`

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

…….. ……..

CASE NO 2014/31526

In the matter between:

BUSHWILLOW PARK HOME OWNERS **Applicant**

AND

PAULODE OLIOVIERA FERNANDES **First Respondent**

LUISA CRISTINA NASCIMENTO ABREU FERNANDES **Second Respondent**

JUDGMENT

HEADNOTE

Representative committee of a housing estate applied to enforce its authority under the rules of the homeowners association

The rules of the association stipulated that, among other matters, home owners were all bound by the rules of the association – committee contending that the rules, properly interpreted provided that prior permission was required for a choice of exterior paint colour to be applied to any building within the estate - such view contested by respondents who had chosen to paint lime green stripes on their house

***Held* that the rules did provide for such authority – despite there being no rule saying in as many words that paint colour had to be approved before use, the rules were express and clear that 'All external finishes and colours should be specified and colour samples may be requested' meant that paint colour to be applied to any building required such approval – the fact that committee, after controversy arose, procuring the association to amend rules to have a rule stating in the exact terms that paint colour had to be approved not evidence nor a consideration that no such authority existed beforehand**

***Held* that the respondents in violation of the rules – committee's demand to comply justified – respondent ordered to repaint in an approved colour**

***Held* that as to costs, the relevant factors included the propriety of the committee asserting its authority, and the inequity that would result from a home owner funded committee having to recover the costs of litigation caused by the defiance of its authority by one homeowner – attorney and clients wholly appropriate in the circumstances**

Sutherland J:

Introduction

1. The dispute between the parties is whether the applicant, the governing body of the estate in which the respondents own a home, are vested with authority to approve or disapprove the colour of the paint with which unitholders in the estate may decorate their homes. The respondents saw fit to paint lime green stripes on their house. The applicant contends that it did not authorise that colour and demands the respondents repaint their house in an approved colour. It is common cause that no authority was given. The applicant, in this application, seeks an order, labelled an interdict, but in truth, an order of specific performance of the estate rules which, it is common cause, impose obligations on the respondents as unitholders. The jurisprudential controversy is about whether or not the

rules encompass a power given to the applicant to determine the paint colour to be used on the houses. This case is therefore principally a case about interpretation of those rules. What this case is not about, is whether the choice of lime green stripes is in good taste or not.

2. It is common cause that, at the relevant times, there was no rule which, in as many words, stated that a unitholder must obtain approval for the colour of paint and that the applicant shall exercise a veto over the colour to be used on every unit. Also common cause is the content of the body of rules and regulations applicable to the parties.

3. After the dispute arose, the applicant amended its rules to articulate a rule, in unequivocal terms, to require its permission as to a colour of paint to be used on every unit. It was argued on behalf of the respondent that this decision by the applicant amounts to an implicit acknowledgement that no such rule existed beforehand. I disagree. The fact that it was thought prudent to eliminate the possibility of further controversy over the scope of the applicant's authority is not evidence of a concession that no authority existed in any event. A similar conclusion must be reached about the fact that the respondents ceased to use the lime green paint to paint any further parts of their house once the applicant demanded they stop: that acquiescence is not evidence that the respondents concede that the authority contended for by the applicant existed.

4. There is no material dispute of fact that affects the interpretation question. The parties are at odds over peripheral events, which may be ignored.

5. The approach to interpretation of contracts requires an examination of the words chosen, within the context of the parties' circumstances and relationship. [1]

The Bushwillow Park estate and its body of Rules

6. The estate consists of 591 plots upon which owners may build freestanding homes. The estate is secured and gated. A condition of ownership is that the unitholder becomes subject to the authority of the applicant in several prescribed respects. The relationship between the applicant and all the 591 unitholders is regulated by contract. Self- evidently, the sum of their reciprocal rights and obligations derives soley from contract.[2] The applicant is a representative body elected by all the unitholders. Decisions made by the applicant, through its elected office-bearers, are therefore made within the compass of conferred authority. Axiomatically, the limits of such authority are determined by the proper meaning to be given to the instruments which articulate that authority.

---

[1] Wallis JA in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18] – [19]. "The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[2] This point was also made by Olsen J in Abraham & Ano v Mount Edgecombe Country Club Estate Management Association two (RF) (NPC) JOL 32322 (KZD) at [23][.

7. In this case the relevant instruments are the Memo of Incorporation (MOI) of the applicant, the House Rules, which address good neighbourliness norms, and the architectural guidelines, which address the structures erected within the estate, their appearances, and the sundry procedures in relation thereto.

8. There is no room to debate the contention that unitholders sacrifice a measure of freedom of choice about the nature of their homes or the uses to which the houses may be put pursuant to these instruments. Typically, in such estate developments, certain attributes are often chosen to characterise the estate. In some cases rigid uniformity is the organising principle. In this case, uniformity was not the norm, but rather, the aesthetics were prescribed in general terms and a range of personal choice was allowed, subject to a veto by the applicant.

9. Although not addressed expressly in any of the instruments, the decisions of an estate governing body are subject to the general norms of reasonableness, and a court may intervene to give relief against capricious decisions. The considerations relevant to that sort of controversy are wholly absent in this case because the resistance to the prayers sought by the applicant is founded on absence of authority, not unreasonableness.

10. MOI 1.1.3 empowers the applicant to prescribe guidelines applicable to the design of 'improvements'.[3] MOI 8.4 and 8.5 address the requirement for approvals prior to any 'building operations' and all 'improvements' must in terms of MO I8.3 comply with the architectural guidelines. These guidelines encompass '…the specifications, materials and

[3] The term "improvements" I understand, in the context of property developments, to refer to any human-driven work that 'improves' otherwise bare land to some use having value. Typically, the establishment of buildings in their entirety.

finishes to be used'. The MOI 5.1.1 provides for '…aesthetic controls [in[relation to improvements …' and MOI 5.1.2 authorises the applicant to vary or amplify these guidelines in respect of, among others, '…exterior finishes….' The MOI 8.1 empowers the applicant to engage an architect to control design matters, including '…the specifications, material and finishes to be used in such erection as well as all matters incidental thereto.'

11. The architectural guidelines, alluded to, are introduced by the statement that the design criteria set out are compulsory. The distinguishing character sought to be achieved by the design criteria for the estate is described thus:

> "These rules set out for prospective homeowners are the design criteria they will have to comply with if they wish to build at Bushwillow Park. The rules have been developed to protect and maintain the unique environmental and physical attributes of the property.
> These are characterised by simplicity, geometric and non-symmetrical order, harmony and visual continuity and are visually set against a simple landscape background of lawns and trees. This is the underlying vision for the architecture of Bushwillow Park."

12. Following that introduction, general rules are provided in paragraph 2. Guideline 2.3 states:

> 'All external finishes and colours should be specified and colour samples may be requested'

13. Guideline 2.3 is located in an extensive set of 'general rules' addressing aesthetics. The significance attached to outward appearances by these general rules is unmistakable. There are 36 outright prohibitions or peremptory prescriptions. Guideline 2.3 is the only one where a submission is called for and the possibility of more detailed interrogation of the unitholders choice is stipulated.

14. The critical question arises whether these rules mean that a unitholder needs authorisation to choose a colour of paint? The respondent argues that they do not.

15. Much of the respondent's counter-arguments are rooted in considerations which are irrelevant. Reference has made to the mechanics of approval obtained when the respondents, some two and half years earlier, bought an existing house and renovated and altered it. A dispute of fact is exists about what the respondents were alerted to or not, at that time, about paint colours. The entire episode about the submission of building plans is quite beside the point at issue in this matter because it is unimportant whether the respondents were alerted or not to any approvals about paint colour given at that time. There is a duty on a unitholder to be aware of the rules governing the estate: and if properly interpreted, they were required to get authorisation of the paint colour, that fact ends the debate about their obligations. Both parties were distracted by this tangent. A second red herring is the allegation of inconsistent application of the rule about paint colours requiring authorisation, assuming such as rule existed; a fact not established on the papers, but in any event, is not a factor that can upset the legitimacy of a demand to comply with the rule, if such a rule exists.[4] A third irrelevancy is the absence of a stipulation in the guidelines about what colours are acceptable. This line of argument is misconceived. The true issue is not about a prescribed range of colours of paint that are acceptable, but rather, solely about the authority to permit or forbid a colour, at the discretion of the applicant.

[4] See Riverland Resort Shareblock (Pty) Ltd v L J Letschert (KZN 2010/3724 25/04/2012 per Swain J at [27] – [28] where it was held that although a cause of action based on a capricious act amounting to an unreasonableness capable of supporting a review of a body corporate's decision could exist, where that remedy is not sought, the mere fact of selective enforcement of a rule is no reason not to order enforcement.)

16. Ultimately, the respondents' best, and perhaps, only point, is that there is no *express* rule. However, this submission must fail for two reasons. First, the text of the rules do indeed speak to control by the applicant over external aesthetics, and although the relevant rules might be accused of a measure of obliqueness, in my view, a fair reading of the rules cited, leaves no doubt that unitholders are obliged to get their paint colours vetted by the applicant. Second, the context of the estate ideal determines how to read the text of the rules; ie the system in place in the estate is one of control and oversight over 'improvements' including in relation to 'finishes' generally, and in guideline 2.3, in respect of paint.

17. The very concept of an estate, and the imposition of controls, as illustrated in the provisions of the various instruments cited, cannot encourage in the mind of any unitholder that there exists a freedom to do as one pleases with the exterior of the house. There is an overriding theme that the houses must 'fit in' and individual choices are fettered by this norm, and enforced through the exercise of the discretion of the applicant. What that means at the level of detail is to be discovered by reading the instruments. If hypothetical unitholders decide that they wish to re-paint their house in a colour different to that existing, their attention must be drawn, by common sense, to the obvious question: to what extent are they restricted, if at all? They cannot avoid asking themselves this question because the norm of restrictiveness permeates the very concept of estate living. this estate, they might look at the instruments to see if a paint colour is prescribed. They would find that it is not. They would however not be left under the impression that they had carte blanche, because they would read, in the architectural guidelines, the injunction of guideline 2.3 cited above, not to mention the other rules to which allusion has been made.

18. Guideline 2.3 cannot, in such a context be understood to mean anything but that unitholders may put forward any colour they like but the applicant shall have the last word.

19. The respondent tries to deflate the force of that rule, and the other related rules cited, as being relevant only to the initial phase of construction. The inspiration to argue this stems from the phraseology employed, which, indeed, is couched in a manner of addressing the initial building work, and the preparations in respect of its design and so forth. However, it would be absurd to understand that such strictures could apply only at one time and not again. Whatever the peculiarities of the terminology, the imposition of control over what a unitholder may or may not do to the exterior aesthetics of his home in an estate are forever, not just when the building is initially constructed. Equally absurd would be to limit the imposition of control to 'building' work as distinguished from 'painting' on the footing that the latter was merely 'decorative'. The critical issue is inescapably the exterior aesthetics of every house. When the text of the rules is read with the function that the rules are meant to fulfil in mind, and read within the context of the dynamics and relationships of inhabiting an estate and being regulated by an elected governing body, in my view, there did indeed exist, at the relevant time, a rule requiring prior consent from the applicant about the choice of a colour of paint.

20. The respondent contends that an interpretation such as that posited for the rule requiring such authorisation would be a tacit term, which, because that was not the case put forward in support of the applicant's claim, it would be illegitimate to uphold the applicant's claim on that basis. In my view, this problem does not arise, as the meaning to be attributed to the text of guideline 2.3 unequivocally subjects paint colour to scrutiny by

the applicant, through its agents. True enough, the words ‘permission’ or ‘authorisation’ are not used. However, notwithstanding the omission of such words, the clear meaning of the phraseology is that the colour must specified and that it is subject to scrutiny. The scrutiny must be, logically, integral to a decision to approve or forbid, a control consistent with the purpose of the guidelines, in the context of the dynamics of estate living.

21. The delay in bringing this dispute to a head was invoked as a rationale for exercising a discretion to refuse relief. The lime green stripes were painted during September 2013. After a fruitless exchange of correspondence, the application was launched on 27 August 2014. The matter was heard in September 2015. Accordingly, two years has elapsed since the saga began. That the applicant did not rush to court is, in my view, not a basis for criticism. Moreover, as I have stated on several occasions in this judgment to emphasise one or another point, the dispute is about the defiance of the applicant’s authority, a defiance which has been ongoing. In my view, there is no culpable delay evidenced by the manner in which the matter has been dealt with, even though it may be regretted it has taken so long.

22. Lastly the respondent contends that if there be any room to misconstrue the rules, the *contra proferentum* rule should be applied. In my view, this need does not arise because there is no danger of misconstruing the rules. Principally, the problem of ambiguity does not arise because the controversy is not about rival interpretations being offered to construe an admittedly ambiguous or vague provision in respect of which, what exactly constitutes compliance is uncertain. The respondent’s case is that no such rule exists at all. Further, the notion does not arise because, in my view, the rule is clear. No risk exists therefore, as cautioned in argument, on behalf of the respondents, that the court might trespass into the realm of making a contract for the parties.

23. It may also be mentioned that no question of estoppel is ventilated.

24. Accordingly, I find that a rule existed that required prior express approval of a paint colour that could be applied to the exterior of the buildings in the estate. Such a rule evidences a clear right by the applicant, as the guardian of the rules, and of the estate to enforce the rule. Defiance of the applicant's authority is a direct harm against which the applicant is entitled to procure relief to prevent or remedy. Specific performance is the only cogent remedy to preserve the integrity of the applicant's authority.

The appropriate relief

25. No sound reason exists why the respondents should not be ordered repaint their house in a colour approved by the applicant at their own cost.

26. It seems to me that a reasonable time within which to undertake that project is 6 months from the date of this order. That allows enough time for an engagement between the parties, and the solicitation of a contractor, if required, to undertake the work.

27. The parties' antagonism towards each other has been palpable. That is regrettable, especially because the several individuals shall have to continue to live with one another. Moreover the intensity of their conduct in the litigation has broadened the scope of the controversy far more than the true issue warranted. The real issue was in truth a clinical question about the meaning of the rules. It could have been resolved more cheaply by focussing on that alone. Part of the reasons for this excessive zeal seems likely to be, one the one hand, a desire to clarify the scope of the applicant's powers and maintain the

credibility of the applicant's authority to function effectively, and on the other, sheer injured pride.

28. It was argued that the respondents have been bona fide throughout this saga. Moreover, it is argued in support of that proposition that a clear articulation of a basis for the rule emerged only in the arguments advanced in the hearing on behalf of the applicant. It is unnecessary to decide the question of bona fides. The question before the court is not a matter of, say, negligence. The issue is simply that the respondents have wrongly denied a proven right of the applicant. They must now comply with the legitimate demands of the applicant.

29. These are matters which are relevant to an appropriate costs order. I am mindful that the any costs to be borne by the applicant shall have to be borne by all 591 unitholders. It seems to me to be unfair that the community, at large, should have to bear such a cost. This is the overriding factor which inclines me to a finding that the respondents, who, however bona fide they might be, must pick up the bill for this case in full. The applicant points out that the rules provide for attorney and client costs, a provision dictated by the relationship of neighbourliness that ought to govern all relationships among the 591 unitholders, and that whoever is responsible for burdening the unitholders with costs of litigation should shoulder that burden. I am unable to reason why that result should not follow in this particular case. Indeed, the burden of having to contribute to the funding of this litigation on the other 590 unitholders might well engender longer lasting and broader enmity. This slate must be wiped clean.

The Order

30. I make an order as follows:

30.1. The respondents shall within 180 days of the date upon which this judgment is delivered, remove the paint that was not authorised by the applicant, and repaint the house in a colour approved by the applicant at their own cost.

30.2. The respondents shall bear the costs of this application on the attorney and client scale.

30.3. In the event that the order in paragraph 27.1 is not complied with, the applicant is given leave to apply for further or ancillary relief on these papers, duly amplified if necessary, on three days' notice to the respondent.

_____

Roland Sutherland
Judge of the High Court,
Gauteng Local Division.

Hearing: 11 September 2015
Judgment: 23 October 2015

For Applicant:
Adv M T A Costa,
Instructed by Crafford Attorneys

For Respondent:
Adv M De Oliviera,
Instructed by Gavin Simpson Attorneys.