

FRAMING THE BODY CORPORATE'S CLAIM AGAINST THE DEVELOPER FOR BUILDING NEGLIGENCE

Central Developments Tshwane (Pty) Ltd and Another v Body Corporate, Twee Riviere Aftree Oord (635/2019) [2020] ZASCA 107 (21 September 2020)

It is perhaps surprising that something so simple had to be clarified by our appeal court. Here, the body corporate instituted action against the developer of a retirement scheme for negligence in the building works. The claim was based on the Sectional Titles Schemes Management Act's provision in section 7(2)(e) that allows it to institute action against a developer on the strength of a special resolution. The special resolution was absent, but the court noted that the Act also empowers the body corporate, in section 7(2)(b), to institute proceedings for damage to the common property sans the requirement of a special resolution. As the damages in the present matter were in respect of common property, the body corporate indeed had the right to proceed, even absent a special resolution.

The Judgment can be viewed [here](#).

FACTS

Central Developments Tshwane (Pty) Ltd ('the developer') was the developer of the Twee Riviere Aftree Oord, a retirement village consisting of 448 units. The development was opened as a sectional title scheme.

The body corporate instituted action against the developer based on an allegation that the design and construction of portions of the common property - more specifically the foundations of the courtyard and patio walls as undertaken by the developer - were defective, and that it resulted from the developer's negligence.

The body corporate instituted two actions in the Gauteng Division of the High Court, Pretoria, seeking to recover damages (the cost of remedying the alleged defects). The cause of action was primarily couched in delict*, ie based on the developer's negligence, with alternative claims for the same damages based on the existence of latent defects or misrepresentations to purchasers of units in the retirement village. (**Delict: The law of delict engages primarily with 'the circumstances in which one person can claim compensation from another for harm that has been suffered'. The basic elements to succeed with a claim in delict are conduct, wrongfulness, fault, causation and damage.*)

The developer raised a special plea related to the body corporate's authority to institute these proceedings. It alleged that the body corporate was precluded from suing, because they had not secured a special resolution of their members as required by section 2(7)(e) of the Sectional Title Schemes Management Act 8 of 2011 ('the Management Act') before commencing action. The body corporate however contended that the failure to obtain a special resolution was capable of subsequent ratification.

The special plea was dismissed in the court *a quo*, that court declaring that the failure to obtain a special resolution (as envisaged in section 2(7)(e) of the Management Act) before the institution of the actions by the body corporate was capable of being ratified. It therefore declared that the body corporate must procure a special resolution, within 6 months of the order, ratifying the institution of the action.

The body corporate appealed this finding. At the time of the appeal the body corporate had not yet obtained a special resolution.

HELD

- Sectional title schemes were introduced in South Africa by the Sectional Titles Act 66 of 1971 (the 1971 Act), which was replaced in 1986 by the Sectional Titles Act 95 of 1986 (the 1986 Act).
- Both of these empowered a body corporate to sue or be sued in its corporate name in respect of:
 - “(a) any contract made by it;*
 - (b) any damage to the common property;*
 - (c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;*
 - (d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule.”* (Our emphasis.)
- In 1992, this section was amended by the addition of a further subparagraph, reading *“(e) any claim against the developer in respect of the scheme if so determined by special resolution.”*
- When portions of the 1986 Act were repealed and replaced in 2011 by the Management Act, the section, as so amended, was re-enacted as section 2(7) reading as follows:

“The body corporate has perpetual succession and is capable of suing and being sued in its corporate name in respect of—

 - (a) any contract entered into by the body corporate;*
 - (b) any damage to the common property;*
 - (c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;*
 - (d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rules; and*
 - (e) any claim against the developer in respect of the scheme if so determined by special resolution.”*
- The basis for the developer’s special plea in this matter was that, because the claim lay *against the developer*, a special resolution was a pre-requisite required before the body corporate was entitled to commence legal proceedings against it. The absence thereof contravened the requirements of section 2(7) of the Management Act and accordingly the body corporate lacked the power or authority to pursue the action against the Developer.
- The argument failed on two grounds:
 - i. Firstly, inasmuch as it was based only on section 2(7), there is no gainsaying that the decision may be ratified and that the body corporate could therefore attend thereto in due course;
 - ii. More importantly, the developer’s argument failed to enquire whether the antecedent assumption - that the source of the body corporate’s power to sue the developer in this matter lay in section 2(7)(e) of the Management Act - was correct.
- The damage complained of was in respect of areas in the scheme that were common property. Thus, the claim of the body corporate is based on section 2(7)(b) and a special resolution was not required. The assumption incorrectly overlooked section 2(7)(b), which empowered the body corporate to sue in respect of any damage to the common property, without the need to obtain a special resolution by the unit owners.

CONCLUSION

The special plea therefore failed. (More detailed discussion from the judgment:

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- i. The common property in a sectional title development is owned jointly by the section owners in undivided shares. In the present case, that would ordinarily mean that any damage unlawfully caused to the common property could only be recovered in proceedings brought by the owners of the 448 units in the retirement village acting jointly. Such an arrangement would be practically difficult, and possibly unworkable, in most sectional title schemes. Accordingly, section 28(6)(b) of the 1971 Act, section 36(6)(b) of the 1986 Act, and section 2(7)(b) of the Management Act all empowered bodies corporate of sectional title developments to sue in their own name to recover damages arising from damage caused to any part of the common property.
- ii. There is an underlying logic to this provision. Under section 3(1)(a)(i) of the Management Act the body corporate is obliged to establish and maintain an administrative fund which is reasonably sufficient, among other matters, to repair and maintain the common property. Under section 3(1)(i) the body corporate is obliged to insure the buildings forming part of the development, which would include structures forming part of the common property. Where such structures are damaged by third parties it is appropriate that the body corporate should be entitled to recover those damages. Indeed, if it did not have that power, it might be debatable whether it had an insurable interest in the buildings it was obliged to insure. Be that as it may the power to sue in their own name is vested in all bodies corporate in relation to claims for damage to the common property.
- iii. In *Oribel Properties* it was stated that section 36(6)(b) of the 1986 Act conferred a power to sue for damage to the common property that bodies corporate would not otherwise have enjoyed. The same would have been true of that provision as well. The same power is now derived from section 2(7)(b) of the Management Act.
- iv. The effect of the provisions of section 36(6) of the 1986 Act was explained in that judgment as follows: 'A body corporate is constituted by law, and it is charged with responsibility for the enforcement of the rules and the control, administration and management of the common property for the benefit of all members. A body corporate has perpetual succession and is capable of suing or being sued in its own corporate name in respect of the five matters referred to. Some of the powers, such as the one in paragraph (a) are only declaratory, but the power granted in paragraph (b) – and in some circumstances paragraph (c) as well – gives it an entitlement it would otherwise not have had under normal circumstances, only the owners of the common property, ie the owners of the sections, would have been able to do so jointly as the common property is owned by them jointly. Section 36(6)(e) also bestows a power it would not otherwise have had on the body corporate: there is no contractual arrangement between the developer and the body corporate and, while there may be cases where a developer is contractually bound to a sectional owner to give effect to the scheme, the body corporate is in no such relationship with the developer. . . . The body corporate is empowered by section 36(6)(e) to institute proceedings against the developer 'in respect of the scheme; if so determined by special resolution'. This general power of the body corporate, however, does not detract from this specific right given to the individual or owner under section 25(13).'
- v. Neither the language nor the context of section 2(7)(b) suggests that the power to sue to recover damages arising from damage to the common property is confined to damage caused by parties other than the developer of the sectional title development. Where the damage is occasioned by defects in the original design and construction of the structures on the common property, such as the foundations that are the *casus belli* (reason for the dispute) in the present case, the developer is an obvious target for any claim. Others who may be liable are the architect, the engineer and the builder. There is no question that they can be sued by the body corporate in its own name without the need to obtain a special resolution.
- vi. The inevitable outcome of this analysis is that the body corporate in this case did not require the authority of a special resolution in order to pursue the claims advanced by it. The special plea was accordingly bad in law as it proceeded from a misconception as to the body corporate's powers.)