



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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

From: The Registrar, Supreme Court of Appeal

Date: 28 November 2019

Status: Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (SCA) dismissed the appeal by the appellant with costs

The appellant in this case is the Body Corporate of Marine Sands, 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. The first respondent is Extra Dimensions 121 (Pty) Ltd (the respondent). The scheme is partly residential and partly non-residential.

This was an application for special leave to appeal and, if granted, the determination of the appeal itself. 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, would be liable for 6% of the aggregate levies. In 1997 the scheme was extended by the addition of a new non-residential section. This was followed by an amendment to the sectional plan and an adjustment of the participation quota of each of the non-residential sections.

In January 2013 the appellant started charging the respondent a basic monthly levy of R19 878, 17. This was based on 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 an increase in levies charged by the appellant towards the respondent. The respondent's levies more than doubled in January 2013. Consequently, on 31 July 2014 the respondent applied to the KwaZulu-Natal Division of the High Court, Durban, for the special resolution be declared to be invalid. The application failed before Masipa J, who dismissed it with costs. With the leave of this court, the respondent appealed to the Full Court of that Division, Pietermaritzburg. In the full court the central issue was whether the resolution passed modifying the owner's liability for

levies was beyond the powers of the Act and therefore void. Further there was an invitation to both parties to consider the distinction between the conduct rules and management rules. The full court then concluded that the 'conduct rule' which modified the liability of the sectional owners to contribute towards the levies of the scheme was in conflict with s 37(1)(d) of the STA and accordingly invalid and that it was not necessary to determine the issue, that had occupied the attention of Masipa AJ, namely whether the appellant was 'adversely affected' as contemplated by s 32(4).

The appellant petitioned this court for special leave to appeal the judgment of the full court and it was referred 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 of whether the resolution 'adversely affected' the respondent as contemplated by s 32(4) of the STA. This court held that 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. Masipa AJ held that the fact that the resolution increased the respondent's liability for levies did not mean that it was adversely affected thereby. 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).

Further this court emphasised that Thistledown altered the statutory provision rather than interpreting it and cannot be supported. That judgment failed to give the words 'their ordinary, literal, grammatical meaning' or for that matter any meaning. It was held by the SCA that the function of the court is to give effect to the statutory provision provided that they are clear instead of relying on an amending Act as an aid to construing a section. This would cross the divide between interpretation and legislation. 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. A disregard of the words used by the legislature, on the basis of a general principle of 'fairness' leads to uncertainty and failure to observe the separation of powers doctrine.

The STA draws a distinction between residential and non-residential schemes with regard to the calculation of the participation quota. 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. 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'. In this case, 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. 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 is clearly wrong.

This court dismissed the appeal with costs and concluded that the respondent was 'adversely affected' within the meaning of that expression by the resolution and that written consent was required and the

resolution was 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.