REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

17-01-2023
DATE

SIGNATURE

CASE NUMBER: 2021/30916

In the matter between:

THE BODY CORPORATE OF CENTRAL SQUARE
SS661/2017 Applicant

and

PENELOPE BECK-PAXTON N.O First Respondent
ANDRE ANDREAS N.O Second Respondent
THE CHIEF OMBUD OF THE COMMUNITY
SCHEMES OMBUD SERVICE Third Respondent
PHILIP IAN TILLMAN Fourth Respondent

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an application for the review and setting aside of two arbitration awards ('the adjudication orders'), granted by the first and second respondent. The application is brought pursuant to section 6 of the Promotion of Administrative Justice Act, 2000 ('PAJA'), alternatively under Rule 53 of the Uniform Rules of Court. The application is only opposed by the fourth respondent.

[2] The applicant was the respondent in both referrals in terms of s54 of the Community Schemes Ombud Service Act Number 9 of 2011 ('the CSOS Act'). The fourth respondent was the applicant in both referrals. This Court will for purposes of this judgment use the citations in the matter *in casu* to refer to the parties in the adjudication orders. Accordingly, they will be referred to as the applicant and fourth respondent respectively, throughout this judgment.

[3] The additional issues for determination are whether the 2017 certificate should be rectified and whether declaratory relief should be granted in favour of the applicant or the fourth respondent.

[4] The relief sought by the applicant is the following:

'(1) reviewing and setting aside the adjudication orders;

(2) confirming and declaring that the Management Rules prescribed in Annexure 1 of the Sectional Titles Schemes Management Regulations published in terms of the Sectional Titles Schemes Management Act 8 of 2011 ("the STSMA") and as amended by the certificate issued by Helen Margaret Coetzee on 2 October 2017 in terms of section10(2)(a) of the STSMA ("the Certificate") remain valid and binding and applicable to the Sectional Title Scheme known as "Central Square Sectional Scheme" 661/2017 ("the scheme") subject only to any further lawful amendments thereof passed by the Body Corporate of the Scheme and lodged with and confirmed by the Chief Ombud in terms of section 10(5) of the STSMA;

(3) confirming and declaring that:

(a) the value of the votes of owners of units in the Scheme set aside and/or used for residential purposes shall total 50%;

(b) the liability of the owners of units in the Scheme set aside and/or used for residential purposes to make contributions for purposes of section 3(1)(a) or section 3(1)(h) of the STSMA shall, subject to 3(c) below, total a minimum of 60%; and

(c) the liability of the owners of units in the Scheme set aside and/or used for non-residential purposes to make contributions for purposes of section 3(1)(a), or section 3(1)(h) of the STSMA shall be automatically determined by dividing the total area, from time to time, of such sections as reflected on the sectional plan or plan of extension by the total area, from time to time, of sections set aside and/or used for residential purposes and as reflected on a sectional plan or sectional plan of extension, but to a maximum of 40%;

(4) Ordering the Fourth Respondent to pay the costs of this application.'

[5] The declaratory relief sought by the fourth respondent is as follows:

(a) Declaring the 2017 certificate invalid and unenforceable.

(b) Declaring the 2019 amendment to the management rules invalid and unenforceable in terms of s11(2)(a) and s11(2)(b) of the STSMA.

(c) Dismissing the applicant's case with costs, including the costs of Part A of the matter and that the applicant should not recover a *pro rata* share of the contribution towards costs from the fourth respondent.

BACKGROUND

[6] The applicant is a body corporate of a sectional title scheme. The scheme was developed by Lushaka Investments ('Lushaka'). Lushaka sold units within the scheme which were separated into two areas, namely the residential and non-residential sections, thereby comprising a "mixed-use" scheme.

[7] In developing the mixed-use scheme, Lushaka marketed and sold units in the residential section first, entering into sale agreements with various purchasers, of which the fourth respondent was one of them. The fourth respondent purchased a unit in the residential section of the scheme on 4 May 2016, before the establishment of the applicant under s2(1) of the STSMA.

[8] On 2 October 2017, a conveyancer issued a certificate in terms of s10(2)(a) of the STSMA, which had the effect of altering the prescribed management rules which would apply to the applicant upon the opening of the sectional titles register.

[9] The scheme was initially 100% residential. In January 2019, Lushaka extended the scheme and created the non-residential section. This brought about amendments to the management rules in terms of s32(2) of the Sectional Titles Act, 1986 ('STA'). Lushaka maintains it altered the prescribed management rules to ensure that they align with the mixed-

use nature of the scheme. This was done so that the body corporate could allocate the expenses of the residential component thereof to the owners of residential units and the expenses of the non-residential component to the owners of non-residential units. This was done in accordance with the participation quotas determined by Lushaka before the opening of the sectional titles registry.

[10] When the certificate was lodged, the sectional titles register was not yet opened, and no juristic personality was attached to the applicant. As a result, the certificate was issued before the body corporate came into existence.

[11] The third respondent approved the altering of the prescribed management rules and thereafter Lushaka opened the sectional titles register in October 2017. On the opening of the sectional titles register, there was deemed to be established a body corporate.

[12] A dispute over the voting rights and levies due, arose between the fourth respondent and the applicant. The basis of the dispute is that the fourth respondent contends that the 2017 certificate deviated from the terms of the deeds of alienation, the agreement of sale, in that the 2017 certificate introduced the words ‘a minimum of’ in respect of the liability for levies of the residential section. This insertion changed the levy liabilities to a floor of 60% rather than a ceiling of 60%, of levy contributions payable by the residential section. This change was unilaterally implemented by the developer.

[13] The fourth respondent contends that the management rules which provide for that structure were not put in place lawfully and departed from the 2017 management rules, in that they are unfair and benefit Lushaka as owner of the non-residential units, at the expense of the owners of residential units.

[14] The fourth respondent accordingly referred a dispute to CSOS, under case number CSOS/003017/G.P./19 (‘the first adjudication’). The fourth respondent sought an order from CSOS that the management rules be amended to reflect the agreement of sale and that such amendment be backdated to the inception of the body corporate in October 2017. The first respondent adjudicated the above dispute on 15 June 2021 and found that the fourth respondent’s written consent was not obtained prior to the amendment to the management rules as required by s11 of the STSMA and that the fourth respondent was adversely affected by the 2017 amendment to the management rules. The first respondent found further that the composition of the applicant was in contravention of s2 of the STSMA.

[15] The first respondent however dismissed the application to declare the 2017 amendment to the management rules as invalid, because the application brought by the fourth respondent had exceeded the time limit prescribed in s41 of the CSOS Act. The first respondent however ordered that the association had to within 30 days of the issuing of the order call a general meeting of its members to deal with the specified business of the 2017 amendment to the management rules, insofar as it related to the participation quota and voting rights, as well as the composition of the body corporate. This award is the subject of this review.

[16] In January 2019, Lushaka elected to exercise its real rights of extension and develop the non-residential section of the scheme. This brought about amendments to the management rules.

[17] The fourth respondent referred a second dispute to CSOS. The fourth respondent brought this under case number CSOS/824/G.P./20. This time the fourth respondent challenged the fairness of the January 2019 amendments, alleging that same was not obtained with his consent and is therefore unlawful and invalid. The fourth respondent accordingly sought an order directing the applicant to abandon the concocted budget and to apportion levies of the scheme in accordance with the prescribed management rules of the STSMA. On 17 June 2021 the second respondent found in favour of the fourth respondent.

[18] The second respondent accordingly set aside the amendments made to the management rules in January 2019. The second respondent found that the purported amendment of the rules was not affected by a unanimous resolution as is required in s10(2)(a) of the STSMA and further that the purported amendment had an adverse effect on the interests of the fourth respondent and that his prior written consent was not obtained. The effect of the second adjudication order was that the contribution levied on owners by the applicant was unlawful. The second adjudication award also forms the subject matter of this application for review.

[19] The applicant proceeded to place part A of the notice of motion before the urgent court, requesting the Court in terms of s57(3) of the CSOS Act, that the operation of the first and second adjudication orders be stayed, pending the outcome of the final relief sought in part B of the notice of motion, which is before this Court. The applicant also sought an order interdicting and restraining the fourth respondent, pending the outcome of the final relief sought in part B, from taking any steps whatsoever to rely on the adjudication orders or from approaching any

High Court in terms of the CSOS Act, or any Magistrates Court in terms of s56(2) of that Act, to obtain the registration of either of the adjudication orders as an order of any such Court.

[20] The learned Kollapen J, as he then was, ordered that the operation of the first adjudication order granted by the first respondent against the applicant on 15 June 2021, be stayed pending the outcome of the final relief sought in part B of the notice of motion and that the fourth respondent be interdicted from approaching any High Court or any Magistrates to obtain the registration of the first adjudication order as an order of any such Court. The relief sought by the fourth respondent in respect of the second adjudication order, granted by the second respondent, against the applicant on 17 June 2021 was dismissed. The costs of Part A of this application were reserved for determination in Part B of the application.

[21] I accordingly proceed to deal with the issues placed before this Court for determination.

1. Whether the first adjudication order should be reviewed and set aside

[22] The applicant's counsel referred this Court to s10(2)(a) of the STSMA and argued that the legislature is dealing with two scenarios, namely:

(1) when the sectional title register is opened, the developer has the right to add, amend, substitute or repeal rules.

(2) the rules may be added to, amended, substituted or repealed by a unanimous resolution of the body corporate as prescribed.

[23] The applicant contends that the first respondent failed to distinguish between the developer's right at the opening of the scheme and the body corporate's right any time thereafter. The applicant's counsel argued that the unique wording ascribed to s11(2)(a) of the STSMA draws a distinction between a developer, the members of the body corporate and the vote of an owner. Counsel argued that ownership in a sectional title only occurs after the sectional titles register has been opened, because it is only at that point that the property is transferred from the developer to the owner. It was further argued that in order for s11(2)(b) of the STSMA to apply, you need to prove your ownership and you need to have a decision of the body corporate.

[24] Counsel referred this Court to s2(1) of the STSMA which states that it is only when the first property is transferred to an owner, other than a developer, that the body corporate is deemed to be established. That can only occur after the opening of the sectional title register, which is required before the right to that property can be transferred. The only person at that

point in time who is entitled to make rules is the developer. There is no body corporate which has formed pursuant to s2(1) and as a result there are no members who can convene a meeting. Counsel argued that s11(2)(b) of the STSMA only applies once the body corporate has been formed.

[25] Counsel argued that paragraph 55 of the first adjudication award is wrong in that the first respondent incorrectly found that:

'In terms of section 11(2)(b) of the STSMA, where an owner is adversely affected by an amendment to the management rules, the written consent of such owner must be obtained. The intention of the legislature in introducing the word "must" in this section means that the application of the section is not discretionary, but peremptory.'

[26] Counsel also argued that the first respondent incorrectly made the finding in paragraph 62 of her order that:

'I am cognisant of the fact that the developer is not a party to the matter before me and that the CSOS has no jurisdiction over developers. It must however be noted that the developer either acted negligently or recklessly when the developer opened up the sectional title register in 2017 and amended the management rules without first seeking the consent of the Applicant who is adversely affected by the amendment.'

[27] Counsel argued that s11(2)(b) of the STSMA only applies when an owner is adversely affected by a decision of the body corporate. In 2017 it was not a decision of the body corporate that was amended, it was the developer who introduced laws. There were no pre-existing rules which were changed, it is the incorporation of the rules.

[28] Counsel argued that the question of law is what the court needs to find and on a question of law, the adjudicator did not apply the law correctly and in that manner her decision is capable of being reviewed subject to the provisions of PAJA.

[29] Counsel stated that by applying the rules of interpretation as expressed by the Supreme Court of Appeal in the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1], s11(2)(b) of the STSMA does not apply when the developer originally incorporates rules at the opening of the sectional title register. Counsel argued that the first

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

respondent failed to consider fully whether s11(2)(b) of the STSMA was applicable, whether the fourth respondent was an owner at the point when the sectional title registered and further whether or not this was a decision by the body corporate. Counsel argued the first respondent only concentrated on the words ‘adversely affected’ and accordingly came to an incorrect conclusion entitling this Court to review the award.

[30] Counsel argued further that the first respondent did not consider the interpretation of the sale agreement. It was argued that the 2017 management rules are entirely harmonious with the sale agreement and the mixed-use nature of the development. Counsel argued that the fourth respondent’s interpretation of that agreement focuses solely on the grammar and syntax of the particular agreement and fails to take into account the context, and the purpose for which that provision was enforced.

[31] Counsel argued that in terms of the sale agreement, it reserved its right to make changes to the management and conduct rules deemed necessary for the proper management and control of the building, taking into account the mixed-use nature of the development. Counsel argued that Lushaka foresaw the possibility of rules being implemented to suit the mixed-use and undeveloped nature of the scheme and as a result in accordance with clause 9.1.4 of the sale agreement, read with s32(2) of the STA, Lushaka altered the prescribed management rules, thereby adopting rules which were suited and required for the mixed-use nature of the development and for the proper management and control of the building. Counsel argued that the interpretation proffered by the fourth respondent leads to an insensible and unbusinesslike interpretation. As a result, counsel argued that the 2017 management rules were lawfully altered and adopted by Lushaka before opening the sectional titles register and that these rules became binding on the applicant since its incorporation, thereby obliging the applicant to comply with the 2017 management rules.

[32] The fourth respondent contends that altering the management rules before the establishment of the applicant was unlawful. The fourth respondent argues that the altering of the default management rules:

(a) Materially altered members’ agreed liabilities to make contributions to the levy fund contrary to the provision of the sale agreement. The fourth respondent contends that the members in the residential section only agreed to contribute a total of 60% of the scheme total costs. In contrast, the management rules provide for a minimum of 60% of the scheme's costs.

(b) Materially altered members’ agreed value of the votes for the residential section.

[33] The fourth respondent's counsel contends that the first respondent demonstrated a full understanding of the issues when she found that the unilateral amendment to the management rules changed both the voting rights and the participation quota and that this was done without the fourth respondent's written consent, thereby adversely affecting the fourth respondent and all other owners in the scheme.

Evaluation of the first adjudication order

[34] In the case of *Natal Joint Municipal Pension Fund* [2] the Supreme Court of Appeal held that:

'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.'[3]

[35] Referring to the decision of *Natal Joint Municipal Pension Fund*, it is the ordinary rules of grammar and syntax, context and purpose which need to be considered.

[36] Section 22 of the agreement states as follows:

'Participation quota

The land on which the scheme is to be established is zoned from mixed use i.e for residential and other uses as defined in the town planning scheme and accordingly the seller has allocated 60% of the participation quotas to the residential sections and the balance of the participation quotas to the non-

[2] Natal Joint Municipal Pension Fund (note 1 above)
[3] *Natal Joint Municipal Pension Fund* (note 1 above) para 18

residential sections in the scheme. The estimated participation quota of the section is 0,61% an otherwise as reflected on the approved sectional plan.'

[37] Clause 9.1.4 of the sale agreement states that:

'the seller intends to procure that upon the opening of the Sectional Title Register and the establishment of the body corporate, the management and conduct rules contained in the regulations to the Act shall apply subject to any changes and modifications allowed by the Act and as envisaged in this agreement and which the seller may deem necessary for the proper management and control of the building taking into account the mixed use nature thereof. It is recorded that the developer, when submitting the application for the opening of the sectional title register shall make rules in terms of Section 35 of the Act attaching a value of 50% to the vote of the owners of the residential section and a rule in terms of which the liability of owners of the residential section shall, for the purposes of Section 37(1)(a) or Section 47(1) of the Act be modified so that the owners of the residential section are liable to contribute a total of 60% to the levy fund in terms of Section 37(1) of the Act.' [my emphasis]

[38] The developer did reserve rights in respect of management and control, but only 'as envisaged in this agreement'. Section 22 and clause 9.1.4 of the agreement of sale envisaged a total of 60% levy contribution to be allocated to the residential component. No unilateral right to change contributions was granted to the developer.

[39] Section 11 of the STSMA states as follows:

'**Effect of quotas and variation thereof**

11. (1) Subject to subsection (2), the quota of a section must determine—

(a) the value of the vote of the owner of the section, in any case where the vote is to be reckoned in value;

(b) the undivided share in the common property of the owner of the section; and

(c) subject to section 3(1)(b), the proportion in which the owner of the section

must make contributions for the purposes of section 3(1)(a) or may in terms of section 14 (1) be held liable for the payment of a judgment debt of the body corporate of which he or she is a member.

(2) (a) Subject to section 3(1)(b), the developer may, when submitting an application for the opening of a sectional title register in terms of the Sectional Titles Act, or the members of the body corporate may by special resolution, make rules under section 10 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 3(1)(a) or 14(1) is modified.

(b) Where an owner is adversely affected by such a decision of the body corporate, his or her prior written consent must be obtained.

(c) The members of the body corporate may not make rules by which a different value is attached to the vote or liability of the owner of any section as contemplated in paragraph (a) until such time as there are owners, other than the developer, of at least 30 per cent of the units in the scheme.
(d) Where the developer alienates a unit before the opening of a sectional title register in terms of the Sectional Titles Act, the developer may not make rules by which a different value is attached to the vote or liability of the owner of any section as contemplated in paragraph (a), unless the developer has disclosed such intention in all deeds of alienation.' [my emphasis]

[40] Section 32 of the STA states as follows:

'PARTICIPATION QUOTAS AND DEVELOPERS
32. (1) Subject to the provisions of section 48, in the case of a scheme for residential purposes only as defined in any applicable operative town planning scheme, the participation quota of a section shall be a percentage expressed to four decimal places, and arrived at by dividing the floor area, correct to the nearest square metre, of the section by the floor area, correct to the nearest square metre, of all the sections in the building or buildings comprised in the scheme.
(2) Subject to the provisions of section 48, in the case of a scheme other than a scheme referred to in subsection (1), the participation quota of a section shall be a percentage expressed to four decimal places, as determined by the developer: Provided that-
(a) where a scheme is partly residential as defined in any applicable operative town planning scheme, the total of the quotas allocated by the developer to the residential sections shall be divided among them in proportion to a calculation of their quotas made in terms of subsection (1);
(b) where a developer alienates a unit in such a scheme before the sectional title register is opened, the total of the quotas allocated to the respective sections and the participation quota of that unit must be disclosed in the deed of alienation; and
(c) where such disclosure is not made, the deed of alienation shall be voidable at the option of the purchaser and that the provisions of section 25 (15) (b) shall mutatis mutandis apply in respect of any such alienation.
(3) Subject to the provisions of subsection (4) of this section, the quota of a section shall determine-
(a) the value of the vote of the owner of the section, in any case where the vote is to be reckoned in value;
(b) the undivided share in the common property of the owner of the section; and
(c) subject to the provisions of section 37 (1) (b), the proportion in which the owner of the section shall make contributions for the purposes of section 37 (1) (a), or may in terms of section 47 (1) be held liable for the payment of a judgment debt of the body corporate of which he is a member.
(4) Subject to the provisions of section 37 (1) (b), the developer may, when submitting an application for the opening of a sectional title register, or the members of the body corporate may by special resolution, make rules under section 35 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 37

(1) (a) or 47 (1) is modified: Provided that where an owner is adversely affected by such a decision of the body corporate, his written consent must be obtained: Provided further that no such change may be made by a special resolution of the body corporate until such time as there are owners, other than the developer, of at least 30 per cent of the units in the scheme: Provided further that, in the case where the developer alienates a unit before submitting an application for the opening of a sectional title register, no exercise of power to make a change conferred on the developer by this subsection shall be valid unless the intended change is disclosed in the deed of alienation in question.' [my emphasis]

[41] By amending the levy contribution of purchasers, which was not a reserved right, the developer ignored s11(2)(d) of the STSMA and s32(2) and s32(4) of the STA which expressly prohibits the developer from prejudicing the fourth respondent and all other purchasers in the residential section in this manner.

[42] Paragraph 2.11.2 of the certificate of Helen Margaret Coetzee states that:

'the liability of the owners of units in the scheme set aside and/or used for residential purposes to make contributions for purposes of section 3(1)(a) or section 3(1)(h) of the Act shall, subject to 2.11.3, total a minimum of 60%;'

[43] It is clear that clause 9.1.4 of the sale agreement said a total of 60 percent. Even though the applicant's counsel argued that the fourth respondent's interpretation is a narrow interpretation which is unbusinesslike and insensible, so too is the change brought about by the 2017 management rules unbusinesslike and insensible for the fourth respondent, as they go contrary to what the fourth respondent signed when the sale was made.

[44] The sale agreement must be interpreted in a manner that is commercially sound. Although the applicant's counsel states the fourth respondent's interpretation is not commercially sound, so too is it not commercially sound to expect a purchaser to pay almost R8 million for their unit, under the impression that their levy contributions will be capped at 60%, which is later changed, adversely affecting the purchaser who must now pay a higher levy. Had the fourth respondent known that his levy payments would increase at such a rate he would most definitely have reconsidered purchasing this property.

[45] The STA is designed to ensure that, before purchasing a sectional title unit, the prospective purchaser will be aware of the participation quota attaching to that unit and the levy liability.

[46] Purchasers are protected under ss32(2) and 32(4) of the STA, when purchasing units from a developer 'before submitting an application for the opening of a sectional title register' which is the situation in the matter *in casu*. This is because:

(a) Section 32(2)(b) of the STA requires that a developer in a scheme that is not for 'residential purposes only', namely a mixed-use scheme, as the matter *in casu*, the total of quotas 'must be disclosed in the deeds of alienation'. (b) Section 32(4) of the STA requires that no such variation shall be valid 'unless the intended change is disclosed in the deed of alienation in question'.

The quotas as reflected in the 2017 certificate were not so disclosed in the matter *in casu*.

[47] There is a dramatic difference between what the rules say and what is in the agreement. The agreement says the owners must contribute a total of 60%, in other words there is a cap on what your levy contributions will be. As a result, when the fourth respondent signed the sale agreement, he knew that his levies would be capped at 60%. Due to it being a mixed use scheme, the rest would be paid by the commercial section. The rules when they came out stated 'a minimum of 60%'. Therefore, there was a change from a ceiling of 60% to instead a floor of 60% which means the fourth respondent and all the other purchasers in the residential section would be liable for 100%. The change is not envisaged in the agreement, as what is envisaged in the agreement, is the cap of 60%. All the owners in the residential section, including the fourth respondent, are affected by this change. In financial terms, the fourth respondent's levy contribution has increased immensely, adversely affecting not only him but all the purchasers in the residential section.

[48] The first respondent demonstrated that she understood the mixed-use nature of the scheme by referring to the 'residential component' and 'non-residential component' and quoting s32(2) of the STA. Section 11(2)(b) of the STSMA may only be applicable to the decision of a body corporate, however, s11(2)(b) of the STSMA cannot be read in isolation, as it must be read with s11(2)(d) and s32(2) of the STA which covers the situation where a developer, when submitting an application for the opening of a sectional title register and may want to make rules attaching a different value to the vote of an owner, must disclose this intention in the deed of alienation for it to be valid. The first respondent not only dealt with s11(2)(b) of the STSMA, but also correctly referred to s11(2)(d) and s32(2) of the STSMA in paragraphs 42 and 51 of her order. These intended changes pertaining to the participation quota and the levies were not disclosed in the deed of alienation before the 2017 certificate was issued. Taking into consideration the cumulative reading of ss11(2)(b) and 11(2)(d) of the STSMA and s32(2) of the

STA, this Court finds the first respondent considered her order correctly. Even though s11(2)(b) of the STSMA may be applicable only when an owner is adversely affected by a decision of the body corporate, the reality exists that every time the body corporate issues a levy statement, based on the amendments made by the developer, the body corporate is also breaching the provisions of the STSMA.

[49] The developer has this limited power to make changes to the rules and can only do it until the point the sectional title is registered, but it must be done in accordance with what is disclosed in the deed of alienation and this is not what occurs in the matter *in casu*.

[50] This court cannot find fault with the first respondent's findings, as the first respondent demonstrated a full understanding of the fourth respondent's complaint which pertained to the unilateral amendment of the management rules of the scheme by the developer in 2017 and further, that this unilateral amendment of the management rules, changed both the voting rights and the participation quota of the fourth respondent, without the fourth respondent's written consent. Even if this Court is wrong in this regard, the applicant ignored the limitation imposed by s11(2)(d) of the STSMA, which states that a developer is not entitled to, and expressly 'may not', amend the levy contributions of the scheme without disclosing such specific intention in all deeds of alienation. Instead, the developer unilaterally amended the liabilities in a manner that was not declared, disclosed or agreed to, by either the fourth respondent or other purchasers in the residential section. This resulted in a negative financial prejudice to all purchasers and an unfair financial benefit to the developer.

[51] This Court accordingly finds that the first respondent correctly found that the 2017 certificate was implemented unilaterally by the developer and that it had an adverse impact on the fourth respondent without his prior consent being obtained in the sale agreement or an amended sale agreement.

[52] This Court finds that the first respondent did not commit any error.

[53] Accordingly, this Court finds that the first respondent's decision was neither influenced by a material error of law or an irrelevant consideration, nor was it irrational. Therefore, the order is not impeachable in terms of s6 of PAJA and should not be reviewed or be set aside.

[54] This Court accordingly declares that the 2017 certificate is invalid and unenforceable in terms of s11(2)(d) of the STSMA. The effect of which is backdated to the opening of the sectional title register on 27 October 2017.

2. Whether the second adjudication order should be reviewed and set aside

[55] On 30 January 2019, the developer caused the following further amendment to the management rules to be made which referred to the 2019 certificate. The amendments were to the following effect:

'2.1 In terms of section 3(1)(c) of the Act, the owners of the commercial units to which rights of exclusive use and enjoyment of defined parts of the common property allocated in accordance with these rules and, similarly, rights of owners of residential units to whom the rights of exclusive use and enjoyment of defined parts of the common property allocated in accordance with these rules shall be responsible, either singularly where such rights have been allocated to one section directly or jointly, where rights are allocated to one or two or more sections, be responsible for the costs of the insurance and maintenance of such parts of the common property. Such costs shall be allocated to the particular owners in accordance with the ratio that each section bears to the total area of all of the sections entitled to the joint exclusive use rights of that part of the common property.'

[56] Counsel for the fourth respondent contends that the effect of the new budget was that the fourth respondent's levy contribution in respect to multiple items increased by 639% in a single month. It is due to this adverse effect on the fourth respondent, that a second referral was made to CSOS. The relief sought by the fourth respondent was an order directing the applicant to abandon the concocted budget and to apportion levies of the scheme in accordance with the prescribed management rules of the STSMA.

[57] The applicant's counsel contended that the award of the second respondent is a far cry from clarity and it's difficult to make heads or tails out of his findings. Counsel contended that the second respondent noted that the validity of the 2017 management rules were not before him, yet despite this finding, the second respondent set aside the budget of the applicant on the basis that it was calculated under the 2017 management rules, which was unlawfully amended. Counsel argued that the second respondent erroneously applied s11(2)(a) and (b) of the STSMA and held that a unanimous resolution of members was required to amend the 2017 management rules. Counsel contended that this was the same error made by the first respondent. Counsel repeated that s11(2)(b) of the STSMA did not apply to Lushaka in that at the time of the altering and adoption of the 2017 management rules, there were no 'owners', a

body corporate had not been established, and therefore there was no 'decision'. Counsel argued there was only one amendment which occurred in 2019 which deals with exclusive areas and the allocation of budgets to exclusive use areas.

[58] The applicant's counsel argued that the decision of the second respondent was materially influenced by an error of law, irrelevant considerations and the decision was wholly irrational based on the information and purpose before him and had to be reviewed and set aside.

[59] The fourth respondent's counsel argued that the second respondent's decision was not influenced by a material error of law or an irrelevant consideration and neither was it irrational. Counsel for the fourth respondent contends that the second respondent dealt with the requirements of s10(2)(a) of the STSMA, which states that management rules can be 'amended or repealed by unanimous resolution of the body corporate' and s11(2)(b) of the STSMA, which requires that 'Where an owner is adversely affected by such a decision of the body corporate, his or her prior written consent must be obtained'.

Evaluation of the second adjudication order

[60] In the matter of *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* [4], the Supreme Court of Appeal held that the scheme in question was partly residential and partly non-residential, as in the matter *in casu*. When the scheme was registered, the developer made a determination in terms of s32(2) of the STA that the levies payable by the non-residential sections would differ from those of the residential sections. This had the effect that the respondent's levies more than doubled. The applicant did not give its written consent to the special resolution to modify the liability for levy contributions or to amend the conduct rules in this regard. The Supreme Court of Appeal decided that the resolution was *ultra vires* the STA Act and void.

[61] When interpreting statutes, the language in the legislation should be read in its ordinary sense and the words must be given their ordinary, literal, grammatical meaning. Words in a statute must be given their ordinary meaning in accordance with the context in which they are found. [5]

[4] *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd* (1082/2018) [2019] ZASCA 161 (28 November 2019).
[5] *Bellevue Motors CC v Johannesburg City Council* 1994 (4) SA 339 (W) 342F-G].

[62] Section 32(4) of the STA is very clear. When a developer submits an application for the opening of the sectional title register, or members of the body corporate by special resolution make rules, whereby a different value is attached to the vote of an owner or the liability in respect to the owner's contributions towards levies is modified, then, should an owner be adversely affected by such decision of the body corporate, his or her written consent must be obtained. Section 32(4) of the STA ensures that owners of units should be treated fairly.

[63] As stated in the matter of *Body Corporate of Marine Sands*[6]:

'It is not for a court to substitute what it regards as reasonable, sensible or businesslike for the words actually used, as this would cross the divide between interpretation and legislation.'[7]

[64] Section 32(4) of the STA states further that:

'in the case where the developer alienates a unit before submitting an application for the opening of a sectional title register, no exercise of power to make a change conferred on the developer by this subsection shall be valid unless the intended change is disclosed in the deed of alienation in question.' [my emphasis].

[65] The 2019 certificate, which amended the liabilities of owners including the fourth respondent, was introduced more than a year after the opening of the sectional title register and is accordingly governed by ss10(2), 11(2)(a) and (11)(2)(b) of the STSMA.

[66] Section10(2(a) of the STSMA provides that:

'(2) The rules must provide for the regulation, management, administration, use and enjoyment of sections and common property, and comprise-

(a) management rules, as prescribed, which rules may subject to the approval of the chief ombud 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, and which rules may be substituted, added to, amended or repealed by unanimous resolution of the body corporate as prescribed; ...' [my emphasis]

[67] Section 11(2) of the STSMA provides for only 2 scenarios in which a different value is attached to the vote or liability of members of a sectional title scheme. They are:

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[6] *Body Corporate of Marine Sands* (note 4 above)

[7] Ibid para 14

a. by a developer, when submitting an application for the opening of a sectional title scheme, provided that no exercise of power to make a change conferred on the developer is valid unless the intended change is disclosed in the deed of alienation in question.[8]

b. by the body-corporate, but only by special resolution of the body corporate.[9]

[68] In the absence of a unanimous resolution in terms of s10(2)(a) of the STSMA, or a special resolution in terms of s11(2)(a) of the STSMA and without the written consent of the affected owner in terms of s11(2)(b) of the STSMA, the developer and the body-corporate's right to amend management rules was limited. The applicant achieved no unanimous or special resolution or any written consent from the owner in amending the management rules in terms of the 2019 certificate.

[69] This Court finds that s10(2)(a) read together with s11(2)(b) of the STSMA are the correct sections of the STSMA for the second respondent to have considered. The second respondent correctly noted that the developer did not have the right to amend management rules after the opening of the sectional title register and the registration of the sectional title plan, which had occurred 15 months prior to the 2019 Certificate. Even if this Court is wrong in this regard, s11(2)(d) expressly prohibited the developer from attaching a different vote or liability to the owners of residential sections without this intended change being disclosed in the deeds of alienation.

[70] The intended change to amend the management rules was not disclosed in the deed of alienation. Neither do the minutes of the general annual meeting held on 2 December 2019 show that such a vote was proposed or that such resolution was passed unanimously to amend the management rules. The 2019 certificate was not presented to the members for the required vote, accordingly, no consent was given by the members of the scheme, and so the 2019 certificate could not be applied to amend the management rules in respect of the liabilities of owners.

[71] In the matter of *Body Corporate of Marine Sands*[10], the Supreme Court of Appeal held that:

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[8] Section 11(2)(d) of the STSMA
[9] Section 11(2)(a) of the STSMA
[10] *Body Corporate of Marine Sands* (note 4 above)

'In the context of a resolution to modify an owner's liability for levies, it seems a simple matter of logic that an owner whose liability for levies increases is adversely affected thereby. It is impossible to conceive of any other meaning of those words. That being so, the clear intention of the legislature is that the written consent of such a member must be obtained, so as to observe the *audi alteram partem* rule and to prevent a diminution of property rights being imposed on a minority by the majority.'[11]

[72] This Court cannot find any unreasonableness in the decision of the second respondent in finding that the 2019 certificate to amend the management rules and the budget was flawed, in that there was no unanimous resolution or special resolution or the consent of the members of the scheme.

[73] As a result, this Court cannot find that the second respondent's decision was influenced by a material error of law or an irrelevant consideration. Neither does this Court find that the second respondent's decision was irrational, or impeachable in terms of s6 of PAJA, or that it should be reviewed and set aside.

[74] Accordingly, this Court declares the 2019 amendment to the management rules invalid and unenforceable in terms of ss10(2)(a), 11(2)(a),11(2)(b) and 11(2)(d) of the STSMA. The effect of which is to be backdated to the date of the 2019 amendment which is 30 January 2019.

3. Whether the certificate issued in 2017 should be rectified

[75] The applicant seeks a rectification of the 2017 conveyancers certificate as follows:

'(a) by deleting the words section 11(3)(1)(d) of the Act where they appear in paragraph 2.11.3 of the Certificate and by inserting in their stead the words sectlon11(2)(d) of the Act; and
(b) by deleting the words of sections set aside and/or used for residential purposes where they appear in the sixth and seventh lines of paragraph 2.11.3 of the Certificate, and by inserting in their stead the words of sections set aside and/or used for non-residential purposes:'

[76] It is clear that there was some inelegance in the drafting of the certificate and that the correct section is s11(2)(d). Although there may be no prejudice from this amendment, the correct procedure to vary or amend the rules requires the approval of the Chief Ombud and the unanimous resolution of the body corporate, as dictated by s10(2)(a) of the STSMA. Therefore, it would be improper for this court to grant the rectification relief sought by the applicant. The

[11] Ibid para 21

certificate was produced by the developer on 2 October 2017, prior to the formation of the applicant. Accordingly, it is the exclusive responsibility of the developer to rectify it and not the applicant.

4. Whether declaratory relief should be granted

[77] The parties seek declaratory relief under section 8(1)(d) of PAJA.

[78] The fourth respondent has demonstrated that:

(a) The deeds of alienation declared in clause 9.1.4 of the agreement of sale, that a ceiling of 60% of the levies would be apportioned to the residential component, and the balance to the non-residential component. Furthermore, that in section 22 of the schedule to the agreement of sale, that the developer 'allocated 60% of the levies to the residential section and the balance to the non-residential section'.

(b) Prior to opening the sectional title register, the developer unilaterally amended the management rules using the 2017 certificate, and thereby apportioning from a floor of 60% up to 100% of the levies to the residential component. By doing so, it adversely affected the fourth respondent through undisclosed amendments to the management rules.

(c) That the legislation is clear in respect of a developer's rights to make changes to management rules without the consent of the purchasers, as follows:

i. Section 11(2)(d) of the STSMA requires that the developer may not make rules by which a different value is attached to the vote or liability of the owner of any section as contemplated in paragraph (a), 'unless the developer has disclosed such intention in all deeds of alienation', and

ii. Section 32(2) of the STA requires that the 'participation quota of that unit must be disclosed in the deed of alienation', and

iii. Section 32(4) of the STA requires that changes to the rules before the opening of the sectional title register must be disclosed in the deed of alienation in question.

[79] Accordingly, in terms of s8(1)(d) of PAJA this Court makes the following declarations in terms of the rights of the parties in respect to rules 2.10, 2.11.2 and 2.11.3, namely:

(a) Rule 2.11.2 of the 2017 certificate is invalid and unenforceable in terms of S11(2)(d) of the STSMA read with s32(2) and s32(4) of the STA;

(b) The correct rule 2.11.2 of the 2017 certificate should be amended to reflect the agreed deed of alienation position such that the words 'a minimum of' are removed and that rule 2.11.2 of the 2017 certificate should state the following:

'the liability of the owners of units in the scheme set aside and/or used for residential purposes to make contributions for purposes of s3(1)(a) or s3(1)(h) of the Act shall, subject to 2.11.3, total 60%; and'

(c) The correct rule 2.11.2 of the 2017 certificate should be backdated to the opening of the sectional title register on 27 October 2017.

(d) As regards rule 2.11.3 of the 2017 certificate:

i. Rule 2.11.3 of the 2017 certificate is invalid and unenforceable in terms of s11(2)(d) of the STSMA;

ii. Rule 2.11.3 of the 2017 certificate should be removed in its entirety and a correct rule 2.11.3 should be inserted to the 2017 certificate which states the following:

'the liability of the owners of units in the scheme set aside and/or used for non-residential purposes to make contributions for purposes of s3(1)(a) or s3(1)(h) of the Act shall total a minimum of 40%.'

(e) That the effect of the correct rule 2.11.2 of the 2017 certificate should be backdated to the opening of the sectional title register on 27 October 2017.

(f) In respect to rule 2.10 of the 2017 certificate:

That rule 2.10 of the 2017 certificate should be removed in its entirety and the effect of the removed rule 2.10 of the 2017 certificate be backdated to the opening of the sectional title register.

COSTS

[80] The fourth respondent's counsel argued that costs should follow the result, with the qualification that the fourth respondent be excluded from paying his pro-rata share of the costs, as the fourth respondent has gone to the expense of initiating the litigation and should not have to contribute to the body corporate's costs.

[81] This Court is in agreement with the fourth respondent's counsel. Accordingly, costs will follow the result, including the costs of part A, however, a pro-rata share of the contributions towards costs may not be recovered from the fourth respondent.

ORDER

[82] In the result, I make the following order:

1. The application for the review of the first and second respondent's adjudication order is dismissed.

2.Rule 2.11.2 of the 2017 amendment to management rules, contained in the conveyancers certificate dated 2 October 2017, is declared invalid and unenforceable in terms of s11(2)(d) of the Sectional Titles Schemes Management Act, No. 8 of 2011 read with s32(4) of the Sectional Titles Act, No. 95 of 1986.

3.Rule 2.11.2 of the 2017 amendment to management rules, contained in the conveyancers certificate, dated 2 October 2017, is deleted and the following substituted in the conveyancers certificate dated 2 October 2017, with effect from the opening of the sectional title register on 27 October 2017:

‘the liability of the owners of units in the scheme set aside and/or used for residential purposes to make contributions for purposes of section 3(1)(a) or the section 3(1)(h) of the Act shall total 60%.’

4.Rule 2.11.3 of the 2017 amendment to management rules, contained in the conveyancer’s certificate dated 2 October 2017, is declared invalid and unenforceable in terms of s11(2)(d) of the Sectional Titles Schemes Management Act, No.8 of 2011 read with s32(4) of the Sectional Titles Act, No. 95 of 1986.

5.Rule 2.11.3 of the 2017 amendment to management rules, contained in the conveyancer’s certificate dated 2 October 2017, is deleted and the following substituted in the conveyancers certificate dated 2 October 2017, with effect from the opening of the sectional title register on 27 October 2017:

‘the liability of the owners of units in the scheme set aside and/or used for non-residential purposes to make contributions for purposes of section 3(1)(a) or section 3(1)(h) of the Act shall total a minimum of 40%.’

6.Rule 2.10 of the 2017 amendment to management rules, contained in the conveyancer’s certificate dated 2 October 2017, is deleted with effect from the opening of the sectional title register on 27 October 2017.

7.The 2019 amendment to the amended management rules, contained in the conveyancer’s certificate dated 30 January 2019, is invalid and unenforceable in terms of s11(2)(a) and s11(2)(b) of the Sectional Titles Schemes Management Act, No.8 of 2011, with effect from the date of the certificate, namely, 30 January 2019.

8.The applicant is to pay the fourth respondent’s costs including the costs of Part A of the matter. A pro rata share of the contributions towards costs may not be recovered from the fourth respondent.

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JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 17 January 2023

Date of hearing:	08 June 2022
Date of Judgment:	17 January 2023

Appearances:

On behalf of the applicant:	Adv. S. Mushet
Instructed by:	S Brown Attorneys Incorporated
On behalf of the respondent:	Adv. M. Oppenheimer
Instructed by:	D'arcy-Herrman Raney Inc.