Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 7729/2012

In the matter between:

THE BODY CORPORATE OF THE PEAKS
SECTIONAL TITLE SCHEME, NO: SS 230/2002 Applicant

And

DEAN ALAN PR1NSLOO N.O. (ID NO:)
(in his capacity as Executor of ESTATE LATE ROUMEN
MIRTCHEV SPASSOV) (ID NO:) First Respondent

VESKA TIHOMIROVA MEDJIDIEVA SPASSOVA
(ID NO:) Second Respondent

JUDGMENT: 20 SEPTEMBER 2012

MEER J.

Introduction

[1] The applicant applies for the provisional sequestration of the respondents' estate. The basis of the application is a claim in an amount of R1 10,725.37 which the applicant contends that it has against the respondents for levies owing to the applicant as the Body Corporate of the Peaks Sectional Title Scheme. The respondents oppose the sequestration. In so doing they dispute the applicant's claim against them, deny that the estate is insolvent and contend that a sequestration will not render any benefit to creditors.

Parties

[2] The applicant is the duly registered Body Corporate of the Peaks Sectional Title Scheme, NO: SS230/2002 ("'the Peaks"). The second respondent and her husband, the late Roumen Mirtchev Spassov ("the deceased''), were joint owners of a Sectional Title Unit situated at the Peaks, namely Section 61, commonly known as flat 24 the Peaks, Paseta Street, Rosen Park, Bellville, Cape ("the immovable property"). They also owned an undivided share in the common property. The first respondent is the duly appointed executor of the estate of the late Roumen Mirtchev Spassov ("the deceased'). The deceased was at the date of his death in July 2009 married to the second respondent in community of property.

Background Facts

[3] Default Judgment was granted against the second respondent and her late husband on 8 December 2009 for payment to the applicant of the sum of R33 256,91 together with interest at 15.5% per annum, from 19 November 2009 to date of payment, plus costs on the scale as between attorney and client. The judgment, was granted in the Cape Town Magistrate's Court, is for outstanding levies in respect of the immovable property. The founding affidavit of Leigh Maingard a director of Diamond Property Management, the Managing Agents of the applicant, contends that further levies have been incurred since the default judgment was granted and that the respondents are presently indebted to the applicant in the sum of R110 725,37, which includes costs incurred to date. The applicant holds no security for the debt.

[4] In pursuance of the judgment and recovery of arrear levies, the applicant obtained an order in the Cape Town Magistrate's Court in terms of Section 66(1)(a) of the Magistrate's Court Act No 32 of 1994 for the immovable property to be declared specially executable. A sale in execution was arranged to take place on 22 February 2011. The sale did not however proceed because on 21 February 2011 notification was obtained that the second respondent had published a notice (in the Government Gazette of 18 February 2011), for the voluntary surrender of the estate of the respondents.[1].

[5] On 22 February 2011 Maingard was informed by Mr Besselaar of Bisset Boehmke McBlain Attorneys, who were winding-up the estate of late RM Spassov, that a substantial payment in respect of the arrear levies would be made.

[6] On 25 February 2011 Maingard wrote to Bisset Boehmke McBlain Attorneys confirming the undertaking to make payment of the arrear levies and costs in consideration of the cancellation of the

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[1] In terms of Section 4(I) of the Insolvency Act No 24 of 1936 the publication of the Notice of Surrender would have made the sale of the attached property unlawful.

sale in execution. He explained the calculation of the outstanding balance and claimed a total amount of R90 100,55. When no payment was forthcoming a letter followed from Maingard's attorney dated 12 April 2011 stating instructions had been received to arrange a new sale in execution. The letter also informed that the second respondent had refused consent for a private sale of the property to realize funds to pay the outstanding levies.

[7] A response of 19 April 2011 from Bisset Boehmke McBain Attorneys stated ... *"the Estate was not (and still is not) possessed of sufficient cash to pay your client's claim at that time".*

. . In addition, attorney Ken Bredenkamp expressed confidence in his ability to enter into a payment arrangement with yourselves on behalf of the surviving spouse in respect of your client s claim, and we trust that such arrangements have been finalized".

[8] On 5 May 2011 Maingard received an email from the second respondent's attorneys offering to make payments of R6 000,00 per month as from 5 June 2011. A reply of 27 May 2011 from Maingard's attorney stated that concrete instructions from applicant were still being awaited as to whether any further steps in execution should be taken, and requested that in the meanwhile payments of R6 000.00 per month should commence. The founding affidavit records that to date only one payment in the sum of R5 000,00 was made on 14 June 2011. Despite numerous further telephone calls and emails to second respondents' attorneys no further payments were received.

[9] There followed a letter dated 18 July 2011 to the applicant's attorney from HJ Pieterse. the erstwhile executor of the estate, indicating inter alia, that the estate is insolvent. The relevant section of the letter states:

" After conducting certain investigations, some of which remain ongoing, as to the solvency of the Estate the executor is currently, on the available information, of the opinion that the Estate is insolvent ", ...

This report is issued to you in terms of Section 34(1) of the Administration of Estates Act A'o 66/1965 as amended".

Annexed to the letter are two schedules. Schedule A reflects the assets and liabilities of the Spassov Estate. It records the Peaks Sectional Title levy account in the sum of R90 000.00 as a liability. Schedule B reflects claims in favour of the estate which are being investigated. Annexirre A records that the liabilities exceed the assets by JR.1,914 677.35 (one million nine hundred and fourteen thousand six hundred and seventy seven rand and thirty five cents).

[10] In the answering affidavit filed on behalf of the respondents Dean Alan Prinsloo, who is the current executor of the estate, records his shock that the erstwhile executor and first respondent's legal representatives sought fit to state that the estate was insolvent. Prinsloo points out that the erstwhile executor was at all material times aware that the estate had substantial claims against a third party who had received shares from the late Mr Spassov (to thwart the claims of his wife, the second respondent, against him). The Reserve Bank has caused the shares to be returned to South Africa where they are now in the possession of a Mr Simeon Kennev. These shares it is contended are available, and are more than sufficient for the purposes of settling the applicant's claims. He states that a summons had been issued to recover the shares which are worth a substantial amount of money and the first respondent is entided to dividend payments. As executor of the estate he has instituted an interim interdict to prevent the possessor of the shares from disposing of them. The estate, he contends, has realistic prospects of recovering the shares and far from being insolvent, it is in fact possessed of assets worth millions of rands.

[11] Maingard states in reply that the shares do not form part of the assets in the estate and accordingly may not be taken into account in establishing the value of the estate. According to him it is utterly contrived to state that the estate is possessed of assets worth millions of rands.

[12] On 30 August 2011 Maingard was informed (by first respondent's attorney), that the second respondent's attorneys had indicated that they would sequestrate the estate for their client's maintenance claims. To date the second respondent has not launched a sequestration application. On

22 September 2011 a further letter was addressed to the second respondent's attorneys by Maingard in which he records that the non-payment of levies by the estate and the surviving spouse is causing severe prejudice to the applicant. No response has been received to such letter.

[13] As to the assets and liabilities of the respondents, the founding affidavit records the only asset to be the fixed property at the Peaks of which the respondents are the registered owners in equal undivided shares. The property was purchased on 17 July 2006 for R1 500 000.00 and there is a bond in favour of Absa Bank Limited for that amount. The market valuation of the property as per a valuation obtained by the applicant is reflected as R1 450 000.00. The founding affidavit records the liabilities to amount to approximately R1 610 725.37 being the bond of R1 500 000.00 plus the arrear levies of R110 725.37, plus estate agents commission and VAT of R123 975.00, giving a total liability of R1 734 700.00. Hie total liabilities less the value of the property of R1 450 000.00, gives an amount of R284 700.30, which says Maingard is the amount by which respondents' liabilities exceed their assets.

[14] The answering affidavit of Prinsloo contends that there would be no benefit to creditors flowing from a sequestration because the secured bond holder's claim would be in excess of the value of the property on these figures. Prinsloo contends moreover that a sequestration would incur additional costs as opposed to a liquidation by him as executor. In reply Maingard states that on further investigation into the financial status of the estate he has discovered that the second respondent is also the registered owner of an immovable property situated at 43 Trichardt Street, Welgemoed. Bellville and attaches a deeds office search in this regard. It is to be noted that Schedule A attached to the letter of 18 July 2011 of the erstwhile executor of the estate reflects this property as an asset in the Spassov Estate, and records its value as R2 600 000.00 (two million six hundred thousand rand).

[15] On the above information the applicant contends that the respondents have committed an act of insolvency within the meaning of the Insolvency Act and/or are insolvent in that they are unable to meet their indebtedness to their creditors, and thus unable to pay their debt to the applicant.

[16] It would be to the advantage of the creditors, contends the applicant if the respondent were to be sequestrated and a trustee appointed to investigate and manage the affairs of the respondents. The non-payment of levies and the considerable arrears which are increasing continually on a monthly basis, are causing severe prejudice to the applicant as well as to the other owners in the building who will in all likelihood be compelled to pay a special levy as a result of the respondents' failure to pay levies. It is submitted that it would be just and equitable if the respondents are sequestrated so as to put an end to their increasing indebtedness.

[17] To this Prinsloo, the executor responds that the flat has been let and there is a monthly income which can be utilized for the purposes of paying the arrears and preventing further levies from increasing. He denies that there is any need to put an end to the increasing indebtedness *of* the respondents. He does however state that it will take some time for the arrears to be paid off. The replying affidavit counters that the respondents have furnished no proof that the flat has been let or that there is a monthly income. Neither has any attempt been made to pay the arrears since reneging on the undertaking in May 2011 to pay R6 000.00 per month.

[18] In the light of the aforementioned background facts, Mr Cutler on behalf of the applicant submitted that the applicant has established *primu facie* that the three requirements for insolvency, as

specified at Section 10 of the Insolvency Act No 24 of 1936. It has shown, he argued, that it has a liquidated claim of at least R100.00 as is specified at Section 9 of the Act. that the respondents have committed an act of insolvency or are insolvent, and that there is reason to believe that it will be to the advantage of creditors if their Estate is sequestrated. I commence with considering if the threshold requirement of a liquidated claim has been established.

Does the Applicant have a liquidated claim as specified at Section 9 of the Insolvency Act?

[19] Mr Van Zyl for the respondents disputed that the applicant had established prima l'acie a liquidated claim in terms of section 9 of the Act, and sought the dismissal of the application for this reason. A claim had not been established, he argued, because liability for the levies claimed by the applicant had not accrued. Section 37(2) of the Sectional Titles Act specifies, that liability for contributions levied, accrues from the passing of a resolution to that effect by the Trustees of the Body Corporate. No resolution by the Body Corporate was passed and there is consequently, so the argument went, no liability or accrued claim. There could accordingly not have been compliance with Section 9(2) of the Insolvency Act and the establishment of a liquidated claim, and the sequestration application, he submitted, must be rejected.

[20] Mr Cutler conceded that no resolution had been passed in terms of Section 37(2) of the Sectional Titles Act. He however submitted that in view of the admission of liability to pay the applicant's claim (which included untaxed legal fees and costs), as per the letter from the attorneys for the estate of 19 April 2011, and the further unequivocal admissions of liability, (including liability in respect of the default judgment claim) without raising any dispute by the first respondent's erstwhile attorney of record duly instructed by the erstwhile executor, the first respondent had waived, abandoned and/or pre-empted any right to claim that the default judgment was improperly taken. I note that an

application for rescission of the judgment granted by default has already been launched. This aspect can and no doubt will more appropriately be canvassed during those proceedings and need not be considered here.

Estoppel

[21] Mr Cutler further argued that the erstwhile executor's various acknowledgments of liability for the applicant's claim were irrevocably binding on the first respondent deceased estate and that the first respondent was estopped from now denying liability for the applicant's claim. Notwithstanding the failure of the applicant itself to comply with section 37 of the Sectional Titles Act, he argued that it should be entitled to rely on estoppel

[22] Mr Van Zyl attacked the admissions, submitting they were nothing more than inadmissible and manifestly incorrect expressions of opinion by the erstwhile executor and should be disregarded. He called for the admissions to be disregarded, relying on the following extract from *Canaric NO* v *Shevil's Garage* 1932 TPD 196 at 199:

> *"*... the Court may disregard an admission made in the pleadings where it is clear ufler a full investigation that this admission is contrary to the facts and where injustice will result from an adherence to the admission

[23] It has not been made clear to me after a full investigation that the admissions made by the erstwhile executor and attorneys were contrary to the facts. The respondents certainly have not proved that the admissions were manifestly incorrect as contended on their behalf. I note moreover that since the erstwhile executor himself states in the letter of 18 July 2011, that the executor is on the available information of the opinion that the estate is insolvent, there is no substance in the complaint that the admissions are not confirmed on affidavit by the erstwhile executor or that they are inadmissible hearsay. In the circumstances the admissions do not fall to be disregarded. This being so I now turn to consider whether the respondents can be estopped from denying liability.

[24] The circumstances under which estoppel is raised in this case, pose the question whether the applicant can invoke estoppel when the applicant itself did not comply with Section 37(2) of the Sectional Title Act, and the taking of a resolution prescribed therein. Put differently can estoppel come to the rescue of a party who has acted contrary' to a statute and who has thereby performed an invalid act?

[25] Mr Cutler argued that the plea of estoppel should prevail. He submitted that public policy should preclude debtors like the respondents from hiding behind a technical defence that no debt had accrued because a resolution in terms of Section 37(2) of the Sectional Title Act had not been passed. In support of this submission he drew attention to the following extract from *Levi and Others* v *Zalrut Investments (Ply) Ltd* 1986(4) SA 479 (W) at 487 F - H where Van Zyl J stated:

"In any event, even in the case of illegal or invalid acts, should there be no considerations of public policy which militate against the recognition of estoppel, estoppel may still be raised. See Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A) at 415-416 A (per HOEXTER A.JA as he then was):

"The doctrine of estoppel is an equitable one, developed in the public interest, and it seems to me that, whenever a representor relies on a statutory illegality, it is the duty of the Court to determine whether it is in the public interest that the represent ee should be allowed to plead estoppel. The Conn will have regard to the mischief of the statute on the one hand and the conduct of the parlies and their relationship on the other hand."

[26] The genera! principle is that estoppel is not allowed to operate in circumstances where it would have a result which is not permitted by law. A defence of estoppel cannot be upheld if its effect would be to render enforceable what the law, be it the common law or statute law, has in the public interest declared to be illegal or invalid. See the Chapter on Estoppel by P J Rabie in Lawsa Volume 9 (2nd Edition) paragraph 673. The principle finds firm and unequivocal articulation by the Supreme Court of Appeal at various passages in the case of City of Tshwane Metropolitan Municipality v

RPM Bricks 2008 (3) SA (1) SCA. At paragraph 16, it was stated by Ponnan JA:

"It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine of estoppel (Trust Bank van Afrika Dpk v Eksteen 1964 (3) SA 402 (A) at 411H-4 HR), for to do so would be to compel the defendant to do something that the statute does not allow it to do. In effect therefore it would be compelled to commit an illegality (Hoisain v Town Clerk. Wynberg 1916 AD 236)."

At paragraph 23 D-F:

"Estoppel cannot, as 1 have already staled, be used in such a way as to give effect to what is not permitted or recognised by law. Invalidity must therefore follow uniformly as the consequence. That consequence cannot var\> from case to case. "Such transactions are either all invalid or all valid. Their validity cannot depend upon whether or not harshness is discernible in a particular case" (per Marais JA in Eastern Cape Provincial Government & others v Contractprops 25 (Fly) Ltd20U1 (4) SA 142 (SCA) paragraph [9])... "

And further at paragraph [24] H-J:

"The approach advocated by the learned Judge, if endorsed, would have the effect of exempting courts from showing due deference to broad legislative authority, permitting illegality to trump legality and rendering the ultra vires doctrine nugatory. None of that would be in the interests of justice. Nor. can it be said, would any of that be sanctioned by the Constitution, which is based on the rule of law, and at the heart of which lies the principle of legality."

In the matter of *Philmatt (Pty) Ltd* v *Mosselbank Developments CC* [1996] 1 All SA 296 (A) at 304 i-j Grosskopf JA stated:

*"*Generally, where a statute requires that certain formalities have to be complied with in order to render a transaction valid, a failure to comply with such formalities cannot be remedied by estoppel (see Rabie, The Law of Estoppel in South Africa, 106, and authorities there referred to). "

See also *Slrydom* v *Land-en Landboubank van SA* 1972 (1) SA 801 (A) at 803H to 804D, in which Rumpff JA similarly held that estoppel will not be permitted if by doing so a result would be achieved which is contrary to the intention of the legislature; *Stand 242 Hendrik Potgieter Road Ruimsig (Ply) Lid and another v Gobel NO and others* [2011] 3 All SA 549 (SCA) at paragraph 23 where Lewis JA similarly endorsed the principle that estoppel cannot operate to allow a contravention of a statute.

The above statements, by the Supreme Court of Appeal, which take precedence over the *dicta* in

Levi *supra* relied upon by the applicant, are not qualified by considerations of equity.

Christie, in The Law of Contract in South Africa Sixth Edition at page 409 aptly states:

"The equities surrounding the estoppel ("the conduct of the parties and their relationship") should be taken into account, but no matter how strong these equities the court cannot nullify the statutory provision".

The statutory provision at Section 37 (2) of the Sectional Title Act cannot be nullified by the equities surrounding the estoppel or the conduct of the parties in the instant case. The statutory provision is designed to ensure that any action for the claiming of levies by the Body Corporate is sanctioned by the trustees. The section clearly states that liability for such levies accrues from the passing of such a resolution and thereby protects sectional title holders from claims for levies which have not been approved by the trustees. Should the application of estoppel be allowed a result would be achieved which is contrary to the intention of the legislature. See *Strydom supra; See* also *Farren v Sun Services SA Photo Trip Management* (Pty) Ltd [2003] 2 All SA 406 at paragraph 18.

[28] In the light of all of the above the defence of estoppel cannot prevail against the failure by the applicant to comply with the statue.

[29] Mr Cutler argued in the alternative that even if the applicant's reliance on estoppel did not succeed, the applicant was entitled to a claim for legal fees under Management Rule 35 (1) promulgated under the Sectional Tiles Act. In terms of such Rule an owner in a Sectional title Scheme is liable for all legal costs incurred by the Body Corporate in recovering arrear levies. No resolution was required for the recovery of such fees so the argument went. I do not agree. Given that the legal expenses flow from a claim for levies which had not accrued in the absence of a resolution, such expenses in my view had similarly not accrued.

[30] It follows from my finding that the applicant is precluded form invoking the defence of estoppel

and my rejection of its alternative claim for legal expenses, that the applicant has not shown it has a claim for outstanding levies that had accrued or a claim for legal expenses. There has accordingly not been compliance with section 9 (2) of the Insolvency Act in that the first threshold requirement for ihe granting of a provisional sequestration, namely prima facie proof of a liquidated claim of at least R100 against the respondents has not been established. 1 am accordingly on the papers before me unable to grant the application.

I order as follows:

1. The application is dismissed with costs.

Y.S. MEER

Judge of the High Court