

1998-11-26

In the matter between

DATE 20/4/2007

QUEENSGATE BODY CORPORATE

Appellant

MARCELLE JOSIANNE VIVIANNE CLAESEN

Respondent

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J U D G M E N T

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BLIEDEN, J: The respondent is the owner of two sectional title units in a sectional title housing project known as Queensgate. The project is a sectional scheme as envisaged by Act 95 of 1986 (the Act). The respondent and the body corporate of Queensgate (the appellant) were in dispute with each other. For the purposes of this appeal the facts relating to the dispute are not relevant save that as a consequence of this dispute the respondent refused to pay the monthly levies to the appellant as she was obliged to do. In the papers before the court *quo*, she claimed to be entitled to act in this way. This was disputed by the appellant.

As a result of the respondent's refusal to pay the monthly levies

the appellant cut off the electricity supply to her two units. The appellant claimed that it was entitled to do this because of rule 15 of the house rules which were promulgated in terms of the Act. The rule reads:

"15. Levies

a) Owner shall pay to the trustees or to the duly appointed managing agents levies due by them in terms of the rules for the control and management of the property on or before 7th day of each calendar month.

Should any owner be persistently late in paying levies the trustees at their sole discretion shall have the right to compel the owner to pay an amount equal to six months levies as a deposit.

b) In addition to the above the trustees shall have the right to

i) disconnect the electricity supply to the relevant unit until payment is made

ii) proceed with any rights the body corporate may have in law for the recovery of any amount due

iii) suspend any or all other services to the relevant unit for such time as they may consider necessary."

On behalf of the respondent it was submitted that the appellant's action in cutting off the respondent's electricity supply constituted an act

of spoliation which entitled the respondent to an order to have the electricity supply immediately restored to her.

The magistrate upheld the respondent's contentions and granted an order as prayed for by the respondent. It is against this order that the present appeal has been brought.

The legal remedy of *mandament van spolie* has been part of our law for generations. Its scope has been admirably summarised in the old Transvaal full bench decision of *Nino Bonino v De Lange* 1906 TS 120 at 122 where *Innes, CJ* said:

10        "It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so the court will summarily restore the status quo ante and will do that as a preliminary to any enquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear."

20        On behalf of the appellant counsel in his heads of argument conceded that depriving a party of electricity supply as was done in the present case was an invasion of that person's possessory rights and could justify spoliation proceedings. See *Froman v Herbmores Timber and Hardware (Pty) Limited* 1984 (3) SA 610 (W). However he submitted that in the instant case the deprivation was lawful by virtue of the provisions of the Act and the house rules promulgated in terms thereof and that it:

"occurred with at least the tacit consent of the respondent"

It is of course a defence to any application based on the mandament van spolie that the spoliated party consents to the spoliation. For this latter defence counsel relied on two facts, firstly that when buying into the complex the respondent accepted the house rules as being binding on her and secondly that on a previous occasion approximately a year before the respondent had accepted the cutting off of her electricity supply by doing nothing about it when it occurred.

10 Dealing with the last proposition first, the fact that the respondent had agreed to be spoliated a year before does not assist the appellant. Her claim before the magistrate's court was based on one event and that was the only one relevant at the stage of the hearing. As regards the first proposition I can do no better than to again quote from the judgment of *Innes, CJ* in the *Nino Bonin* case where the learned chief justice dealt with a clause in a lease which purported to prevent a party who had breached a lease having access to the leased premises without the lessor having to have any recourse to law. At page 123 his lordship said:

20 "Under these circumstances does a clause of this kind place the lessor in any better position than he would have occupied without it. In my opinion it does not and for the simple reason that the court cannot recognise such a provision. It is an agreement which purports to allow one of two contracting parties to take the law into his own hands to do that which the law says only a court shall do, that is to dispossess one person and to put

another person in the possession of the property. It purports to allow the lessor to be himself the judge of whether a breach of contract has been committed and having decided in his own favour to allow him of his own motion to prevent the lessee from having access to the premises. Only a court of law can do these things. The parties cannot stipulate to do it themselves."

The appellant's attempt to distinguish the present case from *Nino Bonino* because the house rules are sanctioned by Section 35 of the Act is without merit. The relevant portions of Section 35 of the Act read:

10           "35. Rules

1. The scheme shall as from the date of the establishment of the body corporate be controlled and managed subject to the provisions of this Act by means of rules.

2. The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property and shall comprise -

a) management rules prescribed by regulation which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register to the extent prescribed by regulation which rules may be substituted, added to, amended or repealed from time to time by unanimous resolution of the body corporate as prescribed by regulation.

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b) conduct rules prescribed by regulation which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of the sectional title register and which rules may be substituted, added to, amended or repealed from time to time by special resolution of the body corporate, provided that any conduct rule substituted, added to or amended by the developer or any substitution, addition to or amendment of the conduct rules by the body corporate may not be irreconcilable with any prescribed management rule contemplated in paragraph (a)."

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The fact that the house rules have been drawn up in accordance with the provisions of Section 35 of the Act does not elevate them into anything more than an agreement between the unit holders themselves and the appellant. The analogy between the house rules and the Articles of Association of a company as suggested by the respondent's counsel in his heads of argument is a valid one. That was said by *Trollip, JA in Gohlke & Schneider and Another v Westies Minerale Eiendoms Beperk and Another* 1970 (2) SA 685(A) at 692F-G:

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"The articles therefore merely have the same force as a contract between a company and each and every member as such to observe their provisions..."

The clause giving the appellant the right to cut off electricity of any unit owner who is in arrears with his or her levies is clearly contrary to the common law. It constitutes nothing but a power to interfere with such

person's right to use the existing electricity supply. The instant case is an *a fortiori* example of spoliation. Here unlike the *Nino Bonino* case, no court would have had the power to deprive any holder of his or her electricity supply in the circumstances the appellant has done. It is a clear act of spoliation and there was no consent valid in law to such an act. In the circumstances the magistrate was correct in making the order which he did. I would therefore dismiss this appeal with costs.

SEROBE, AJ: I agree

BLIEDEN, J: It is so ordered.