



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

DELETE WHICHEVER IS NOT APPLICABLE

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

4 June 2024
DATE


SIGNATURE

CASE NO: 2022-626451B

In the matter between: -

PHILBERT MASHAKADU SEKOWE

1st APPLICANT

VERONICA TSHEGOFATSO MARUPING

2nd APPLICANT

and

KYALAMI TERRACCE HOME OWNERS ASSOCIATION

RESPONDENT

JUDGEMENT

CAJEE AJ

1. The facts of this matter are mostly common cause.
2. The Applicants, on the 3rd of March 2010, entered into a contract to purchase a piece of undeveloped land from a property developer, namely Simcha Properties 2 CC (the seller) for a purchase price of R 530 000, and simultaneously entered into a contract with the seller and a contractor to be nominated by a company called BFPG Devco (Pty) Ltd for the erection of a dwelling unit on the property for the price of R1 312 751-56. The undeveloped property was transferred into the name of the Applicants on the 11th of August 2011 on which day the Applicants became members of the Respondent..
3. In terms of the sale/construction agreement:
 - 3.1. The Seller and BFPG would nominate the contractor;
 - 3.2. The completion date was when the contractor would hand over the completed dwelling to the Applicants;
 - 3.3. The Applicants were not allowed to hire their own sub-contractors or suppliers without the permission of the appointed contractor. In other words they had no control over when and how the the

dwelling would be constructed save with the permission of the appointed contractor..

- 3.4. Subject to certain conditions, the contractor would commence with the construction within a reasonable time after signature of the agreement. One of these conditions was requiring that the property be transferred into the name of the Applicants prior to any construction being commenced.
 - 3.5. The Applicants would become members of the Respondent upon registration of the property into their names.
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4. For unexplained reasons the transfer of the property into the names of the Applicants only took place on the 11th of August 2011 and on this day Applicants became members of the Respondent and subject to its memorandum of incorporation and rules at the time. At this time no construction had begun on the property. The memorandum and rules applicable at the time are not attached to the papers of either of the parties to this application.
 5. Due to circumstances beyond their control the dwelling was only completed on the 19th of November 2015. The reason given in the

founding affidavit is that the constructor initially appointed did not have enough cash reserves to meet its obligations and had to be wound up before it could commence building. An alternative contractor was only appointed in January 2015 and building only commenced in February 2015. It was only on the 19th of November 2015 that the City of Johannesburg issued a certificate of occupancy for the dwelling. The Applicants informed the Respondent of this on the 23rd of December 2015 via an email sent to them and which is attached as annexure FA6 to the founding affidavit. It is alleged by the Applicants that the Respondents acknowledged receipt of same. None of these allegations are denied and are thus taken to be admitted in the answering affidavit.

6. According to the founding affidavit the Respondents adopted a new memorandum of association at a meeting a month after the Applicants took possession of the property. This would appear to be on the 21st of June 2016 according to annexure FA7 to the founding affidavit which is a Notice of Amendment of the Memorandum of Incorporation. It is however not explained what this amendment entailed. In the founding affidavit it is asserted that the minutes of this meeting are attached as annexure FA6 thereto. However annexure FA6 is the email sent to the Respondent on the 23rd of December 2015 informing it that a certificate of occupancy had been issued by the City of Johannesburg. The newly adopted memorandum of association is not attached to the founding affidavit as Annexure "FA7" as alleged. Annexure FA7 is the only the notice

mentioned above. Despite these anomalies these allegations in the founding affidavit are not denied.

7. It is alleged by the Applicants that the new memorandum of association contained the following provisions:

- 7.1. the directors shall from time to time impose levies upon members for purposes of meeting actual and anticipated expenses.

- 7.2. Every levy shall be paid monthly in advance

- 7.3. Any building constructed must be completed within 36 months after registration of transfer.

- 7.4. Any building must be completed within 12 months after commencement of construction

- 7.5. A penalty of R5000 per month would be levied for each month of late start/completion.

8. The above allegations are not denied by the Respondent, which does not deal with it in the Answering Affidavit. They are thus taken to be admitted. However, whether these provisions were different from the old ones is not explained. From a reading of paragraph 13 of the founding affidavit, which is admitted, it would appear that they were the same.

9. The Applicants allege at paragraph 13 of the founding affidavit that they are not liable for any of these penalties because the late commencement of the construction of the dwelling was not their fault, and further that a claim for any such penalties had in any event prescribed by the time the Respondent issued a summons against them in the magistrates court as set out below. Any such penalty would further amount to no more than R75000-00 if they were to be upheld. Apart from this the Applicants deny any further liability to the Respondent, claiming they have paid to it everything they owe. The Respondent in the answering affidavit alleges that the action in the Magistrates Court is still alive and hence lis pendens.
10. In 2017 the Respondent under case number 14186 / 2017 issued the aforesaid summons from the Randburg Magistrates Court against the Applicants for arrear levies and penalties. The action was defended. However a copy of the summons is not attached to the founding affidavit, only the Applicants plea. From paragraph 12 of the plea it would appear that, inter alia, the Applicants are taking issue with the fact that the penalty clauses are applied retrospectively. This is in addition to the defence that the Applicants cannot be held liable for the late construction of the dwelling. This action is still pending in the Magistrates Court and was last set down for trial in April 2020 but the hearing was not proceeded with. The Respondent allegedly made certain settlement proposals which is contained in a without prejudice letter attached to the

founding affidavit as annexure FA8. However, the Respondent takes issue with the disclosure of this letter as it was written without prejudice. I did not have sight of the letter as it is not uploaded to caselines and I wont 'draw any inferences from it.

11. In September 2021 the Respondent issued another summons out of the Randburg Magistrates Court against the Applicants for unpaid levies and penalties of R21 400. The full particulars of claim are not attached to the founding affidavit, in particular paragraphs 5 to 10 thereof. It is unclear whether the amounts claimed are for the same period and same debts in both summons. The case number is also illegible.
12. Yet another summons issued out of the Randburg Magistrates Court under case number 23412/2021 in November 2021 was served on the Respondents. The summons and particulars were not attached to the founding affidavit. The Applicants only attach an exception thereto. It is again unclear if it is for the same debt or in respect of which time period.
13. In paragraph 16 of the Founding Affidavit the Applicants allege that they have been paying building levies as and when they fall due. The Applicant's attorney sent a communication to the Respondent's attorney dated the 20th of December 2021 wherein liability for the late building penalty is denied as well as liability for payment of levies. The Respondent is invited to withdraw all the summons issued.

14. In March 2022, yet another summons was issued against the Applicants in the Randburg Magistrates Court for the sum of R26 400-00 for the non-payment of levies, building penalties and other charges for the period December 2021 to March 2022. In this instance the summons and particulars of claim are attached. No breakdown is given in the particulars of claim as to what constitutes levies, what constitutes building penalties and what the other charges relate to.
15. In a supplementary affidavit deposed to on the 1st of November 2022 the Applicants attach an "Owner Account Breakdown" emanating from the Respondent which according to the Applicants indicates that the Applicants are not in breach of their obligations to the Respondent for payment of levies, which they allege have been paid on time. Liability is once more denied for payment of penalties indicated in the breakdown. The Applicant also attaches a "without prejudice" letter from the Respondent's attorney referring to the breakdown and indicating that the Respondent would not oppose the application but would try and settle the issue of building penalties out of court upon receipt of the occupation certificate being forwarded to them.
16. In its answering affidavit the Respondent takes issue with the supplementary founding affidavit, which discloses without prejudice communication between the parties and which it states does not really

take the matter any further. I agree with this submission. The Respondent instead proposes a Draft Order which reads as follows:

"It is Ordered that:

1. The Respondent is not entitled to charge late building penalties in respect of the property owned by the applicants after the date upon which the applicant's provided the respondent's representative with their certificate of occupation on (sic) 19 November 2015"

17. The date upon which the certificate of occupancy was provided, namely the 23rd of December 2015, is not denied. This takes care of the issue of late building penalties claimed after the 19th of November 2015 which the Respondent concedes it is not entitled to charge for. This only leaves the claim for late building penalties before this date. As far as the claim for unpaid levies is concerned, the Respondent does not seriously challenge the assertion by the Applicants that same was paid. This presumably forms the subject matter of at least part of the claim in the first Magistrates Court Action. While the letter is without prejudice and should not have been disclosed, the attachment setting out the breakdown is not.
18. At the hearing of this matter I was informed that the Respondent had withdrawn the latter three actions instituted in the Magistrates Court.

19. It is the Applicant's submission that the claim for penalties prior to the date reflected in the certificate of occupancy has prescribed, alternatively that they are not liable for same because they had no control over the construction work, alternatively that the clauses in the memorandum of incorporation relied on by the Respondent cannot apply retrospectively, alternatively that the amounts should be reduced. There may be merit in each of these defences. However, this is the subject matter of the claim still pending in the Magistrates Court. The Respondent may wish to lead evidence as to why the Applicants are liable for these. In my opinion the Respondents should be given an opportunity to try prove same should they be so advised. If it fails the Magistrate presiding will be best placed to make an appropriate order. This is a matter best left to the Magistrates Court.
20. I do find that the institution of the other three actions do constitute an abuse of process and that the Applicant was entitled to seek the assistance of this court to set them aside. A simple discovery in the first action would have provided the Respondent with the certificate of occupancy. A simple reconciliation would have shown the Respondent that the Applicants had paid all the levies it claims were owed to them.
21. I am perturbed at the amount of time it is taking for the remaining matter in the Magistrates Court. It may be that the Respondent is stalling in bringing the matter to finality because it does not have a good case.

However, the Applicants are not without remedy. They are at liberty to use the rules and processes in the Magistrates Court to set the matter down or otherwise bring it to finality. Had this been the only action instituted in the Magistrates Court by the Respondent would not have been grounds to justify an order dismissing it. The fact that the Respondent instituted further actions does not alter that position.

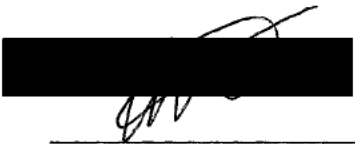
22. In the premises I make the following order:

22.1. The Respondent is not entitled to charge late building penalties in respect of the property owned by the applicants after the date reflected on the certificate of occupancy, namely the 19th of November 2015.

22.2. It is noted that the Respondent has withdrawn all actions instituted by it in the Randburg Magistrates Court save for the action instituted under case number 14186/2017 which at the time of the hearing of this Application is still pending in the Magistrates Court.

22.3. The Respondent shall pay the Applicants costs of this application on the party and party scale.

23. I hand down judgment



CAJEE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: 6th November 2023
DATE OF JUDGMENT: 4th June 2024

LEGAL REPRESENTATIVES OF PARTIES

For the Applicant: Adv. P. Baloyi
For the Respondent: Adv. S. McTurk