REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 13/34654

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

....
DATE SIGNATURE

In the matter between:

FLETCHER, GLORIA JUNE PENELOPE First Applicant

FLETCHER, DONOVAN WHYNDAM Second Applicant

And

MONTEGA BODY CORPORATE Respondent

J U D G M E N T

FISHER AJ:

[1] The First Applicant is the owner of a property in a sectional title scheme known as "*Montega"* and situated in Sandown. The Second Applicant is the husband of the First Applicant and a former trustee of the Respondent.

[2] The First Applicant is thus a member of the Respondent by virtue of section 36(1) of the Sectional Titles Act 95 of 1986 ("*the Act"*). It is, in fact, only the First Applicant who has *locus standi* in these proceedings. The First Applicant took transfer of her unit in the scheme during 2007.

[3] The dispute in this matter is about access by the Applicants to the records of the body corporate. The Applicants rely on the provisions of section 37(1)(l) of the Act, read with Sectional Title Management rules 34 and 35 for the relief they seek. In relation to the management rules, the Respondent has not adopted rules that differ from the standard rules promulgated under the Act and thus such rules apply.

[4] Section 37 of the Act provides as follows:

> "*Functions of bodies corporate*
>
> *(1) A body corporate referred to in section 36 shall perform the functions entrusted to it by or under this Act or the rules, and such functions shall include-*
>
> *...*
>
> *(l) to comply with any reasonable request for the names and addresses of the persons who are the trustees of the body corporate in terms of the rules referred to in section 35, or who*

are members of the body corporate;"

[5] Sectional title rules 34 and 35 provide as follows:

"*Minutes*

34. (1) The trustees shall-

(a) keep minutes of their proceedings;

(b) cause minutes to be kept of all meetings of the body corporate in a minute book of the body corporate kept for the purpose;

(c) include in the minute book of the body corporate a record of every unanimous resolution, special resolution and any other resolution of the body corporate.

(2) The trustees shall keep all minute books in perpetuity.

(3) On the written application of any owner of registered mortgagee of a unit, the trustees shall make all minutes of their proceedings and the minutes of the body corporate available for inspection by such owner or mortgagee.

Books of Account and Records

35. (1) The trustees shall cause proper books of account and records to be kept so as fairly to explain the transaction and financial position of the body corporate, including –

(a) a record of the assets and liabilities of the body corporate;

(b) a record of all sums of money received and expended by the body corporate and the matters in respect of which such receipt and expenditure occur;

(c) a register of owners and of registered mortgagees of units and of all other persons having real rights in such units (insofar as written notice shall have been given to the trustee by such owners, mortgagees or other persons) showing in each case their addresses; and

(d) individual ledger accounts in respect of each owner.

(2) On the application of any owner, registered mortgagee or of the managing agent the trustees shall make all or any of the books of account and records available for inspection by such owner, mortgagee or managing agent.

(3) The trustees shall cause all books of account and records to be retained for a period of six years after completion of the transaction, act or operations to which they relate; Provided that minute books shall be retained for so long as the scheme remains registered."

[6] The First Applicant's attorneys have withdrawn. She, accordingly, prepared the replying affidavit herself and argued the matter in person.

[7] The Applicants allege that they suspect mismanagement of the affairs of the body corporate by the board of trustees. They allege that they seek the documents for the purposes of establishing this mismanagement. The First Applicant was, however, careful to emphasise that she does not contend for any fraudulent conduct on the part of the trustees or the managing agent. It emerges that the genesis of the dispute is the alleged failure of the Respondent to properly fix the roof of the complex, which the Applicants allege has caused them expense and inconvenience. The Applicants contend that they made numerous requests for the documents which are enumerated in the notice of motion and that the trustees have been uncooperative in providing the documents.

[8] The relationship between the Applicants and those trustees with whom they have engaged, appears to have broken down. The Applicants also engaged at length with the management agent employed by the trustees to manage the complex. Similarly, the relationship with this management agent, Berader Properties (Pty) Ltd ("*Berader*") and more specifically the employee seized with dealing with the management of the complex on behalf of Berader, Mr Derek Varkevisser ("*Mr Varkevisser*") has also broken down. Mr Varkevisser deposed to the answering affidavit on behalf of the Respondent.

[9] The animosity between the Applicants and Berader and the board of trustees has become pronounced. It is my sense that it has informed and fuelled the Applicants' conduct in this matter. During 2013 the Applicants reported Berader to the Estate Agency Affairs Board and the Respondent's auditors to their professional

council.

[10] The Respondent contends that there is no merit in the Applicants' allegations of maladministration. This is not a matter which I am called upon to resolve.

[11] The Applicants eventually felt compelled to approach attorneys for the purposes of securing the documents which they sought. On 5 February 2013 the Applicants, through their then attorneys Kevin Hyde Attorneys, demanded in writing that the Respondent give them access to a list of documents and financial records.

[12] The demand for the documents was to the effect that the Respondent produce such documents at a meeting of the trustees scheduled for the next day.

[13] In response to such letter, and by letter of 6 February 2013, the Respondent replied to the Applicants that it would supply all the information demanded by the Applicants, subject to any limitations by law, at the offices of Berader. The Applicants were asked to supply three proposed dates for the inspection.

[14] Somewhat inexplicably, the correspondence which followed from the Applicants' attorneys reflected a reluctance to take up this offer.

[15] On 14 February 2013 the Respondent again extended the invitation to meet and to inspect all documents at Berader's offices at a mutually agreed date and time.

[16] The Respondent contends that the meeting was tendered so that the documentation requested by the Applicants could not only be provided, but also discussed and explained where necessary.

[17] Again the Applicants did not accept this invitation. However, approximately six months later, on 15 August 2013, the Applicants sent a letter to the Respondent repeating their demand for the same documents described in their demand of 5 February 2013, but now seeking the documents until 2013. The Respondent was given an election to provide copies of the documents against payment of the reasonable costs of copying or to allow attendance at the offices of Berader to inspect the documents. It was threatened in the letter that if the election was not provided legal proceedings would be instituted.

[18] The applicants then proceeded to deliver the application on 17 September 2013.

[19] On 20 September 2013 the Respondent again tendered inspection of the documents. There was, however, in such letter, a rider to the tender being that the Respondent's auditor be present during the inspection at the Applicants' cost.

[20] The parties then agreed that an inspection of all documents requested would take place and that the application would be suspended pending this inspection.

[21] During October 2013 correspondence passed between the parties in relation to the logistics of inspection of the documents, including who would make copies of the documents, who would pay for such copies, whether auditors would attend and who would bear the costs associated with such attendance. It suffices to say, in relation to this correspondence, that both parties appear to exhibit an unreasonable and obstructive approach in relation to the carrying out of the inspection. It appears clear that the right to inspect the documents had become more than a means to an end. The parties had, by this stage, gone to war with one another and the inspection of the documents had become their battleground.

[22] On 28 November 2013 dates were provided during December 2013 upon which the Applicants would attend at Berader's offices in order to inspect the documents. A letter written on 28 November 2013 for the purposes of arranging this meeting stated that the Applicants would attend at Berader's offices "*with legal representation in order to ensure that a full inspection takes place and that our client is neither harassed nor abused during such inspection ...*". Furthermore, it was stated that the Applicants had gone to the lengths of making arrangements to bring their own photocopier to the inspection for the purposes of copying the documents.

[23] Pursuant to this letter a meeting ultimately took place at Berader's offices on 25 February 2014. This meeting was attended by the Applicants and their legal representatives. It appears as if the attendance of an auditor was dispensed with. The Applicants indeed brought their own photocopy machine. Mr Varkevisser alleges that he had prepared all the files containing all the documents that the

Applicants had requested in the application and in correspondence, that the documents were furnished to the Applicants, and they and their representatives were left in an office to go through the documents at their leisure and to take any copies that they deemed necessary.

[24] The First Applicant complains that the documents furnished were found to be disordered and that there were no audit trails or reference numbers on general ledger entries. She complains also that it was difficult to locate documents that she was looking for. A complaint is also made that proxies which were specifically requested were not supplied.

[25] The Respondent concedes that certain of the proxies were not supplied and the one service agreement that was asked for was also not supplied. Mr Varkevisser indicated that such documents were missing from the records but that he undertook to provide them if he was able to find them in due course. I was advised in argument that the proxies in question are not to hand but that the service agreement has been provided to the Applicants. In any event, the provisions of the Act to which reference is made above and the management rules do not specifically entitle the Applicants to copies of the proxies.

[26] Apart from the aforegoing, it is contended by the Respondent that all documents in Berader's possession which were sought by the Applicants in their demands in correspondence leading up to the application and in the notice of motion dated 17 September 2014 were made available to the Applicants at this inspection

on 25 February 2014. This is not seriously disputed save, as aforesaid, that the Applicants contend that they were unhappy with the fact that there were no audit trails or reference numbers in the general ledger entries and that they had difficulty locating documents.

[27] What is clear is that, on any version, there was an attempt on the part of the Respondent to provide such documentation as had been requested and there were inordinate lengths undertaken by the Applicants in relation to the copying of documents in the presence of their legal representatives.

[28] Subsequent to the inspection of 25 February 2014 there was a breakdown in the relationship between the Applicants and their then attorneys which led to the withdrawal of such attorneys. The Applicants then obtained the services of a new firm of attorneys, Biccari Bollo Mariano Inc ("*BBM*").

[29] The entry of these new attorneys into the fray prompted advice to the effect that the Applicants should narrow their enquiry by further identifying and specifying the documents that they sought. Accordingly, the Applicants, on the advice of their new attorneys, sought to supplement the application with the addition of a further list of documents.

[30] A supplementary affidavit was put forward in this regard. It bears mention that in such supplementary affidavit it is stated on behalf of the Applicants, that all the documents requested therein fall under the original notice of motion, but that same

are being specified in "*order to avoid any confusion*".

[31] There are vexatious elements to the list of documents sought in the supplementary affidavit. For example copies of "*all 'unfounded allegations' made by our client*" are sought as is "*All information relating to the resolution to oppose a special levy on the 25th of February 2014*". There is an interrogative approach taken in the compiling of this new list that goes beyond what the Applicants are entitled to in terms of the Act and the management rules.

[32] The application to supplement the main application was opposed by the Respondent. The Respondent went as far as to file a Rule 30A application in relation to the purported filing of such affidavit. This is characteristic of the level of animosity that has been generated in this matter.

[33] On 20 January 2015 the matter came before Sutherland J after it was set down by the Applicants on the unopposed roll. On such date Sutherland J made an order to the effect that the Respondent was to file an answering affidavit in comprehensive terms dealing with both the founding affidavit and the supplementary affidavit. No decision was made in relation to the admittance of the supplementary affidavit. This dispute came before me. It is my order in this matter that the supplementary affidavit be accepted. Such affidavit has been answered pursuant to the order of Sutherland J and the Applicants have replied thereto.

[34] The supplementary affidavit was preceded by a letter of demand for the documents described therein, which letter was sent during April 2014.

[35] In response to such letter of demand on 5 May 2014, the Respondent sent a letter in terms of which it stated that the Applicants had had access to "*each and every document that you now demand again at the inspection of the 25th of February 2014 and in fact made copies of most of them*".

[36] It was stated further that, because access to the documents had already been given, further access would be given only if the Applicants bore the reasonable costs of taking the documents out of storage and making them available to the Applicants and the costs of an employee of Berader and an auditor being in attendance at a second inspection.

[37] The Applicants did not accede to these conditions, but it appears that it was not disputed on any real basis that access to the documents had already been afforded them on 25 February 2014.

[38] Whilst it may not be reasonable for conditions to be appended to the inspection of documents in the first instance, it is not unreasonable that reasonable accommodations be asked for under circumstances where access has already been given to the Applicants at considerable expense to the body corporate. It is implicit in the provisions set out above in the Act and in the Management Rules that the access to the documents in question must be exercised reasonably.

[39] In the circumstances I find that the Applicants have been allowed the required access to all the documents requested by them that are in the possession of the trustees. Should the Applicants wish to proceed against the Respondent on the basis of a contention that it has not kept proper records in that, on inspection, documents were found to be missing or not properly drawn up, it is obviously open to them to do so. They cannot, however, use proceedings of this nature to persist in seeking an order for documents which the Respondent contends it does not have in its possession and which contention the Applicants cannot gainsay.

[40] It appears, however, that access to the documentation was only afforded to the Applicants after the application was launched. There is furthermore no doubt that both parties have engaged in obstructive and unreasonable behaviour in relation to the inspection of the documents. The disputes generated appear, for the most part, to be unconnected to the true needs, rights, and obligations of the parties.

[41] In all the circumstances I order as follows:

1. The application is dismissed.

2. Each party is to bear his/her/its own costs of the application.

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DC FISHER
Acting Judge of the High Court

APPEARANCES:

For the Applicants:

First Applicant in person

(Tel: (011) 782 7014)

For the Respondent :

Adv R Goslett, instructed by Johann van Niekerk Inc.

(Tel: (011) 482 2908. Ref: J van Niekerk/RC/MTC 101)

DATE OF HEARING

12 October 2015

DATE OF JUDGMENT

16 October 2015