REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: A 3062/11

A 3063/11

A 3064/11

A3065/11

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

16/10/12 .....

In the matter between

SECTOR FIVE TRADING 46 (PTY) LTD **Appellant**

and

VILLA NOSA HOMEOWNERS ASSOCIATION **Respondent**

Neutral citation: *Sector Five Trading 46 (Pty) Ltd v Villa Nosa Homeowners Association* 2012 SA (GSJ)

Coram: SATCHWELL J and COLLIS AJ

Heard: 11th October 2012

Delivered: 16th October 2012

Summary: Proposed defence in application for rescission of judgment is not based on any evidence, is contradicted by all evidence available and is a flight of fancy presented solely for purposes of delay.

JUDGMENT

SATCHWELL J:

INTRODUCTION

[1] This is an appeal brought by Sector Five Trading 46 (Pty) Ltd ("Sector Five") against the decisions of the Magistrate's Court at Boksburg dismissing applications for rescission of four default judgments against Sector Five. The respondent in the appeal, ("the Association"), has brought an application for orders declaring that the appeals have lapsed and striking the appeals off the roll. In response, Sector Five has brought an application for condonation of certain defects in the appeals process and record.

[2] I was concerned that, if this appeal court, were merely to render a decision on the technical issues pertaining to the appeals – ranging from failures to furnish security timeously, failure to furnish a complete and appropriate record timeously or at all and failure to properly comply with the relevant Rules of this Court pertaining to appeals – that we would do no more than put off the day of judgment in that the merits would go unexplored and undecided.

[3] After hearing argument from counsel for both the Association and Sector Five, there was agreement that there may be value in hearing both the applications to strike out, the application for condonation and the appeal on the merits.

APPLICATION TO DECLARE APPEAL LAPSED AND TO STRIKE OUT

[4] The judgment of the learned Magistrate at Boksburg was handed down on 15th June 2011 but apparently only came to the attention of Sector Five on 25 July 2011. Sector Five served a Notice of Appeal on 18th August and furnished security on 21st October 2011. The explanation offered by Sector Five for the late provision of security is a complete misreading (if at all) of the Rules of the Magistrate Court but I can see no prejudice to the Association and do not think this issue should be taken further.

[5] The so-called "record" furnished by Sector Five on 14th October 2011 failed to comply with Rule 50 of this Court in virtually every possible respect. Suffice to mention that:

a. One ringbinder file of documents was lodged with the Registrar and one such ringbinder file was served on Sector Five.

b. The contents thereof were a mixture of papers from two separate applications – only one of which is the subject matter of this appeal – resulting in a great deal of irrelevant and extraneous material handed to the Registrar and served on the Association.

c. There are four appeals. The documents in each should comprise the full documentation from the rescission applications which form the subject matter of these appeals – namely a Notice of Motion, a Founding Affidavit, an Answering Affidavit, a Replying Affidavit, a Supplementary Replying Affidavit, the judgment of the learned Magistrate, the Notice of Appeal etc. Suffice to say that in each appeal the "record" omitted at least three or four of these essential documents.

d. The contents of the ringbinder file were not paginated nor was there an index.

[6] On 2nd March 2012 the Association advised Sector Five that, in its opinion, the appeals had lapsed. On 27th June 2012 Sector Five then filed two copies of a bound "record" of the Magistrate Court proceedings at the High Court which were paginated and indexed – although not apparently still not complete and not certified.

[7] From such "record" some of or all of the irrelevant documentation pertaining to other litigation had apparently been removed. This copy of the record was not served on the Association. However the Association was, for some reason, served on 22nd June with an index pertaining to the "record" now at court. This was rather like serving a manual advising how to work a kettle on a person who has received a photocopy machine and equally as useful.

[8] A date for the hearing of these appeals was advised by the Registrar of this court. The Association then brought the application to declare the appeal lapsed and for striking out.

[9] An application for condonation was launched by Sector Five on 3rd October 2012. On Friday 5th October 2012, four court days before the hearing of these appeals, the Association was suddenly furnished with a different "record" ie the same as that before the appeal court. Index and "record" now coincided.

[10] It was conceded, on behalf of Sector Five, that it was not possible to contend that there had been "no transgressions". I find the attitude and behaviour of Sector Five in the "prosecution" of these appeals to be more than uninformed as to the court procedure and more than negligent. Procedure and process in both the Magistrate's Court and the High Court have been ignored or disregarded.

[11] This was contemptuous behaviour in the extreme. This appellant has served two different appeal "records" – one in a ringbinder file on the Association and one which is bound on the appeal court – containing different documents, presented in a different order, one paginated and the other not, one indexed and the other not. Sector Five was quite indifferent to the extreme inconvenience occasioned to the Association in its preparation for the hearing and to which the appeal court would be also be put at the hearing of this appeal.

[12] The Association would, to my mind, be entitled to the order which they have sought. Sector Five has failed to "prosecute" its appeals as required by Rule 50 of this Court in that it has done no more than the first step of noting an appeal and thereafter has failed to pursue the appeals process by providing both the appeal court and its opponents with a full, complete, certified record of proceedings in the court *a quo*. The Association was certainly entitled to bring these issues to the attention of the appeal court.

[13] However, as I have indicated a decision on this basis alone would be unsatisfactory. There are clearly strong feelings between the Association and one of its members, Sector Five, which need to be resolved once and for all. Accordingly, I am of the view that this court should make no finding on the applications to declare the appeal lapsed and to strike it out but to satisfy (insofar as this is possible) the Association with the appropriate costs orders and then proceed to the merits of the appeal.

CONSIDERATION OF APPLICATION FOR RESCISSION

[14] These appeals are against the decision of the learned Magistrate to refuse an application for rescission of four default judgments. This appeal court is not asked to decide the issues in dispute between the parties. We are not seized with the duty to determine the merits of the defence. We must apply our minds to the requirements for the granting or refusal of a rescission application in the Magistrate's Court and determine whether or not the learned Magistrate was in error.

[15] The powers of the Magistrate's Court to rescind a judgment of that court are confined to those set out in section 36 of the Magistrate's Court Act which include where default judgment was granted – as in the present case. Rule 49(1) of the Magistrate's Court Rules requires an applicant for rescission of a default judgment to show "good cause" for such rescission.

[16] The discretion to rescind a judgment of another court has been held to require both evidence rather than mere averments and the existence of a substantial defence. In *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 AD it was pointed out that the burden rested upon the applicant for rescission "of actually proving as opposed to merely alleging good cause for rescission" and that "such good cause includes but is not limited to the existence of a substantial defence".

[17] The Concise Oxford Dictionary defines "substantial" as being "real and tangible rather than imaginary" and "of considerable worth". In *Galp v Tansley NO and another* 1966 (4) SA 555 (C) the court stated that a substantial defence does not require the probability of success but "shows a *prima facie* case or existence of an issue fit for trial".

CLAIM BY SECTOR FIVE OF AN EXEMPTION FROM PAYMENT OF LEVIES OR THAT A PREPAYMENT OF LEVIES WAS MADE

[18] The Association sued and obtained default judgments against Sector Five in respect of unpaid levies due and payable to the Association, as contributions for "the control and management of the building and home owners association" of Villa Nosa which Sector Five

was alleged to be liable to pay by reason of its ownership of four erven in the Villa Nosa development.

[19] Hauptfleisch on behalf of Sector Five, in its application for rescission, states that he was "appointed duly authorised representative of the developer [Upbeatprops 158 (Pty) Ltd] with authority to act as owner of the development [Villa Nosa]. He acted as "owner and project manager". Subsequently, he "established" Sector Five but he does not state whether or not he was the sole or majority or a minority shareholder thereof. He states that "it was decided by me and the developer" that Sector Five would purchase four erven and build dwellings thereon and that "a term of the agreement to purchase" was that Sector Five "would be exempt from effecting payment of levies, as long as [Sector Five] remains the proprietor of the said ervens".[1]

[20] This version is remote and improbable, is supported by no evidence and contradicted by such evidence as is available. Amongst the reasons for such view:

a. Hauptfleisch is silent as to any other person involved in Upbeatprops and since he was acting as "representative and owner" it would appear that he concluded an agreement with himself – there was a handshake between the left hand and the right hand of only Hauptfleisch.

b. It was argued, that even without information as to the involvement of any person other than Hauptfleisch in this exemption arrangement, there was nevertheless a meeting of minds as to the agreement but one is constrained to find that only one mind (that of Hauptfleisch) could have been involved.

c. Hauptfleisch has been obliged to concede that this exemption agreement was never reduced to writing. The only knowledge of this agreement is in his mind. Interestingly enough Hauptfleisch has not tendered any minutes of any meetings of either Upbeatprops or Sector Five which would support such agreement. The Deeds of Transfer of these erven to Sector Five record no such exemption in the conditions of sale. The Conditions of Establishment issued by Ekurhuleni

[1] Paragraph 8.1 – 8.8 of the Founding Affidavit.

Municipality contain no reference to such exemption. The original Articles of Association to which Hauptfleisch was a subscriber[2] specifically state that there are no pre-incorporation contracts. The resolution to the amendment to the original Articles, signed by Hauptfleisch, makes no reference to this exemption from payment of levies.

d. Where there is documentation it is clear that levies may be imposed on members of the Association. The Conditions of Establishment empowers the Association to "levy each and every member of the Homeowners Association the costs incurred in fulfilling its function".[3] The Articles of Association were amended by resolution signed by Hauptfleisch during May 2003 to the effect that the Association was empowered "to levy from each and every member of the [Association] the costs incurred in fulfilling its function".

e. In short there is no evidence to support Hauptfleisch and everything to contradict him.

[21] This version is so improbably advantageous to Sector Five and so prejudicial to all other members of the Association that it cannot be accepted as a likely defence to the action.

a. Sector Five is not the only member of the Association which has made a financial investment in the development. Other members have either built or purchased the dwellings thereon. There is no credible reason why only one member should be privileged because of making such an investment whilst other investors receive no advantage and are, in fact, prejudiced because they have to subsidise Sector Five. Hauptfleisch claims that this special privilege endures whilst Sector Five remains "the proprietor of the said erven". This, considering the lifespan of registered companies, could be in perpetuity.

b. Absent any recordal in any documentation of this exemption, persons who purchase erven and erect dwellings or purchase both erven and dwellings have no opportunity to know of this special exemption and the additional financial

[2] Page 122.
[3] Para 1.5.2 (iii) at page 225.

obligations which will be imposed upon themselves as members of the Association. In other words, there is a secret known only to Hauptfleisch and concealed from all other purchasers and members.

c. Such agreement that Sector Five be exempted from payment of members' levies was *inter partes* – Hauptfleisch (on behalf of Upbeatprops) and Hauptfleisch (on behalf of Sector Five) and did not involve the Association on whom such private agreement could not be binding.

[22] Not only is the claimed defence of this unrecorded and undisclosed exemption improbable but it is contradicted by Hauptfleisch's averment in his Founding Affidavit that the costs which would be incurred by Sector Five in constructing these dwellings "would be regarded as pre-payment of levies."[4]

a. This suggested defence is contradictory of the earlier suggested defence. Either Sector Five is exempt from payment of levies or it has paid levies in advance – it cannot be both exempt and compliant.

b. As already stated there is no recordal of this agreement in any documentation.

c. If Sector Five's building costs were to constitute a "pre-payment" of levies then one would expect a disclosure of the actual amount of the pre-payment or deposit against levies and what interest would accrue thereon. One would expect a statement of account to be prepared monthly or on an annual basis setting out the interest accruing on the deposit or pre-payment, the levy amounts by which this pre-payment had been reduced and the balance outstanding to the credit of Sector Five. No such record has been indicated.

MERITS OF APPEAL – HOMEOWNERS ASSOCIATION LACKS AUTHORITY

[23] Sector Five contends that this Association lacks authority either to impose levies to recover costs or to institute this action by reason of Hauptfleisch's lifetime appointment as

[4] Paragraph 10.18 of Founding Affidavit.

Chairperson of the Association and that he has no knowledge that other persons have resigned as directors or that new directors have been elected.

[24] This issue need not be taken further. At no stage during the lifetime of this Association has Sector Five taken steps to have the appointment of the directors or the Chairperson set aside. This is a new concern which is not supported by very dubious documentation or affidavits of the genuine members:

a. Hauptfleisch claims that he was appointed Chairperson of the Association and that such appointment is "irrevocable" and relies upon a document which purports to be a resolution of the directors of the Association on 15th January 2004 to the effect that "his appointment will endure indefinitely and be irrevocable subject to him or any company in which he has an interest owner properly in the development".[5] Regrettably, the person who prepared and typed this document inserted the date of signature as "15th January 2010" which is some 6 years later than this purported resolution. One hesitates to call an officer of this court, as is Hauptfleisch who is a practising attorney, a party to forgery or fraud. However, there is absolutely no explanation for the discrepancy in dates and no affidavit from the typist, the secretary who supposedly signed the document or from the directors who supposedly passed this resolution.

b. Hauptfleisch claims that he has no knowledge of the resignations of the former or erstwhile directors of the Association recorded in CIPRO but he fails to produce affidavits from those persons supporting his averment that they are still directors.

c. Resolutions and minutes of meetings in the papers satisfy me that this Association has the authority both the impose levies and to collect through legal action.

CONCLUSION

[5] Page 305.

[25] Sector Five has raised other defences – pertaining to the National Credit Act and a counterclaim – which were not argued at the hearing of this appeal but Sector Five has reserved its right to raise these issues in its defence if the application for rescission is granted.

[26] For the reasons set out above, I find myself tempted to paraphrase that which was said by the Supreme Court in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2006 (6) SA 1 (SCA) that Sector Five "has not been able put up a defence which has good prospects of success. Indeed, his prospects of success are so remote that it cannot, in my view, be said that he has a *bona fide* defence". It was pointed out, in that judgment, that "the defendant has led no evidence at all" and has "not filed affidavits from the persons" from whom one would expect to hear. As the learned judge said "Even if I overlooked the problems of proof, ignore the rules of evidence and have reference to all the information placed before the court, whether it is admissible or not, the defendant's case is insufficiently made". The court concluded that the applicant for rescission had not shown the required good cause.

[27] I am of the same view in respect of this applicant, Sector Five. I can find no misdirection on the part of the learned Magistrate in the court *a quo*.

[28] The complete inadequacy of the purported defences postulated by Hauptfliesch on behalf of Sector Five strongly suggest that there was never any real intention to proffer this defence and go to trial. The noting of an appeal and the presentation we have heard argued convinces me that there was no real purpose in the appeal. All this has been done solely for the purposes of delay. Such conduct on the part of an officer of the court is to be deplored.

ORDER

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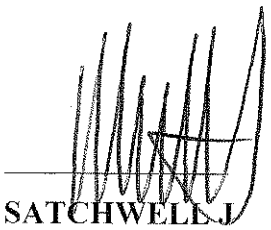
1. The appeal of Sector Five is dismissed with costs.
2. Villa Nosa Homeowners Association is awarded costs in its favour to be paid by Sector Five in respect of the application for an order that the appeal has lapsed and is to be struck off. Such costs are awarded on the attorney and own client scale.

3. Villa Nosa Homeowners Association is awarded costs in its favour to be paid by Sector Five in respect of the application brought by Sector Five for condonation of its failure to comply with the provisions of the Rules of the High Court. Such costs are awarded on the attorney and own client scale.
4. It is recorded for purposes of taxation of costs that one and half hours of argument on 11th October 2012 was expended on the applications for striking off and condonation which costs are to paid on the attorney and own client scale.

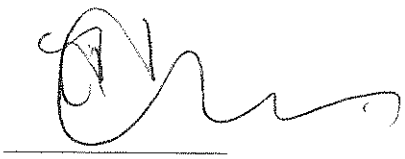
DATED AT JOHANNESBURG ON THIS 16TH DAY OF OCTOBER 2012.



SATCHWELL J

JUDGE OF THE HIGH COURT

I agree:



COLLIS AJ

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

APPELLANT:	JP Blignaut
	Instructed by Hauptfleisch Attorneys, Johannesburg
RESPONDENT:	T Ossin
	Instructed by Hugh Raichlin Attorneys, Johannesburg