

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case no: **4943/2011**

In the matter between:

JAMES STEPHEN BOWIE

Appellant

v

**THE BODY CORPORATE OF CAPE ROYALE
under Sectional Scheme SS454/2008**

Respondent

JUDGMENT HANDED DOWN ON TUESDAY, 15 MARCH 2011

CLEAVER J

[1] The applicant is the owner of a sectional title unit in a sectional title scheme known as Cape Royale situated in Main Road, Green Point, Cape Town. As he had sold the unit, the attorneys attending to the transfer of the unit had to be provided with a clearance certificate from the Body Corporate to the effect that all monies due to it up to the date on which transfer of the unit was to be passed had been paid. Such a certificate must be obtained before transfer can be passed. Having ascertained from the managing agents of the Body Corporate what amount was due in respect of levies for the property up to the 31 March 2011, the applicant paid that amount to the managing agents and also paid them their fee for providing the levy clearance certificate, both payments being effected on 17 February 2011.

[2] When the clearance certificate was not forthcoming, the applicant's attorneys were advised by a representative of the managing agent that the chairman of the Body Corporate, Mr Pascal Phelan ("Phelan"), was in charge of issuing the certificates and that she was awaiting the signed certificate from him. The applicant was of the view that the chairman was delaying the issue of the certificates and surmised that a dispute between him and the

developer in respect of furniture which was purchased on his behalf for the unit may have contributed to the delay, but points out that such dispute had nothing to do with the issue of the clearance certificate. When the respondent failed to respond to a demand for the issue of the levy certificate, the applicant instituted proceedings to compel the delivery of the certificate as a matter of urgency, contending that the sale of the unit was being prejudiced by the delay. The applicant's papers were served on the respondent on the afternoon of 2 March 2011, the matter having been set down for hearing on Monday, 7 March. The clearance certificate was made available to the applicant before the time for the hearing of the matter and all that remains to be dealt with is the issue of costs. The applicant was of the view that since the clearance certificate had been issued as a result of the application being brought, he was entitled to his costs, but the respondent contested this and in the result further papers have been filed by both parties dealing only with the issue of costs.

[3] Prior to the hearing, counsel for the respondent indicated that he wished to apply for leave to file additional affidavits and that if successful, a postponement would be necessary. The additional affidavits were to deal with the content of the clearance certificate which was provided by the respondent and which reflects the date of signature thereon as 28 February 2011. In order to avoid further delay the applicant recorded that it would place no reliance on the date of the clearance certificate or its contents and the matter was then argued, without the need for further affidavits.

[4] The case for the respondent is that it was entitled to delay the issue of the clearance certificate as the trustees were in the process of implementing a special levy and that the Annual General Meeting of the owners of the respondent had been called for 17 March 2011 at which meeting a levy increase is to be introduced, effective from 1 March 2011.

Consequently the respondent says it was not in a position to issue the levy clearance certificate until such time as the special levies and other levies had been paid and / or secured by the applicant.

[5] The further papers which have been filed reveal that the issue of special levies was brought to the attention of the applicant for the first time only after service of the papers on the respondent. The respondent has produced a resolution ostensibly passed by two trustees of the respondent on 3 March 2011 in which it is resolved to raise a special levy with effect from 18 March 2011 and which it is recorded that the special levy is to be raised in instalments over the next four months starting on 1 April 2011. The applicant's attorneys were advised of the resolution on 3 March 2011 and in response thereto paid or secured the amounts required by the respondent in respect of the special levies in order to obtain the clearance certificate. The applicant contends however that when the papers were served no resolution had been passed and that the resolution was in effect passed in order to delay the issue of the clearance certificate.

[6] For a number of reasons the explanation proffered by the respondent is unconvincing to say the least.

6.1 When the managing agents informed the applicant's attorneys of the amount which had to be paid in order to obtain a clearance certificate, no mention was made of any special levies; and when payment was effected on 17 February 2011 there was also no mention of any special levy.

6.2 The resolution was passed only after service of the papers on the respondent on 2 March 2011.

6.3 The resolution ostensibly passed by the trustees on 3 March 2011 was to the effect that the special levy would be raised over four months starting only from 1 April 2011.

6.4 It seems clear that when the respondent's attorneys wrote to the applicant's attorneys on 3 March 2011 they themselves were unaware of the fact that a resolution was to be passed that day or had been passed that day.

6.5 The chairman's report for the Body Corporate for the year ended 30 June 2010 which was signed by Phelan in February 2011 contains the following single reference to a special levy:

"In addition we believe a special levy is needed to address the deficit position to date and will be discussed at the AGM."

Clearly the intention had been to deal with a possible special levy only at the AGM. There is no indication in the papers that at the time the papers were served a date for the AGM had been set.

[7] In my view a strong inference to be drawn from the facts is that the resolution ostensibly passed by trustees of the Body Corporate on 3 March 2011 was prompted by the service of the application on the respondent and but for that service would in all probability not have been taken at any stage prior to the Annual General Meeting. There is therefore in my view no basis for the submission that the respondent should not pay the costs of the application because it was entitled to delay the issue of the clearance certificate resulting from the resolution taken on 2 March. As already indicated, the applicant's attorneys were informed by the agents for the Body Corporate of the amount due in order to obtain a clearance certificate on and that the amount or amounts specified by the agents were paid by the applicant on 17 February 2011. Inasmuch as the respondent may have been concerned about recovering any special levy which might be passed at a meeting on 17 March had

transfer of the property not been registered by that date, protection for the respondent is afforded in terms of section 37(2)(a) of the Act which provides that levies are recoverable from owners of units at the time that a resolution to raise levies is validly taken.

[8] In the final analysis a clearance certificate was issued only after the applicant launched proceedings against the respondent to procure the issue of the certificate which in all the circumstances which I have sketched could and should have been issued immediately after the amounts due for the certificate were paid.

[9] In the circumstances, the respondent is ordered to pay the applicant's costs.



R B CLEAVER