THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 537/2016

In the matter between:

MOUNT AMANZI SHARE BLOCK LIMITED	**APPELLANT**
and	
THE BODY CORPORATE OF WINDSOR HEIGHTS SECTIONAL TITLE SCHEME	**FIRST RESPONDENT**
SKY AFRICA PROPERTIES 24 CC	**SECOND RESPONDENT**
WALTER SZEZINSKI	**THIRD RESPONDENT**
ERIKA SZEZINSKI	**FOURTH RESPONDENT**
IRFAAN KHOTA	**FIFTH RESPONDENT**
NICO VAN ECK	**SIXTH RESPONDENT**
WILHELMINA VAN ECK	**SEVENTH RESPONDENT**
INA VAN STADEN	**EIGHTH RESPONDENT**
THEUNS F DREYER	**NINTH RESPONDENT**
DINA SCHOEMAN	**TENTH RESPONDENT**
ALBERTUS SCHOEMAN	**ELEVENTH RESPONDENT**
GINA JACOBS	**TWELFTH RESPONDENT**
GIDEON JACOBS	**THIRTEENTH RESPONDENT**
MARIUS PRETORIUS	**FOURTEENTH RESPONDENT**

MELISSA PRETORIUS	**FIFTEENTH RESPONDENT**
ERIC RYCROFT	**SIXTEENTH RESPONDENT**
ISOBEL RYCROFT	**SEVENTEENTH RESPONDENT**
LIANIE SCHNAAR-CAMPBELL NO	**EIGHTEENTH RESPONDENT**
EDWARD AUCAMP	**NINETEENTH RESPONDENT**
CLIVE GOMEZ	**TWENTIETH RESPONDENT**
LIZEL GOMEZ	**TWENTY-FIRST RESPONDENT**
MARY ANNE VAN DER WESTHUIZEN	**TWENTY-SECOND RESPONDENT**
FRED TRENTELMAN	**TWENTY-THIRD RESPONDENT**
JACO SWART	**TWENTY-FOURTH RESPONDENT**
LIANA SWART	**TWENTY-FIFTH RESPONDENT**

Neutral citation: *Mount Amanzi Share Block Limited v The Body Corporate of Windsor Heights Sectional Title Scheme & others (*537/2016) [2017] ZASCA 38 (29 March 2017)

Coram: Cachalia and Swain JJA and Nicholls, Coppin and Mbatha AJJA

Heard: 10 March 2017

Delivered: 29 March 2017

Summary: Deed of servitude : right to supply services to other party to deed : right to determine levies payable for services : bare denial of correctness of determination : real, genuine and bona fide dispute of fact not established : discretion to determine levies exercised reasonably and honestly : claim valid and enforceable.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mavundla J sitting as court of first instance.)

(1) The appeal succeeds with costs.

(2) The order of the court a quo is set aside.

(3) The following order is granted in respect of the main application:

'The application is dismissed with costs'

(4) The following order is granted in respect of the counter application:

'(a) It is declared that the first applicant, the Body Corporate of Windsor Heights Sectional Title Scheme, is liable to the respondent Mount Amanzi Share Block Ltd, for levies budgeted by the respondent in its 2014 budget, in terms of Notarial Deed No K8235/1996, calculated as 7.6% of the total budgeted expenses of the respondent for 2014, in respect of the following services;

(i) Security services.

(ii) Sewerage, removal of refuse and rubble and supply of water.

(iii) Public liability insurance.

(iv) Contribution to salaries for staff providing services.

(v) Maintenance of gardens and grounds.

(vi) Electricity for the illumination of the common area.

(vii) Telephone expenses.

(viii) Contribution to salaries for staff at the front office and reception.

(b) The first applicant is ordered to make payment of the sum of R40 208.75 per month to the respondent, for a period of 12 months commencing on 1 October 2014, being the applicants' total monthly share of the respondent's budgeted expenses for 2014.

(c) The first applicant is ordered to make payment of interest on each of the monthly payments from the day of the month in which each payment fell due, at the statutory

prescribed rate of interest, to date of payment.

(d) The applicants are ordered to pay the respondent's costs jointly and severally, the one paying the other to be absolved.'

JUDGMENT

Swain JA (Cachalia JA and Nicholls, Coppin and Mbatha AJJA concurring):

[1] The appellant, Mount Amanzi Share Block Ltd, is a share block company in terms of the provisions of the Share Blocks Control Act 59 of 1980, known as Mount Amanzi, whose main object and business is to operate a timeshare scheme in a housing estate. The first respondent is the body corporate of the Windsor Heights Sectional Title Scheme known as Windsor Heights, that administers a housing estate situated on land within the boundaries of the property of the appellant. The 2nd to 21st respondents are owners of the units, and the 22nd to 25th respondents are tenants of owners of units in Windsor Heights.

[2] In order to place the dispute in context it is necessary to briefly examine the history and development of both housing estates. Windsor Heights and Mount Amanzi were developed by an entity known as the De Wildt Trust on a phased basis commencing in 1988. Because of the distance between Mount Amanzi, Windsor Heights and the municipal area of Hartbeespoort (which later became known as Madibeng Local Municipality) the estates could not connect to the water reticulation, sewerage infrastructure and refuse removal services offered by the municipality.

[3] To cater for the absence of municipal services (services), the development of Windsor Heights was made subject to a notarial deed of servitude being registered in which the right of Mount Amanzi to render these services to Windsor Heights, was recorded. An obligation was also imposed upon Mount Amanzi to make its infrastructure, facilities and amenities available to Windsor Heights. In return for the supply of these services and access to Mount Amanzi's facilities, Windsor Heights was obliged to make payment to Mount Amanzi of levies to be determined by Mount

Amanzi annually, in its discretion. Provision was also made for a right of way in favour of Windsor Heights over the property of Mount Amanzi as it was landlocked, having no access to a public road. A servitude of right of way was accordingly necessary to afford to the residents of Windsor Heights, ingress to and egress from their property.

[4] The seeds of dissension inherent in such an arrangement, which should have been apparent from the outset, have now borne fruit. Disagreement arose between the parties because of an increase in the remuneration determined by the appellant in the exercise of its discretion, for the supply of these services to the respondents and access by the respondents to the appellant's facilities. The respondents accordingly launched an application in the Gauteng Division of the High Court, Pretoria (Mavundla J), based upon the assertion that because the unilateral increase in the levies by the appellant was disputed, payment was sought to be enforced by the appellant by restricting the access of the respondents to the property and facilities of the appellant. It was alleged that interference with the unrestricted use of the appellant's facilities and unrestricted access to the property of the appellant, constituted acts of spoliation. An order was sought restoring the free and unrestricted use of the access road and access to the property of the appellant. Pending the final determination of the dispute between the parties in respect of the levies payable, an order was sought directing the appellant to grant the respondents full access to its facilities. In addition, an interdict was sought restraining the appellant from interfering with and/or limiting the use and enjoyment of these facilities by the respondents. A further interdict was sought restraining the appellant from interfering with and/or interrupting access to its property, the water supply and any other service provided by the appellant to the respondents. The appellant, by way of a counter application, sought a declaratory order that the first respondent was liable to make payment of the levies charged, in terms of the notarial deed of servitude, in respect of the services supplied as well as payment of the arrear levies.

[5] The court a quo granted the respondents the relief claimed in the main application and dismissed the counter application, on the ground that an irresoluble dispute of fact existed on the papers. The appellant was ordered to pay the costs of both applications. Leave to appeal to this Court was thereafter granted by the court a

quo.

[6] The respondents alleged they had been spoliated by the appellant in the following respects:

(a) The residents of the respondents' property and their guests had been denied access to the recreational facilities on the appellant's property and more specifically the restaurants, shops and tuck shop.

(b) Access by residents of the respondents' property and their guests to the respondents' property through the entrance gate to the appellant's property and via the access road, had been restricted.

[7] The appellant conceded that there had been a temporary denial of access to the appellant's recreational facilities but justified this on the basis of a request by the deponent to the respondents' founding affidavit, Mr Gideon Jacobs, a trustee of the first respondent, to restrict access to these facilities in an endeavour to reduce the levies raised by the appellant. In a memorandum dated 12 March 2014 sent by the appellant to the trustees of the first respondent, reference was made to discussions and correspondence during the previous year between the parties, regarding the use of the servitude road, access control to Windsor Heights and use of the appellant's facilities. It was recorded that at an on-site meeting attended by authorised representatives of the appellant and the first respondent, an agreement in the following terms was reached:

'. . . your members in the main do not use the facilities of the share block [Mount Amanzi] and furthermore are not prepared to pay the charges calculated in this regard that you requested that we immediately cease offering access to the members and guests of Windsor Heights until the impasse is resolved one way or the other.

We confirm that acting on your request we implemented the restriction with immediate effect as agreed.

We confirm that you would provide us with a circular for distribution at the gate and we await same.

We further confirm that your Legal representative Mr Tom Dijsel met with our legal

representative requesting a cessation of the restriction but given the confirmation of the arrangement, we can't at this stage agree to the cessation of your request and the rules flowing from same.'

Reference was also made to twelve 'rules' allegedly requested by the representatives of the first respondent as a guideline, one of which reads as follows:

'11. Use of resort facilities by Windsor Heights residents or their guests is strictly prohibited.'

[8] The contents of the memorandum were also sent to the first respondent's attorneys Messrs Theron & Henning, who replied by way of a letter dated 28 March 2014, in the following terms:

'6. *It was suggested by W/H [Windsor Heights] and accepted by M/A [Mount Amanzi] that the residents and their guests should not use the facilities of M/A until the "impasse" regarding the additional levies is resolved.* It was never even contemplated by W/H that M/A would "immediately cease offering access" to residents and/or visitors (*unless this "access" refer to the facilities of the resort!?)* The *status quo* should continue especially since the refusal of W/H to pay whatever is demanded by M/A may lead to court action and the "impasse" may endure for some time.' (My emphasis).

It was therefore acknowledged by the respondents' legal representative, that there was an agreement that the residents and guests of the respondents would not use the facilities of the appellant until such time as the 'impasse' was resolved. The only concern of the writer was that access to the appellant's property itself not be denied.

[9] In a letter dated 18 April 2014 the appellant's representative replied stating as follows:

'Windsor Heights owners' rights to use Mount Amanzi facilities are subject to Windsor Heights paying a levy to Mount Amanzi the quantum of which is determined by Mount Amanzi unilaterally levying an amount reasonable in their discretion.

. . .

The amounts levied are due and payable however we confirm that your Body Corporate opted out of the usage of the facilities on the common property, and as a result the Share Block is prepared to waive the levies raised in respect of this line item, upon confirmation of the arrangement by yourselves, but unfortunately it appears that this decision taken at the last meeting by your appointed subcommittee meeting has not been accepted by or possibly

not conveyed to some of your members.

In the interim the agreement as concluded with your subcommittee remains, and we look to the Body Corporate for due payment of the account now overdue.'

[10] In reply Elsa Kruger Attorneys (who it appears had replaced Messrs Theron & Henning as the legal representatives of the first respondent) in a letter dated 28 June 2014 stated that:

'As a result of the above mentioned dispute, the residents and/or the tenants and/or guests are not allowed to use the facilities of Mount Amanzi, with specific reference to the shop, swimming pool/s, restaurant and interference with unrestricted access via the Mount Amanzi gate, previously enjoyed by the owners and/or tenants and/or guests. Mount Amanzi's interference alternatively prevention of the owners and/or guests and/or their tenants from using the facilities without a court order is unlawful and constitutes an act of spoliation.'

An undertaking in writing was requested inter alia:

'2. That the full use and enjoyment of all Mount Amanzi's facilities will be restored to the owners and/or their tenants and/or their guests, with immediate effect.'

[11] A reply by the appellant's representative dated 6 July 2014 states in part that:

'It is clear from your communication that your client has not fully or correctly informed you, as to the negotiations between the parties and the agreements reached regarding your clients agreed levy liability and requests for a commensurate cessation of access.'

The first respondent's attorneys were invited to obtain the correct information from the first respondent and it was alleged that:

'. . . [Y]our clients have chosen to (again) renege on their own undertaking and requests.'

[12] Ms Du Toit, the resort manager of the appellant, stated in a confirmatory affidavit that after this agreement was reached:

'Many of the members of the first applicant [Windsor Heights] and their children continued to make use of the facilities of the respondent. They still do so today. I was, therefore, surprised when the respondent [Mount Amanzi] was served with the papers in these proceedings claiming interdictory relief to compel the respondent to make available to the members of the first applicant all of its facilities . . .'.

These allegations were simply ignored but not denied by the respondents.

[13] In addition Ms Du Toit stated that:

'Subsequent to the meeting of 10 February 2014 I instructed the staff of the respondent [Mount Amanzi] to implement the rules imposed by agreement at the meeting . . . Application of the twelve rules by the staff of the respondent [Mount Amanzi] gave rise to uncouth behaviour by some of the members of the first applicant [Windsor Heights]. It soon became evident that some of the members of the first applicant [Windsor Heights] insisted on making use of the facilities of the respondents and others not. Those who preferred to make use of the facilities of the respondent ignored the agreement reached by the first applicant and the respondent at the meeting of 10 February 2014 and ignored the twelve rules referred to above.'

The respondents denied these allegations and maintained that the instructions that were given by the appellant to its staff to deny access to these facilities, were given without confirmation by the first respondent that the contents of the memorandum were accurate. It was alleged that because the contents of the memorandum were not considered accurate, it was not presented to the owners who were unaware of the alleged agreement. The respondents asserted that the owners were not in favour of relinquishing use of the facilities of the appellant, in order to settle the levy dispute.

[14] The letter from the first respondent's erstwhile attorneys, Messrs Theron & Henning (the existence and content of which was admitted by the respondents), in which it was acknowledged that the residents and guests of the first respondent would not utilise the recreational facilities of the appellant, until such time as the 'impasse' concerning the increased levies was resolved between the parties, contradicts this assertion. It is therefore difficult to see how the contents of the memorandum on this important issue, could not be considered accurate by the respondents. The first respondent's attorney, Ms Elsa Kruger, in demanding the immediate restoration of the use and enjoyment of the appellant's recreational facilities, despite the prior acknowledgement by her predecessor of the agreement, could only have been done on the basis of new instructions from the respondents that the agreement had not been concluded. It was not alleged that the subcommittee of the first respondent with whom the appellant alleged it had concluded the agreement, lacked the necessary authority to do so without the approval of the owners.

[15] Any temporary denial by the appellant of the respondents' access to its recreational facilities was justified in terms of this agreement. In any event it is quite clear in the light of Ms Du Toit's uncontested evidence, that any denial of access was temporary and had not been implemented for some time when the respondents launched the application. On a conspectus of the evidence it is clear that the respondents failed to establish, that they were spoliated by a denial of access to the appellant's recreational facilities.

[16] I turn to consider the respondents' allegation that residents of Windsor Heights and their guests' access to the respondents' property, via the entrance gate to the appellant's property was restricted, and that they were accordingly spoliated. It is clear that even on the respondents' version of events access via the entrance gate was 'not necessarily completely restricted but made inconvenient and difficult, especially for guests and contractors . . .' of the respondents. The nature and degree of the restriction on access complained of was the result of reasonable security arrangements imposed by the appellant at the access gate to its property. This the appellant was clearly entitled to do. That the respondents dispute the efficacy of these arrangements and complain that they render access to their property difficult and inconvenient, does not on the evidence justify a claim that they were spoliated.

[17] In this regard the court a quo concluded that:

'In casu, it is common cause that the applicants [respondents] had access to the respondent's [appellant's] property and facilities. It is also common cause that respondent [appellant] has since raised its levies and thereby restricted the aforesaid access subject to payment of the increased levies. It is common cause that there is a dispute between the parties in respect of the increased levies. Absent an agreement between the parties, the implementation of the levies is, in my view, tantamount to despoiling the applicant's right to access to the facilities.'

The finding that it was common cause that the appellant had raised the levies and restricted the respondents' access to the appellant's property subject to payment of the increased levies, was a material misdirection by the court a quo. The alleged denial of access to the appellant's recreational facilities, as well as the respondents' property was the central issue. As a consequence of this misdirection the court a quo

failed to properly consider the evidence and decide whether the respondents had established that the appellant had denied the respondents' access to the appellant's recreational facilities and the respondents' property. The allegation by the respondents that the appellant's motivation was to coerce payment of the levies without a court order, was irrelevant to this primary enquiry.

[18] It is clear that at the time the respondents launched the spoliation application, access to the respondents' recreational facilities, as well as the respondents' property, had not been prevented by the appellant. The respondents accordingly failed to prove that the right to use the appellant's property by way of access to the appellant's recreational facilities, as well as access to Windsor Heights, via the right of way as provided for in the servitude, was denied by the appellant. The court a quo accordingly erred in concluding that the implementation of the levies was tantamount to despoiling the respondents of their right of access to the recreational facilities of the appellant.

[19] The court a quo also granted an order directing the appellant to grant the respondents full access to the appellant's recreational facilities, pending the final determination of the dispute concerning the levies. An interdict was also granted restraining the appellant from interfering with, or in any way limiting the use and enjoyment of these facilities by the respondents, as well as their access to Windsor Heights. The appellant was also interdicted from interfering with, or interrupting the respondents' water supply, as well as any other services provided to the respondents by the appellant.

[20] It is trite that in order to obtain the interdictory relief granted by the court a quo, the respondents had to establish a well-grounded apprehension of irreparable harm if the interim relief was not granted, pending a resolution of the dispute. The evidence established that the respondents were not despoiled of their rights of access to the recreational facilities of the appellant and their property, and also established the absence of a well-grounded apprehension that the appellant would deny these rights to the respondents, in the future. The uncontested evidence of Ms Du Toit was that the occupants of Windsor Heights and their children continued to make use of the appellant's recreational facilities at the time the application was

launched. The respondents also conceded that although access via the appellant's entry gate was not completely restricted, it was made inconvenient and difficult. This was the result of reasonable security arrangements imposed by the appellant.

[21] Respondents' counsel submitted by reference to the 'twelve rules,' referred to above and mentioned in the affidavit of Ms Du Toit, that the threat of their enforcement by the appellant established a well-grounded apprehension on the part of the respondents that they would be denied access to Windsor Heights. Although the respondents denied they had agreed to these rules, it is quite clear their objective was to enhance the security of both estates and they would have had no impact upon the respondents' access to their property.

[22] The court a quo should not have granted an interdict restraining the appellant from interrupting the respondents' water supply. In a letter dated 8 May 2014, written by the appellant's resort manager, it was stated that a failure to pay the outstanding amount of R4635.90 owed by the respondents for water supplied by the appellant, would result in a limitation to the supply. This amount was paid by the respondents on the following day. No further threats were made by the appellant to reduce or terminate the water supply to the respondents. Accordingly, at the time the application was launched by the respondents, nine months later during February 2015, they could not reasonably have apprehended that the appellant would interfere with the supply. No evidence was furnished by the respondents to establish any apprehension on their part that other services supplied by the appellant, would be interfered with. The court a quo accordingly erred in granting any of the relief sought by the respondents.

[23] I turn to consider the appellant's counter application and whether the appellant validly determined the levies payable by the respondents. The court a quo did not deal with the merits of this issue, finding that an irresoluble dispute of fact arose on the papers. It was disinclined to refer this issue for the hearing of oral evidence and dismissed the counter application with costs.

[24] The respondents challenged the validity of the appellant's determination of the levies on two grounds:

(a) The respondents alleged that at a meeting of the representatives of the first respondent and the appellant, held on the 23 February 2011, a compromise was reached between the parties in respect of the levy dispute. This precluded any subsequent variation of the levies by the appellant, otherwise than in accordance with the compromise and;

(b) The appellant, in determining the levy payable by the respondents, failed to exercise its discretion *arbitrio boni viri,* being the requirement when a discretionary power to fix performance is exercised.

[25] The respondents rely upon the minutes of a meeting held on the 23 February 2011, between representatives of the appellant and the respondents, for their contention that the levy dispute was compromised. The relevant portion reads as follows:

'Decision

It was agreed that the levy increase for March 2011 (R 2234.44) will be effective until September 2011, when from then onwards a yearly increase will be effective every September at the same rate as MA [Mount Amanzi] shareholders. WH [Windsor Heights] trustees will correspond with their managing agent, Pro Admin, for a quote on the legal document.'

[26] The appellant denies that any compromise was reached and relies on the preceding passage where a request by the respondents for a formal legal document, was couched in the following terms:

'It was requested that a legal addendum be made to the contract on the levy clause to secure stability in the future.'

Seen in context, the only contract between the parties containing a 'levy clause' was the notarial deed, which the respondents wished to alter by way of a 'legal addendum.' The later reference to a quote being obtained in respect of 'the legal document', was clearly a reference to the so-called 'legal addendum' to the notarial deed. Consistent with this understanding are the contents of a letter to the first respondent, dated 18 April 2014:

'We wish to again place on record that the Notarial rights registered against the respective properties are still intact in that same can only be amended by the registration of a bilateral notarial deed.

Your contention that the decision taken at the Windsor Heights meeting held on 23 February 2010 and approved by your Mr Gideon Jacobs on 14 April 2011 overrides the Notarial rights is therefore factually and legally incorrect.'

[27] According to the appellant, the first respondent's request that there be an annual increase in the levies at a fixed percentage rate, was not acceptable. Even if the appellant had been agreeable, both parties appreciated that for the agreement to be valid and enforceable the notarial deed would require amendment by a 'legal addendum.' The discretion vested in the appellant to vary the levies annually, would have to be replaced by an automatic annual increase in the levies, at a fixed percentage rate.

[28] The respondents argue that although the agreement was not recorded in a 'so-called legal document', a compromise was reached. This agreement (compromise) did not amount to an amendment of the notarial deed. However, a removal of the appellant's discretion to vary the levies annually, would constitute an impermissible variation of the provisions of the notarial deed. The appellant was accordingly not precluded from thereafter determining the levies payable by the respondents, in the exercise of its discretion.

[29] The respondents allege that the appellant failed to exercise its discretion *arbitrio boni viri*, in determining the levies payable by the respondents. The discretion conferred upon the appellant is contained in these core provisions of the notarial deed:

(a) The use of recreational facilities is referred to in the notarial deed in category E under the heading 'Gebruiksregte en Fasiliteite', in the following terms:

'E1 Die partye en hul regsopvolgers is verplig om lede, gaste en verbruikers van elk se onderskeie eiendomme toe te laat om gesamentlike fasiliteite geleë in hul eiendomme vrylik te gebruik.

E2 Die eienaar van die *Dienende eiendom en/of sy regsopvolgers is verplig om die eienaar van die Heersende Eiendom 'n akkommoderingsfooi / heffing jaarliks as teenprestasie hiervoor te betaal. Hierdie heffing word deur die eienaar van die Heersende Eiendom in sy eie diskresie bepaal*.'

(b) The provision of water and services is referred to in the notarial deed in category B, under the heading 'Water- en Dienstevoorsiening' in the following terms:

'B.1 Die eienaar van die Heersende Eiendom is geregtig om water en dienste aan die Dienende Eiendom te verskaf. Waar die Eienaar van die Heersende Eiendom sy regte uitoefen om water en dienste aan die Dienende Eiendom te verskaf, is die Dienende Eiendom verplig om van sodanige gebruik te maak.'

'B.7 Die eienaar van die Heersende Eiendom bepaal die koerse vir betaling ten opsigte van elke diens gelewer, jaarliks in eie diskresie. Hooflyn instandhouding en instaleringskostes word by sodanige koerse ingereken.'

(c) The provision of water for irrigation is referred to in the notarial deed in category G, in the following terms:

'G.3 Die eienaar van die Dienende Eiendom en/of sy regsopvolgers is verplig om besproeing vir sy tuin en terrein vanaf die Krokodil Rivier soos voorsien deur die Heersende Eiendom, te gebruik, en mag nie water uit die drinkwater reservoir hiervoor aanwend nie, sonder die toestemming van die Heersende Eiendom nie.

G.4 Die eienaar van die Heersende Eiendom sal 'n heffing vir sodanige besproeing gebruik hef, welke heffing jaarliks deur hom bepaal sal word.'

[30] The parties were ad idem that the discretion possessed by the appellant was unfettered but valid and enforceable, provided it was exercised *arbitrio bono viri.* In *NBS Boland Bank Ltd v One Berg River Drive CC & others; Deeb & another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) paras 24, 25 and 30, the following was stated:

'[24] In sum I am of the view that, save, perhaps, where a party is given the power to fix his own prestation, or to fix a purchase price or rental, a stipulation conferring upon a contractual party the right to determine a prestation is unobjectionable.

[25] All this does not mean that an exercise of such a contractual discretion is necessarily

unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri* . . .

[30] One further point should be made. It is conceivable, albeit unlikely, that a stipulation may be so worded that an absolute discretion to fix a prestation is conferred on one of the parties. Here again it is unnecessary to express a view as to whether such a stipulation will be invalid as being in conflict with public policy, or whether the fixing of the prestation may only be assailed when it is done in bad faith.'

[31] The respondents' only challenge was that the appellant had failed to exercise its discretion *arbitrio bono viri*, which requires a determination of whether it was exercised both reasonably and honestly. (*Benlou Properties (Pty) Ltd v Vector Graphics* (Pty) Ltd 1993 (1) SA 179 (A) at 188A-C, *Absa Bank Ltd v Lombard* 2005 (5) SA 350 (SCA) para 19, *Blake & another v Cassim & another NNO* 2008 (5) SA 393 (SCA) para 22*, Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd (No1)* 2012 (6) SA 96 (WCC) para 28).

[32] The appellant provides the respondents with the following services, which form the basis for the appellant's determination of the amounts payable by the respondents, in respect of the disputed levies:

(a) 24-hour security services;

(b) Sewerage, rubble and refuse removal and the supply of water for consumption and irrigation;

(c) Insurance against public liability claims;

(d) A salary contribution for staff who provide, maintain or oversee the services and facilities provided to the respondents;

(e) Maintenance of gardens and grounds;

(f) Electricity costs for the illumination of the common area;

(g) Telephone expenses; and

(h) Contribution to the salaries of staff who work at the front office and reception area.

[33] Before dealing with the manner in which the appellant calculated the levies, it is necessary to deal with a preliminary argument advanced by counsel for the respondents. This was that the services outlined above were not referred to in the deed of servitude and the respondents were accordingly not obliged to accept their provision by the appellant, nor pay for them. However, Clause B1 of the notarial deed of servitude however provides that the appellant (as owner of the dominant property) is entitled to provide water and services ('dienste') to the respondents (as owners of the servient tenement). Where the appellant exercises its right to do so, the respondents are obliged to make use of the services provided by the appellant. In addition, clause B7 provides that in respect of every service provided by the appellant ('ten opsigte van elke diens gelewer') the appellant is entitled to determine, annually in its discretion, the amounts to be paid by the respondents for the services provided. There is accordingly no basis for this argument.

[34] The manner in which the appellant calculated the levies payable by the respondents for these services, were as follows:

(a) Security: The appellant averred that security was provided 24-hours a day, seven days a week. This included manning the entrance and exit gate, as well as a full-time security patrol and an electrified security fence around the perimeter of the entire property, which included the respondents' property. The security service was contracted out by the appellant and an amount of R1 049 836.00 had been budgeted for the 2014/15 financial year which ran from 1 October 2014 to 30 September 2015. The first respondent denied these averments and maintained that it did not rely on the appellant's security. No details were however furnished by the respondents of the security that they had arranged to protect the residents and properties on Windsor Heights. This is of particular relevance in the context of clause D4 of the deed of servitude:

'Die partye is elkeen aanspreeklik vir sy eie sekuriteitsdienste.'

If the respondents had assumed responsibility for their own security services and did not rely on the appellant's security, full details should have been supplied to justify their refusal to contribute to this expense. In addition, because there is a single gate

situated on the boundary of the appellant's property, which serves as the entry to and exit from both properties, the appellant is entitled to impose security measures at the gate to protect its residents. Although the respondents dispute the efficacy and reasonableness of the security measures imposed by the appellant at the gate, they obviously benefit the respondents. No details are furnished by the respondents of any security arrangements provided by them at the gate. The respondents are accordingly obliged to contribute to these expenses.

(b) The treatment of sewerage, removal of refuse and rubble and the supply of water for human consumption and irrigation: The appellant states that an amount of R702 200.00 was budgeted for the sorting of wastewater and its purification. This water is used for irrigation purposes and the appellant provides and charges the first respondent with water pumped from the Crocodile River for irrigation. The tariff utilised in the annual budget for 2014/2015 is alleged to be on a par with the municipal sliding scale tariff for water of this nature. The budgeted figure includes provision for repairs, maintenance and replacement of the infrastructure over a period of time, as well as the costs relating to the purification of the water. By reference to a municipal account tariff schedule, R6.67 is levied per kiloliter of water used. All drinking water which is sourced from boreholes on the respondent's property, is analysed and tested by a laboratory accredited by the local authority. A certificate of analysis of the tested water, is issued on a monthly basis. The respondents' reply is that the first respondent pays for the sewerage, refuse removal and water per meter reading, but does not know exactly how much the appellant is paying for the water. From the invoices supplied, the first respondent maintains that it is paying the appellant R6.67 per kiloliter of water. Although the respondents are paying for the water supplied to them at the applicable rate, this payment makes no allowance for repairs, maintenance and replacement of the infrastructure needed to supply the water. The costs of testing the drinking water and purifying the water, is also not covered by the tariff rate.

(c) Insurance for public liability: The appellant states that due to the nature of the resort and its use by members of the public, including the occupants of Windsor Heights and their guests, it is obliged to have adequate insurance cover against claims arising from incidents which may occur on the appellant's property, as well as

the respondent's property. The annual premium of R59 132.00 for cover of R50 million, is a shared cost included in the levy calculations. The respondents deny these averments and maintain that the first respondent is indemnified in this regard by Clause A.3.3 of the notarial deed, which provides as follows:

'[D] Die eienaar van die Dienende Eiendom vrywaar die eienaar van die Heersende Eiendom, sy regverkrygendes en/of sy regsopvolgers uitdruklik van enige aanspreeklikheid vir skade van watter aard ookal wat derdes mag ly as gevolg van die gebruik van die pad deur hulself of deur andere, of as gevolg van die toestand of aard van die pad.'

As pointed out by the appellant, this indemnity relates only to the use of the road which forms the right of way. The public liability insurance covers more than a liability arising from the use of the road.

(d) Contribution to salaries for staff who are employed to provide, maintain or oversee the services and facilities offered to the respondents: The appellant states that certain members of staff are assigned specific tasks relating to the provision of these services. These costs total a budgeted amount of R2 190 974.00, which according to the appellant, have to be shared on an equitable basis by the recipients of these services. The respondents deny these averments.

(e) Maintenance of gardens and grounds: The appellant states that due to the layout of the resort and general open access to all common areas by the residents of the resort, including the residents of Windsor Heights, these areas need to be constantly maintained. This is a general cost to be shared by all who have access to the gardens and grounds. The budgeted costs for the service are R483 893.00 per annum which is allocated to each unit/house on a pro rata basis. The respondents deny these allegations in reliance upon Clause C.1 of the notarial deed which provides as follows:

'Die partye kom ooreen dat elkeen verantwoordelik is vir die instandhouding van gemeenskaplike areas geleë op hulle onderskeie eiendomme.'

The appellant however points out that the levies do not include a charge for the maintenance of the respondents' common property, nor any charge for the maintenance of the appellant's common property.

(f) Electricity for the illumination of the common area: The appellant justifies this item on the basis that all persons have access to the common area after dark. Lighting is essential to ensure effective patrolling of these areas and the safety of residents. The budgeted annual cost of R941 047.00 is 30 per cent of the total annual electricity budget of R5 087 300.00. The respondents deny these allegations.

(g) Telephone Expenses: The appellant avers that the first respondent requires the appellant to contact its members telephonically, before allowing third parties access to any house in Windsor Heights. The respondents deny these averments and maintain that they did not request access control in respect of the resort, which was done at the instance of the appellant. However the minutes of a meeting held between representatives of Mount Amanzi and Windsor Heights on 3 June 2010 record that 'All visitors report to MA reception to get a day pass and the residents are contacted and supposed to fetch their guest at the gate . . .'. In addition the minutes of the meeting held on 23 February 2011(referred to above), record that 'A WH log book will be kept at reception for a record of visitors to WH as well as cell phone confirmations by the resident . . .'. A copy of these minutes was attached to the respondents' founding affidavit in support of the respondents' contention that a compromise had been reached with regard to the calculation of the levies. No allegation was made that the minutes were incorrect in this respect. They recorded clearly that this arrangement existed and was in place for some time. The total budgeted cost is the amount of R272 346.00 per annum.

(h) Contribution to the salaries of staff at the front office and reception area: The appellant states that this expense relates to the clearance of guests wishing to gain access to Windsor Heights, the completion of access indemnity forms, the issuing of access discs and liaison with the security service provider. A total amount of R642 071.00 is budgeted for this item. The respondents deny these allegations and again rely upon Clause A.3.3 of the notarial deed which they allege provides an indemnity in this regard. However, this indemnity only relates to the use of the road forming the right of way.

[35] The appellant calculates the budget expenses and the levy per house on the following basis. There are 166 units/chalets on the appellant's property. Windsor

Heights has 14 residential units and four unbuilt stands on the respondent's property, all of which benefit from the services provided by the appellant. A residential guesthouse unit known as Golden Pond having three residential units, together with a private whole ownership house, are also situated on the respondents' property. The total residential units on the properties of the appellant and the respondents numbers 184.

[36] The appellant has allocated the expenses relating to the services supplied, on the basis of the total number of houses situated respectively on the properties of the appellant and the respondents, as a percentage of the total number of houses on both properties. On this basis the appellant's share of the expenses is 90.2 per cent, being 166 houses out of the total number of 184 houses. The first respondent's share of the expenses is 7.6 per cent, being 14 houses out of this total number. On this basis Golden Ponds share is 1.6 per cent, and the share of the private sole ownership house is 0.5 per cent.

[37] The total amount budgeted by the appellant for the financial year commencing on 1 October 2014 to 30 September 2015 in respect of the items set out above, was R6 341 499.00. The amounts allocated to the respondents in respect of each of the above items, based upon a 7.6 per cent share of the budgeted expenses, were as follows:

- Security – total budgeted expense R1 049 836 – 7.6 per cent share – R79 879.
- Sewerage, removal of refuse and rubble and supply of water – total budgeted expense R702 200 – 7.6 per cent share – R53 428.
- Public liability insurance – total budgeted expense – R59 132 – 7.6 per cent share – R4 499.
- Contribution to salaries for staff providing services – total budgeted expense – R2 190 974 – 7.6 per cent share – R166 705.
- Maintenance of gardens and grounds – total budgeted expense – R483 893 – 7.6 per cent share – R36 818.
- Electricity for the illumination of the common area – total budgeted expense – R941 047 – 7.6 per cent share – R71 601.

- Telephone expenses – total budgeted expense – R272 346 – 7.6 per cent share – R20 722.
- Contribution to salaries for staff at the front office and reception area – total budgeted expense – R642 071 – 7.6 per cent share – R48 853.

[38] The respondents' 7.6 per cent share of the total budgeted expenses of R6 341 499.00 for 2014, in respect of these items was R 482 505.00 for the year. In order to calculate the annual contribution of each of the houses on Windsor Heights, this amount was divided by 14, to produce an annual contribution for each of the houses of R34 464.64. In order to determine the monthly contribution of each of the houses on Windsor Heights this amount was divided by 12, yielding a monthly levy of R2872.05. The total monthly levy payable by the respondents for 2014 was accordingly R40 208.75 (R482 505.00 ÷ 12).[1]

[39] The respondents deny the averments made by the appellant regarding the budgeted expenses for each of the items set out above, as well as the apportionment of these expenses to each of the houses on Windsor Heights. Accordingly, it has to be determined whether the court a quo was correct in deciding that a resolution of this issue was precluded by an irresoluble dispute of fact on the papers. As pointed out by this court in *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment.'

[40] The respondents submit that they do not have knowledge relating to the de

[1] Counsel for the appellant submitted that the amount of R40 280.00, claimed in para 2 of the notice of motion in the counter application, being the total monthly levy payable by the respondents, was produced by dividing the amount of R482 505.00 (being the total annual levy payable) by 12. This submission is incorrect. The calculation produces an amount of R40 208.75 which will be reflected in the order.

facto expenses incurred by the appellant. It is alleged that these facts lie exclusively within the knowledge of the appellant and cannot be tested in application proceedings. The respondents can only attack the basis upon which the calculation was done, by denying the de facto expenses claimed by the appellant. The respondents allege that they do not have a version in respect of the de facto expenses. Insofar as the appellant endeavours to impose a levy on the respondents, the respondents are prejudiced as they are not in a position to test the veracity of the allegations by, inter alia, obtaining discovery of source documents or cross-examining the appellant's witnesses.

[41] Central to the respondents' contentions is an allegation that they lack knowledge of the appellant's de facto expenses. The validity of this assertion requires an examination of the interaction between the parties, before the appellant increased the levies. It is common cause that it has always been the practice to convene meetings between the appellant and the respondents to discuss matters of mutual interest, including the determination of the levies payable by the appellant. These meetings took place regularly from 2009 to 2013. During April 2013, 18 months before the budgeted levies were imposed, a meeting was arranged between the appellant and the first respondent's trustees. At this meeting the first respondent's representatives were informed that the levies would be reviewed and increased to reflect the actual expenses incurred by the appellant, in respect of the respondents' properties. The respondents state that although they were informed that the levies were to be reviewed and increased, no specific figures were mentioned in relation to what the respondents describe as 'an exorbitant increase'.

[42] A second meeting took place on 30 September 2013 at which representatives of the first respondent were present. The appellant annexed to its affidavit a transcript of what was discussed at the meeting. It is clear that a detailed discussion took place between the parties which included reasons for the increase in the levies as well as the basis for their calculation. This is confirmed by the minutes of this meeting relied upon by the respondents, in which the following is recorded:

'4.2 PROPOSED ADDITIONAL CONTRIBUTION TO MOUNT AMANZI AS PER THEIR BUDGET, FOR THE SCHEME AS A WHOLE

4.2.1 It was discussed at some length why the scheme [Windsor Heights] has to date contributed a nominal amount per month for utilising the amenities of the resort.

4.2.2 It would appear as if the basis of that annual contribution payable on a monthly basis, was totally incorrect and has now been revised.

4.2.3 The result is that Windsor Heights is expected to contribute about 7% (their estimate) of the total expenditure of the resort. As long as the substantial increase (which was calculated as far as the increase is concerned as per the agreement of 23 February 2011) is payable with effect from the 1st October 2013, Mount Amanzi will not implement the reasonable contributions retrospectively.

4.2.4 The contribution is only for items of common interest to the parties, like roads, security etc. See copy of the budget attached.

4.2.5 John Meyer confirmed that they are even prepared to assist the scheme in the payment of the substantial amounts by allowing a reduced amount initially, on condition that the full amount be paid at the end of the financial year.'

Attached to the minutes is a document entitled 'Mount Amanzi Share Block Budget Allocation for 2013', containing the same items as set out in the appellant's budget for 2014 referred to above, save for the item 'sewerage and rubble removal' which is replaced by the item 'repairs and maintenance amenities'. The budgeted amounts in respect of each of these items are set out, as well as the 8 per cent contribution required at that stage, from Windsor Heights.

[43] It is common cause that this meeting was followed by a power point presentation by the appellant on 10 February 2014, to which the first respondent's members and trustees were invited. The presentation was well attended and annexed to the appellant's affidavit are printed copies of the slides utilised at this presentation. Details of the items in respect of which the respondents were obliged to contribute, as well as the levies payable in respect of each item and their apportionment to individual owners, were clearly set out. This presentation was followed by a written memorandum dated 12 March 2014, referred to above, which was sent by the appellant to the first respondent. For present purposes the relevant portion of the memorandum reads as follows:

'It is common cause that the servitude is explicit in defining access as well as defining the charges that the Share Block may levy in respect of the use of its facilities/services and

amenities. Against this background and by approaching the matter on the basis of zero based expenditure budget, the Board revised the contribution payable by the Body Corporate to bring it in line with the actual costs of performing the services or offering the use of the facilities.'

The response of the respondents was that they received the memorandum, but did not agree with its contents.

[44] The appellant took considerable care to inform the respondents of the need for an increase in the levies and the manner in which they were to be calculated. The apportionment of the appellant's expenses to the respondents was clearly explained. Counsel for the respondents was unable to refer to any instance where the respondents had requested further information from the appellant, relating to the calculation of the increased levies. The evidence reveals an obdurate refusal by the respondents to engage in meaningful dialogue with the appellant, to resolve the impasse which had arisen. Instead, reliance was placed upon a so-called 'compromise' allegedly concluded between the parties, which removed the appellant's discretion to increase the levies. Even if concluded, such an agreement was clearly unenforceable.

[45] The respondents were furnished with details of the appellant's de facto expenses but chose not to request any details of their composition. Seen in this context, although it may be said that this information lay peculiarly within the knowledge of the appellant, no basis was laid by the respondents for disputing the veracity, or accuracy of the expenses of the appellant. The manner in which these expenses were apportioned to the individual owners of property in Windsor Heights was clearly explained.

[46] The only ground upon which the respondents contended that the appellant exercised its discretion unreasonably, was that the increase in the levies from R357.81 to R2872.05 per house on the respondents' property, was 'exorbitant'. The minutes of the meeting on 30 September 2013 relied upon by the respondents, however recorded that, the respondents had 'to date contributed a nominal amount per month for utilising the amenities of the resort' and that 'the basis of that annual contribution payable on a monthly basis, was totally incorrect and has now been

revised.' When regard is had to the nature and extent of the services supplied and amenities provided by the appellant, the respondents' contribution to the expenses of the appellant, has been woefully inadequate. In the absence of any other basis upon which the respondents may have contended that the appellant's expenses, or their apportionment to the respondents was unreasonable or dishonest, a bare denial of their determination by the appellant, was insufficient to raise a real, genuine and bona fide dispute of fact. The court a quo accordingly erred in dismissing the appellant's counter application for this reason.

[47] The evidence of the appellant detailing how the increase in levies was calculated and apportioned to the respondents, establishes that the appellant exercised its discretion *arbitrio boni viri*, namely both reasonably and honestly. The levies determined by the appellant are accordingly valid and enforceable.

[48] No argument was advanced by the respondents in support of a submission in the respondent's heads of argument, that the principle of passivity in the law of servitude, meant that the respondents were not obliged to pay for any services rendered by the appellant. The argument is spurious. The services that the appellant elects to supply to the respondents and which they are bound to accept in terms of the deed of servitude, includes the reciprocal obligation to make payment for these services, in an amount to be determined by the appellant, in the exercise of its discretion.

[49] The following order is therefore made:

(1) The appeal succeeds with costs.

(2) The order of the court a quo is set aside.

(3) The following order is granted in respect of the main application;

'The application is dismissed with costs'

(4) The following order is granted in respect of the counter application;

'(a) It is declared that the first applicant, the Body Corporate of Windsor Heights Sectional Title Scheme, is liable to the respondent Mount Amanzi Share Block Ltd, for levies budgeted by the respondent in its 2014 budget, in terms of Notarial Deed

of Servitude No K8235/1996, calculated as 7.6% of the total budgeted expenses of the respondent for 2014, in respect of the following services;

(i) Security services.

(ii) Sewerage, removal of refuse and rubble and supply of water.

(iii) Public liability insurance.

(iv) Contribution to salaries for staff providing services.

(v) Maintenance of gardens and grounds.

(vi) Electricity for the illumination of the common area.

(vii) Telephone expenses.

(viii) Contribution to salaries for staff at the front office and reception.

(b) The first applicant is ordered to make payment of the sum of R40 208.75 per month to the respondent, for a period of 12 months commencing on 1 October 2014, being the applicants' total monthly share of the respondent's budgeted expenses for 2014.

(c) The first applicant is ordered to make payment of interest on each of the monthly payments from the day of the month in which each payment fell due, at the statutory prescribed rate of interest, to date of payment.

(d) The applicants are ordered to pay the respondent's costs jointly and severally, the one paying the other to be absolved.'

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K G B Swain

Judge of Appeal

APPEARANCES:

For Appellant:	H F Jacobs SC Instructed by: MacRobert Incorporated, Pretoria Claude Reid Incorporated, Bloemfontein
For Respondent:	D Prinsloo Instructed by: Elsa Kruger Attorneys, Centurion Webbers, Bloemfontein