THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal
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Henque 1838 CC v Maxprop Holdings (Pty) Ltd and Others (759/2022) [2023] ZASCA 131 (12 October 2023)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs together with costs of two counsel, an appeal against the decision of the Kwa-Zulu Natal Division of the High Court, Durban (high court).

This appeal stemmed from a third application launched by the appellant (Henque) in the high court on 2 July 2018. Initially Maxprop, Kirtlington Park (KP1) and Kirtlington Green (KG), were cited as the respondents. Kirtlington Park 2 (KP2), Kirtlington Park 3 (KP3), the Kirtlington Park Home Owners Association (KPHOA), and the remaining seven KG property owners were subsequently added as respondents.

Henque demanded repayment to KG of funds allegedly misappropriated by Maxprop from KG's bank account and transferred to KP1's bank account for the benefit of the KPHOA (the main relief). It also sought various ancillary orders (the ancillary relief). According to Ms Thomson (sole member of Henque and trustee of KG), she discovered that unlawful appropriations had been made from KG's bank account, and that its draft financial statements for the fiscal year ending 30 June 2017 had been drafted on the strength of these transactions. Maxprop and KP1 denied that unlawful transfers were made from KG's bank account to KP1's and that its financial statements for that fiscal year contain incorrect entries, as claimed by Ms Thomson. Maxprop stated that all payments it had made were in accordance with KG's former trustees' instructions or were made in the ordinary course of KG's management.

At issue in this appeal was the standing of a sectional title owner to litigate in its own name for the repayment to the body corporate of funds that such owner alleged were unlawfully paid from the body corporate's bank account to the recipient thereof.

On 7 July 2022, the high court dismissed, with costs, the application of Henque for lack of standing. Aggrieved by the high court's decision, Henque appealed the decision with the leave of the high court.

The SCA also agreed with the high court and held that Henque did not establish its own direct and substantial interest in the relief claimed. The genesis of those claims was s 2(7) of the Sectional Title Schemes Management Act 8 of 2011 (the Act), and not the common law. They were not for payment to Henque itself, or for the correction of its own financial statements. On the contrary, the claims asserted by it were for repayment to KG, the correction of KG's financial statements, and declarators relating to KG's liabilities and funds. This was a clear indicator that those were claims in the hands of KG alone. The alleged loss was suffered directly by KG. The nature of the rights and claims asserted by Henque derived from s 2(7) of the Act. A sectional title owner, such as Henque, was enjoined to follow the steps prescribed by s 9 if it wished to assert a right and claim in terms of s 2(7). Henque did not do so. Thus the conclusion of the high court cannot be faulted, and in the result the appeal must fail.

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