REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG SOUTH LOCAL DIVISION, JOHANNESBURG

CASE NO: 35817/2013

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

SIGNATURE ..... DATE 10/04/14

In the matter between:

FULL SWING TRADING 403 CC	Applicant
and	
3G ON MORRIS HOME OWNERS ASSOCIATION (PTY) LTD	1ST Respondent
BRADLEY SILBERMAN	2ND Respondent
PATRIZA SCALONE	3RD Respondent
DESHANTA SIGAMONEY	4TH Respondent

JUDGMENT

SWARTZ AJ:

[1] This is an application for costs against the respondents arising from an urgent application brought on behalf of the applicant. Marcello Macchelli is the owner of the applicant, Full Swing Trading 403 CC, a close corporation. He is the registered owner of Unit 5, 36 on Morris, Morris Street East, Woodmead, Johannesburg. The first respondent is known as 36 on Morris Homeowners Association (Pty) Ltd. The first respondent is an association incorporated in terms of the Companies Act. The second, third and fourth respondents are directors of the first respondent. They also reside in units situated on Morris, Morris Street East, Woodmead, Johannesburg, Gauteng.

[2] The applicant was the developer of 36 on Morris. On 1 December 2012, Macchelli in his capacity as duly authorised representative of the applicant, commenced with the handover procedures in light of the completion of the complex which involved inter alia calling and arranging for the holding of the first general meeting of the first respondent which general meeting was to be convened on 15 December 2012. On 15 December 2012 the first respondent held its first general meeting where its members, registered homeowners of properties located in the complex, voted and unanimously approved the rules of conduct which rules came into effect on 15 December 2012. These rules were binding upon all members, which could be changed from time to time by the homeowners at an annual general meeting or special general meeting. The rules prescribed the procedure to be followed to inter alia effect

changes to the rules and levies applicable to the members of the first respondent. The procedures prescribed in the rules are peremptory and not discretionary.

[3] The applicant approached the court to obtain urgent interim relief against the second, third and fourth respondents from passing and or implementing a special levy called for on 5 October 2013 as they were in violation of the procedures set out in the Companies Act as well as the adopted conduct rules. On 4 October 2013, being the date on which the applicant set the application down for hearing, the respondents filed their answering affidavits contrary to the filing times set out in the notice of motion. This resulted in the parties agreeing to postpone the matter *sine die* in order to allow the applicant an opportunity to file its replying affidavit. The question of costs was reserved. The agreement was arrived at on the basis that the respondents would not persist with the enforcement of the special levy pending the resolution of the dispute between the parties. Subsequent to the applicant launching the urgent application and the postponement of the hearing of the proceedings on 4 October 2013, the proceeding became settled and the only remaining issue to be resolved was the question of costs which costs the respondents refused to pay.

[4] The applicant's case is that the first respondent at its first general meeting on 15 December 2012 voted and unanimously approved the

rules of conduct; that the rules were binding on all members; the rules prescribed the procedure to be followed to effect changes to the rules and levies applicable; that the homeowners agreed on 15 December 2012 that the starting levy per unit would be R 1 000 per month. On 12 June 2013 the members were notified by the managing agent of the first respondent that the levies approved on 15 December 2012 would be increased from R 1 000 to R 1 500 per month, effective on 1 August 2013. The ability of the directors of the first respondent to unilaterally increase levies without adhering to the approved rules and procedures were queried by members and the applicant. As a result of the queries a special general meeting was called to be held on 29 July 2013. The motion to amend the rules was circulated amongst the members only after the amendment sought had already been effected, which amendments were never approved by the members. On 29 August 2013 the first respondents managing agent provided members with a schedule identifying the various projects forming the subject matter of the special levy to be imposed, which costs would be recovered by way of a special levy effective from 1 September 2013. The minutes of 29 August 2013 indicated that the special levy sought was not approved. It is common cause the first respondent does not have the financial means to finance the various projects forming part of the special levy.

[5] On behalf of the applicant it was submitted that the second, third and fourth respondents have persisted in implementing the special levies, notwithstanding the fact that the directors attention was drawn to the fact

that the rules of conduct were not adhered to; the agreed information was not provided to the members for consideration; a request was made to convene a special meeting for the purposes of resolving the issues surrounding the implementation of the special levy and the refusal by the managing agent and or the second, third and fourth respondents to respond to the applicants communique. All the irregular and disputed issued raised by the applicant became resolved, but only after the applicant was forced to approach the court for interim relief against the respondents.

[6] On behalf of the respondents it was argued that the second, third and fourth respondents have no experience in running a homeowners association and are simply volunteering their services. Furthermore, the applicant's representative has an axe to grind with the second, third and fourth respondent and has acted in bad faith seeking only to punish the directors for simply doing a duty for which they had volunteered. There is no reason why the second, third and fourth respondents should be held personally liable for costs in the light of an indemnity which exists in the complex rules which is wide enough to protect them from a personal costs order. Macchelli, as the sole member of the applicant, who was the developer of the complex, perceived as a personal attack on his ability, when the construction of the complex was challenged by an independent engineer. He stormed out of a meeting as the minutes of a general meeting held on 15 December 2012 reflect. It is therefore submitted that Macchelli has a personal axe to grind with the second, third and fourth

respondents. Amongst various arguments raised, it was submitted that notwithstanding a compromise documented in a notice dated 16 September 2013, the applicant's representative sought an interdict on 25 September 2013 to prevent a special general meeting to be held 5 October 2013. All that was required of the applicant in order to cancel the special general meeting convened by the directors of the first respondent was to demand the cancellation of this meeting without the necessity of seeking an interdict. It was submitted that there was no need for the applicant to approach the court in the manner in which he did and to seek costs against the respondents. The applicant's application has become academic as a consequence of a notice dated 26 September 2013 when the second, third and fourth respondents notified the members of the first respondent that it had decided not to oppose the relief sought by the applicant, namely interdicting the first respondent from convening a special general meeting on 5 October 2013, to communicate the results of the members vote in regard to the special levy. The only issue to be resolved was the costs claimed by the applicant. It was contended on behalf of the respondent that there was no urgency in the applicant seeking the relief sought.

[7] The whole purpose of the vote at the meeting of 5 October 2013 was to determine an amount to be paid in respect of a special levy. Counsel for the respondent submitted that the matter did not warrant an urgent application in the High Court. The respondents sought to afford the homeowners an online vote. There could be no prejudice to the

applicant. By way of the proposed online vote he could have voiced his disagreement to the imposition of the special levy. It was submitted on behalf of the respondents that the second to fourth respondents were simply acting as directors of the first respondent and had done nothing without first consulting the managing agents. As they were volunteering their services they had nothing to benefit personally from seeking to impose a special levy upon the other homeowners in the complex. It was submitted that there was no need for the urgent application in the light of the fact that the applicant prevaricated for a period of some 9 days before launching its urgent application to be heard one day before the special general meeting on 4 October 2013. Counsel for the respondents contended that the applicant through Macchelli intimidated the respondents who as layman simply did an honest job on a voluntary basis for the benefit of the entire complex and its members.

[8] It is significant that all the issues between the parties became resolved only after the applicant had instituted court proceedings. Clearly the respondents irregularly attempted to increase the levies and in so doing did not comply with the rules of conduct agreed to by the members of the first respondent. This was a unilateral variation of the rules. They sought to implement a special levy without adhering to the rules of conduct approved on 15 December 2012. These irregularities were brought to the attention of the respondents. I am not convinced by the argument that Macchelli, as sole member of the applicant, had an axe to grind with the second to fourth respondent. All that is at issue here is the breach of

the rules of conduct of the first respondent, which breach was repeatedly brought to the attention of the respondents by the applicant. A letter of demand was addressed to the respondents in which the applicant raised his concern and the applicant in this letter of demand dated 11 September 2013 informed the respondents that it would approach the court should the issue of the enforcement of the special levy not be resolved. Only after the applicant had launched its application did the causes of complaints raised by the applicant become resolved.

[9] It is trite that, ordinarily, costs are awarded to a successful party in order to indemnify him for the expense which he has been put through to initiate litigation. The award for costs is in the discretion of the court and must be exercised judicially. Generally the award for costs follows the event. Only after the applicant initiated the legal proceedings did the matter become resolved and in my mind this constitutes success achieved by the applicant. The applicant had attempted alternative avenues of resolving the issues by addressing various electronic mails to the respondents as well as a formal letter of demand on 11 September 2013. The respondents at their own peril elected not to consider the concerns of the applicant seriously.

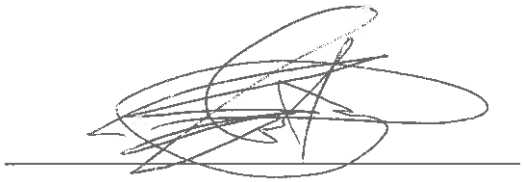
[10] Despite the argument on behalf of the second to fourth respondents that they were merely laymen, they nevertheless volunteered to be directors of the first respondent. They were aware of the rules of conduct of the

voluntary association, which rules they chose to ignore by unilaterally imposing the special levy and furthermore, by choosing to ignore the various notices to them, advising them of such breach, not only by the representative of the applicant, but by other members of the complex, as is evident from the papers filed of record. To visit the members of the homeowners association with a costs order when not all the members of the homeowners were in breach of the rules of conduct would be unjust. The applicant was forced to seek legal intervention to achieve its objectives. It follows therefore that the second to fourth respondents must bear the costs because of them exceeding the limits of their authority in breach of their fiduciary duty to exercise their powers in good faith in relation to the first respondent. They acted to the first respondent's detriment.

[11] The further question to be considered is whether it was necessary to approach the High Court on an urgent basis if the same result could have been achieved by approaching the magistrate's court. The voted on and unanimously approved complex rules of conduct clearly provide that in the event of disputes arising, the Magistrate's Court has jurisdiction. I agree with the submissions of counsel for the respondent that the subject matter of these proceedings falls within the jurisdiction of the magistrate's court. Moreover, there is no reason for a punitive costs order. Although the High Court has concurrent jurisdiction to hear matters wherein interdicts are sought, the matter could have been dealt with in the magistrate's court at less expense to the litigants.

Order:

The second, third and fourth respondents are ordered to the pay the applicants party and party costs on the magistrate's court scale, jointly and severally, the one paying, the other to be absolved.



SWARTZ AJ

ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

Counsel for the Applicant: Adv M. Meyer

Instructed by: David Swanepeol Attorney

Counsel for the Respondent: Adv J.K. Berlowitz

Instructed by: Sharpiro-Aarons Inc

Date of Hearing: 12 May 2014

Date of Judgment: 10 June 2014