (4) SA 379 (TPD), at pages 382B *et seq*; *Badenhorst-Schnetler v Nel en ‘n Ander* 2001 (3) SA 631 (CPD), para [11] *et seq*. It undisputed that the applicant’s legal representative informed the arbitrator that copies of the monthly statements and accounts for levies and other charges are not kept by the applicant after dispatch to the second respondent each month.

[10] In the result the application for review succeeds in part and the following order is made:

1. The first respondent’s ruling on the applicant’s request for documents as set out in paragraphs 2.1 and 2.3 at page 3 of the minutes of the preliminary meeting held on 18 November 2009 (annexure ‘X’ to the notice of motion) is set aside.

2. The second respondent is ordered to make discovery of the documents requested in paragraphs 2.1 and 2.3 at page 1 of the said minutes.
3. The second respondent is ordered to pay the applicant's costs of this application.

P A MEYER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

1 October 2010