IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A110/2022

In the matter between:

PIETER JACOBUS DE WET N.O.	First Appellant
LORRAINE DE WET N.O.	Second Appellant
NICOLAAS JACOBUS LANDMAN N.O.	Third Appellant

v

WATER'S EDGE HOME OWNERS ASSOCIATION	Respondent

and

DEON DE KOCK N.O.	First Appellant
RONKEM PROPERTIES (PTY) LTD	Second Appellant

v

WATER'S EDGE HOME OWNERS ASSOCIATION	Respondent

Coram: Justice J Cloete *et* Acting Justice S Hockey

Heard: 19 August 2022

Delivered electronically: 24 August 2022

JUDGMENT

CLOETE J:

[1] This is an appeal from the Cape Town regional court involving three consolidated actions. The issues before us are to all intents and purposes identical, and 3 principal grounds of appeal are persisted with, namely:

1.1 The respondent's constitution does not provide that its trustee committee could take a decision to impose penalty levies on the appellants for their failure to build timeously, and such decision could only have been taken pursuant to a meeting of the respondent's members. Accordingly the decision of the trustee committee taken on 22 September 2010 to impose such levies was *ultra vires* and of no force and effect;

1.2 A subsequent general meeting held on 29 April 2013 by the respondent, purportedly to ratify the earlier decision of 22 September 2010, was not validly held, in that notice of that meeting in the form of proxies sought was incorrect and amounted to *'an unjustifiable hurdle'* for members to participate, in addition to which the developer who supported the resolutions taken at that meeting was not entitled to vote in terms of the respondent's constitution as certain amounts were owing by it to the respondent; and

1.3 In the event of the appellants failing to succeed on either of the above grounds, the penalty levies that were imposed fall to be reduced in terms of the Conventional Penalties Act.[1]

[2] The background is briefly as follows. The respondent is a home owners association and the appellants at all relevant times owned erven within its estate and therefore are/were its members. The respondent forms part of a greater home owners association, namely Big Bay Beach Estate Property Owners Association ("BBOA").

[3] The appellant in case number RCC/CT/1570/13 in the court *a quo* purchased two erven and these were registered in its name on 28 August 2009. By all accounts this appellant is still the owner of these properties. The appellants in case numbers RCC/CT/471/13 and RCC/CT/2133/13 in the court *a quo* purchased three erven and these were registered in their names on 23 April 2008 (one was sold and transferred to a new purchaser on 16 February 2014 and the other two on 22 October 2015). For sake of convenience they will be referred to as "the appellants", "the De Wet entities" and "the De Kock entities" interchangeably and at times Mr De Wet and Mr De Kock.

[4] The respondent later instituted action against the different appellants for payment of penalty levies/retention of such levies paid under protest in the cumulative sum of around R1.5 million plus interest and attorney and client costs (the interest rate

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[1] No. 15 of 1962.

and scale of costs claimed are permitted in terms of the respondent's constitution). Along with various other defences, the appellants raised those which now form their remaining grounds of appeal.

[5] Certain defences raised *in limine* were separated from the merits, adjudicated upon by the trial court, and dismissed. That order was appealed against and served before a full bench of this Division ("the appeal court") under case number A360/19. The appeal was dismissed.

[6] One of the defences raised *in limine* as a special plea pertained to *locus standi* and was formulated as follows:

> *'1. The Plaintiff's claim is based on its Constitution (i.e. the Water's Edge Home Owners Association). That Constitution provides (in clause 24) that to the extent that there is any conflict between that Constitution and the constitution of the Big Bay Beach Estate Owners Association ("the BBOA") then the provisions of the BBOA Constitution will prevail.*
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> *2. The BBOA Constitution contains a similar provision (clause 13.4) in that the provisions of the Plaintiff's constitution shall not be permitted to conflict with the BBOA Constitution.*
>
> *3. The BBOA Constitution provides that levies in respect of Erven... will be paid to the BBOA.*
>
> *4. The BBOA Constitution provides that penalty levies in respect of a failure to commence building works on Erven... will be paid to the BBOA.*
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> *5. The Plaintiff's Constitution interpreted correctly with the BBOA Constitution provides that penalty levies and levies which form the subject matter to the claim are due to the BBOA and not the Plaintiff.*

6. *The Plaintiff accordingly does not have standing to claim the amounts contained in the Plaintiff's particulars of claim.'*

[7] The appeal court adjudicated (amongst others) the preliminary issue of *locus standi*, i.e. whether the respondent had the power to recover penalty levies as opposed to its umbrella association, the BBOA. The conclusion was that the respondent has independent and concurrent *locus standi* along with the BBOA.

[8] To the extent that the appeal court was *'not persuaded'* that the resolutions taken to impose penalty levies themselves were invalidly taken *'on the evidence of Van Wyk'* (the chairperson): (a) this was not an issue which the appeal court was called upon to determine; and (b) at best therefore the remarks made were *obiter*.

[9] At previously stated the appellants contend that the decision of the respondent's trustees of 22 September 2010 to charge penalty levies was *ultra vires* the respondent's constitution, because the resolution required a decision of the respondent's members in general meeting (which did not occur) and was therefore null and void.

[10] In a nutshell, the appellants argue that both the constitutions of the respondent and BBOA refer to *'the association'* and the *'trustee committee'* independently and it is thus clear that they are intended to bear different meanings. In the case of imposition of penalty levies, the power to decide to do so is conferred upon *'the association'* as opposed to the *'trustee committee'*. Accordingly, so the

argument goes, in order for such a decision to be taken this must occur at a general meeting of the association's members and the trustee committee cannot do so acting on its own.

[11] An association's constitution is not only an agreement entered into by its members but also determines the nature and scope of its existence and activities, and prescribes the powers of its governing body (which in the present case, for the reasons below, can only be the trustee committee).[2] At issue therefore is the proper interpretation of the relevant clauses of the respondent's constitution in accordance with the trite principles.[3] The evidence of Mr Van Wyk, to the extent that it was directed at the interpretation of the respondent's constitution, does not require consideration, since interpretation is a matter of law and not fact. It is to this interpretative exercise that I now turn.

[12] Clause 9 of the respondent's constitution expressly incorporates clause 8 of the BBOA constitution. These clauses relate to the start of construction within 1 (one) year from *'the commencement date'* which is defined in clause 8.2.3 as the date of registration of transfer into the name of the owner concerned.

[13] Should construction not commence timeously the developer has the option to require re-transfer of such an erf to it on certain terms and, should the developer

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2 Inter alia *Kenrock Homeowners Association v Allsop and Another* (A224/2011) [2012] ZAWCHC 31 (28 March 2012) para [26]. LAWSA 3 ed Vol 2 paras 156 and 157.

3 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

not exercise this option, the *'association'* – which the appeal court found includes the respondent – is entitled in terms of clause 8.6 *'to impose whatever penalties it deems appropriate in its sole discretion'* on the owner concerned. In terms of clause 2.1.2 of the respondent's constitution the *'association'* means the respondent, and in terms of clause 2.1.30, the *'trustee committee'* means the board of trustees of the respondent (clause 20.3 provides that during the development period, the majority of the trustees may be appointed by the developer, as developer trustees and the remainder of the trustees shall be appointed by the members, provided that after the development period, all trustees shall be appointed by the members).

[14] Clause 10.2 empowers the trustee committee (and not the association) to impose general levies upon members for the purpose of meeting all expenditure reasonably incurred or to be incurred in respect of maintenance, repairs and the like and *'in connection with achieving the objects of the association, the management of the association, the private open space, the association's affairs and all such things ancillary or incidental to the above'.* Similarly, clause 10.7 confers upon the trustees the power to impose special levies *'in respect of all such expenses as are mentioned in this clause 10... as the trustee committee shall think fit'.* It is thus clearly envisaged that the trustee committee is intended to act as the "governing body" of the association, unless otherwise provided.

[15] Clause 22 of the respondent's constitution stipulates that its trustee committee shall apply (my emphasis) clauses 23 to 32 (both inclusive) and clauses 34 to 38

(both inclusive) of the BBOA constitution. These include the *'functions and powers of the trustee committee'*. (Also included, seemingly erroneously, are *'proxies for general meetings'* since clause 33 of the BBOA constitution, which deals with this, is excluded from clause 22 itself. The respondent's constitution is silent on how a proxy must be appointed, although clause 33 of the BBOA constitution contains a specific procedure to be followed).

[16] Clause 26 of the BBOA constitution (incorporated by reference into the respondent's constitution in its clause 22) prescribes the functions and powers of the respondent's trustee committee. Clause 26.1 confers on the trustee committee *'full powers in the management and direction'* of the business and affairs of the respondent including *'all such acts on behalf of the association as may be exercised and done by the association and are not by these presents required to be exercised or done by the association in general meeting…'* subject to any express provision to the contrary. Importantly, there is nothing in clause 8.6 which expressly prescribes that a decision to impose penalty levies may only be taken by the association *'in general meeting'*. In terms of clause 26 the trustee committee shall also have the right to vary, cancel or modify any of its decisions or resolutions from time to time.

[17] Clause 31 of the BBOA constitution (similarly incorporated by reference) sets out the matters to be considered at annual general meetings *'in addition to any other matters required by these presents to be dealt with'* thereat. The matters listed in clause 31 do not include the imposition of penalty levies. I have also been unable

to find any such provision in the relevant clauses of either constitution which would lend itself to an interpretation that matters to be dealt with at general meetings expressly include the imposition of penalty levies, and counsel did not refer us to any either.

[18] In terms of clause 26.5 of the BBOA constitution (thus also incorporated by reference) the trustee committee is empowered to make *'regulations and by-laws'* that are either consistent with that constitution or *'prescribed... in general meeting'* for, *inter alia*, the furtherance of the objects of the respondent, its better management, and to assist it in administering and governing its activities generally. Although the appellants do not contend that the impugned resolution of 22 September 2010 falls into one of these categories, it is instructive that the aim of the sub-clause appears to be to broaden, rather than restrict, the trustee committee's powers.

[19] As alluded to above, given the interplay between the constitutions of the respondent and BBOA, it is also relevant that the latter's constitution similarly makes no express provision for a decision to impose penalty levies to be taken only in general meeting. In addition clause 26.3 (also incorporated by reference) confers upon the trustee committee *'should it so decide'* the power to investigate a suspected or alleged breach by any member. To my mind it would lead to an insensible and unbusinesslike result to confer such a power on the trustee committee, but at the same time leave it powerless to impose a sanction other than through a vote of members in general meeting, despite it being contractually

obliged to exercise *'full powers in the management and direction'* of the business and affairs pertaining to the respondent.

[20] A further relevant consideration is that if *'association'* in clause 8.6 is to mean its members acting in general meeting, this would render the words *'in its sole discretion'* meaningless, given how members are required to vote thereat as stipulated in clause 23 of the respondent's constitution.[4]

[21] I am accordingly compelled to the conclusion that the trustee committee was not obliged to take the decision to impose penalty levies in general meeting, and there is thus no merit in the first ground of appeal. This being the case, the second ground of appeal must also fail since, irrespective of the procedure adopted for the later meeting on 29 April 2013, there was nothing which required "ratification", and as counsel for the respondent put it, such ratification was "legally inconsequential".

[22] Turning now to the third ground of appeal, which is that the trustee committee imposed excessive penalties which fall to be reduced in terms of s 3 of the Conventional Penalties Act. Section 3 provides as follows:

> ***'3. Reduction of excessive penalty***
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> *If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the*

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4 The number of votes and the procedure to be adopted is set out at Record pages 35 to 36.

circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

(my emphasis)

[23] In Amler's Precedents of Pleadings the author puts it thus:[5]

'Relief by way of a reduction is in a sense discretionary. The question is thus not what damages were suffered but what prejudice the creditor suffered [taking into account the factors in s 3]...

A party claiming a reduction must allege and prove that the penalty is disproportionate to the prejudice suffered by the creditor. This involves proving the actual prejudice. In addition, the debtor must prove the extent to which the penalty should be reduced...

The onus may be discharged without the debtor's evidence. The very nature of the case and those facts or circumstances that are not in dispute or may safely be inferred may suffice to reveal a disproportion entitling a court to refuse to award the full amount claimed...'[6]

[24] The appellants pleaded their defence to the *quantum* of the penalty levies raised in the most skeletal of terms. One alleged that they *'are excessive and subject to reduction'* in terms of s 3, and the others merely that they *'are subject to reduction'* in terms thereof.[7] In addition, in response to a request for further particulars for trial, the respondent was informed that it was *'not entitled to*

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5 9 ed at pp127-128.

6 *Chrysafis v Katsapas* 1988 (4) SA 818 (A) at 828I; *Smit v Bester* 1977 (4) SA 937 (A) at 941A-943A; *National Sorghum Breweries (Pty) Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at para [8].

7 Para 15.2.2 of the plea in case number 1570/13 and para 7.4 of the counterclaim in case number 2166/13.

enquire regarding the basis' of this defence nor *'to request what penalty the* [appellants] *would regard as being reasonable'*.[8] Accordingly the appellants' pleadings are of no assistance in this regard.

[25] It is however common cause that:

25.1 In terms of the resolution passed on 22 September 2010, all owners who had failed to commence construction by 1 January 2011 would be liable to pay penalty levies equivalent to 2 x the normal levy monthly until construction commenced;

25.2 On 31 July 2014 this was increased to 3 x the normal levy with effect from 1 September 2014;

25.3 On 5 September 2016 this was increased to 4 x the normal levy with effect from 1 December 2016; and

25.4 On 12 April 2018 this was again increased to 5 x the normal levy with effect from 1 June 2018.

[26] In the case of the De Kock entities, the penalty was x 2 (from 1 January 2011) which later increased to x 3 (from 1 September 2014), whereupon these properties were sold. In the case of the De Wet entities, the penalty was imposed

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[8] Record p225.

for the duration of the period (i.e. 1 January 2011 onwards). He has since finally commenced construction.

[27] Counsel were *ad idem* (and I agree) that the principles in *Murcia Lands*[9] are helpful to consider in the context of the present matter, since there the court similarly had to adjudicate whether penalty levies for not commencing construction within a predetermined period were excessive. It is worth noting however that, unlike the present matter, in *Murcia Lands* it was a condition of membership that the governing body corporate would have the right to impose a penalty levy of 10 x the normal levy from the outset in the event of an owner failing to commence construction timeously.

[28] The court found that on the evidence before it only very limited actual prejudice had been caused in respect of traffic for building purposes, noise and dust, security and the like, but pointed out:

> *'21. However, that is not the end of the matter. The prejudice to which the Act refers includes* "not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question".
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> *22. If every owner had acted as the plaintiff did, or if a majority had done so, the defendant would have suffered very material prejudice. The security problem caused by extensive ongoing building activities (which the chairman of the defendant described as the main problem) would probably have been significant. This would have led to the inconvenience attached to being at risk of theft or burglary, and possibly to increased insurance premiums. The nuisance inevitably caused by building activities would have continued for a longer period*

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9 *Murcia Lands CC v Erinvale Country Est Home Owners Association* [2004] 4 All SA 656 (C).

than was actually the case, at a substantial level. The damage caused by building activities might well have increased, as it would have been incurred repeatedly over an extended period, instead of occurring over a limited period and then being remedied. And it may well be that property prices in the estate would have been negatively affected. Mrs McLoughlin, the estate agent who was responsible for selling the properties, stated that it was a positive selling feature that the inconvenience caused by building would be over within a specified and limited time, because this provided an advantage from the security, aesthetic and nuisance points of view.

23. This potential prejudice did not materialise, for the reason that most of the homeowners complied with the obligations imposed by the contract.

24. It appears to me that the defendant had a "rightful interest" *in ensuring and obtaining compliance with the terms of the contract. It was entitled to impose a penalty clause to compel the homeowners to carry out their obligations under the contract by providing* "harsh consequences" *should they default:* ***Western Bank Ltd v Meyer, De Waal, Swart & Another****, 1973 (4) SA 695 (T) at 699H.*

25. The fact that the contractual provision is intended as a penalty which creates a deterrent, rather than as a provision which provides compensation for default, does not mean that the defendant suffered no "prejudice" *as a result of the breach of contract. The prejudice was prejudice to its right to enforce concerted action for the common good, and to its interest in obtaining concerted action...*

37. It seems to me that the question of whether the penalty was "out of proportion" *to the prejudice can be assessed in three ways: by looking at comparable situations where the desired result was achieved; by looking at the size of this penalty and the penalties in general in relation to the income and expenditure of the defendant; and by exercising one's sense of fairness and justice.'*

[29] If one cuts through the mass of evidence before the trial court it seems clear that when it comes to actual prejudice the respondent's complaints were essentially

similar to those in *Murcia Lands.* As to the other consideration – and for present purposes the more relevant (i.e. the aim of deterrence) – the following factors are relevant.

[30] Ironically, the appellants attacked the lack of expertise of the respondent's witness, Ms Campbell, who testified *inter alia* about levies imposed in other residential estates, while in the same breath failing to adduce any evidence themselves on this score, other than a belated attempt in the form of impermissible hearsay which was rightly refused by the trial court. Accordingly and at best for the appellants, there was no evidence upon which they relied of any comparable home owners associations which impose lesser penalties than those levied by the respondent.

[31] The evidence of Mr Van Wyk was that the rationale behind the imposition of penalty levies included discouraging members from speculating with their properties (i.e. purchasing vacant plots for the sole purpose of reselling them at a later undetermined date for maximum profit). Mr De Kock readily conceded that he had bought erven in the estate as a business venture and never had any serious intention to reside there. Mr De Wet did not even testify. It also cannot be disputed that, on the evidence, the penalty levies had the desired effect on most other members who failed to comply since they ended up building their homes sooner rather than later.

[32] Properties in the respondent's estate fall within the luxury (if not ultra-luxury) segment of the market. Ms Campbell testified that it is one of the most expensive

security estates on the Western Seaboard with property values ranging between R8 million and R16 million. Mr De Kock himself had no qualms about admitting that he could afford to pay the penalty levies imposed, but chose not to do so "on principle". It is thus fair to infer that, had the respondent imposed more moderate penalties, it would likely not have had the desired effect, or put differently, the same persuasive sting for individuals of substantial means.

[33] The appellants were not the only members who had penalty levies imposed upon them over time with the desired result. If this court is to reduce them, it may well leave the door open to those other members whose claims have not prescribed reclaiming the penalties paid (with interest). This could lead to administrative chaos.

[34] Mr De Kock also conceded during his evidence that, despite being aware of the decisions made by the respondent regarding the penalty levies, and a period of some 8 years having elapsed, he had never taken truly proactive steps to have them set aside. Although he initiated arbitration proceedings at a stage, he later abandoned them. It was submitted by the appellants' counsel in his heads of argument that the penalty levies imposed should not only be reduced, but reduced to nil. In my view this completely ignores the deterrent factor about which Mr Van Wyk testified, and would set a most dangerous precedent for individuals such as Mr De Kock and Mr De Wet who will then be able to consider themselves completely unaccountable, despite willingly taking the risk and choosing rather to fight the inevitable consequences "on principle".

[35] In his address counsel for the appellants invited us to exercise our discretion *mero motu* in partially reducing the percentage levies imposed over the period. For the reasons set out above and hereunder any partial reduction is in my view unwarranted.

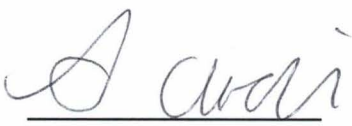
[36] In *Murcia Lands* the court reduced the penalty levies from 10x to 8x, whereas in the present case, as stated above, in comparison those imposed upon members were considerably less. A further factor on this score is that, unlike in *Murcia Lands* where the penalty levy of 10x was imposed from the outset, in the present case it was phased in and progressively increased over two to three-year increments. This indicates that the trustee committee did not impose hefty penalties from the outset, but tried to be fair and reasonable in phasing in the increases over a period of some eight years. It is also noteworthy that the appellants have not contended that the predetermined, agreed period to commence (and not even complete) construction was unreasonable or insufficient. As pointed out by respondent's counsel, Mr De Kock had about 2 years and 9 months from date of registration to commence construction, and in the case of Mr De Wet, he had 1 year and 5 months in which to do so.

[37] Perhaps understandably, and given the particular circumstances of this matter, the submissions made by appellants' counsel focused on actual prejudice as opposed to the legitimate and rightful interest of the respondent to obtain and enforce concerted action for the common good. Given all of the aforegoing, I am not persuaded that the third ground of appeal has merit.

[38] **The following order is made:**

1. **The appeals are dismissed; and**

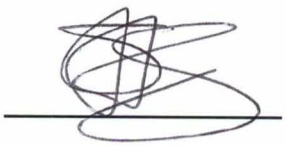
2. **The appellants shall pay the respondent's costs of the appeals, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.**



J I CLOETE

HOCKEY AJ

I agree.



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