THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 525/2023

In the matter between:

CHAPMAN'S BAY ESTATE HOME OWNERS' ASSOCIATION	**APPELLANT**
and	
WILLEM ADRIAAN LÖTTER	**FIRST RESPONDENT**
COMMUNITY SCHEMES OMBUDS SERVICES	**SECOND RESPONDENT**
MNINAWA BANGILIZWE	**THIRD RESPONDENT**

Neutral citation: *Chapman's Bay Estate Home Owners' Association v Lötter and Others* (525/2023) [2024] ZASCA 153 (12 November 2024)

Coram: MOKGOHLOA, WEINER and KGOELE JJA and DOLAMO and DIPPENAAR AJJA

Heard: 03 September 2024

Delivered: 12 November 2024

Summary: Constitution of a Home Owners Association (HOA) – interpretation of clause 9.10 – whether subsequent owner who received a transfer from the first owner and not a developer obliged to pay penalty levies – language of the clause clear – subsequent owners do not acquire transfer directly from a developer – reading-in not legitimate.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Van Zyl AJ and Sher J, sitting as court of first instance):
The appeal is dismissed.

JUDGMENT

Kgoele JA (Mokgohloa, Weiner JJA and Dolamo and Dippenaar AJJA concurring)

[1] The appellant, Chapman's Bay Estate Home Owners' Association (HOA), is a home owners' association established for the Chapman's Bay Estate development, a residential development situated in Noordhoek, Cape Town (the Estate). The first respondent, Mr Adriaan Willem Lötter (Mr Lötter), owns erf 4456 (the erf) in the Estate. The appeal stems from an application brought by Mr Lötter to the second respondent, the Community Schemes Ombud Services (the CSOS), in terms of s 38 of the Community Scheme Ombud Service Act 9 of 2011 (the CSOS Act). Mr Lötter sought an order prohibiting the HOA from imposing penalty levies on him, as a subsequent owner in terms of clause 9.10 of the HOA's constitution. The third respondent, Mr Mnimawa (the adjudicator), was appointed by the CSOS to determine Mr Lötter's application.

[2] The appeal concerns the proper interpretation of clause 9.10 of the HOA's constitution. The impugned clause reads as follows:

'Penalty levies as determined by the Trustees Committee are payable to the Association if a dwelling on the property is not completed within 3 (three) years from date of transfer of the property from the Developer on the basis that construction of the dwelling should commence within 2 (two) years from the date of transfer of the property into the name of Purchaser, and completed within 1 (one) year from date of commencement of such construction process, which shall be undertaken on a continuous basis, unless an extended time period is approved by the Design Review Committee due to the complexity of the dwelling.'

[3] On 5 May 2022, the adjudicator ruled in favour of Mr Lötter. The HOA appealed the adjudicator's ruling as provided for in s 57 of the CSOS Act, and in the alternative, made an application to have part of the adjudication order reviewed and set aside. The appeal, alternatively review application, served before the Western Cape Division of the High Court, Cape Town (the high court). The high court ruled in favour of Mr Lötter, albeit for different reasons from those of the adjudicator. This appeal is with the leave of the high court against its decision. Mr Lötter, the CSOS, and the adjudicator filed notices to abide by the decision of this Court.

[4] The background facts that are common cause can be summarised as follows: The erf acquired by Mr Lötter, was transferred by the developer on 17 August 2016 to Mr. Michael David Gould (the previous owner). Mr Lötter subsequently took transfer of the erf more than four years later, on 29 January 2021. Upon becoming the owner of the erf, Mr Lötter also became a member of the HOA. As a member, the constitution of the HOA binds him. At the time Mr Lötter received the transfer of the erf, the previous owner had not yet built a house thereon.

[5] The HOA brought clause 9.10 to Mr Lötter's attention before he purchased the erf. The HOA also explained to him that the interpretation of the clause is that a subsequent owner of an erf will be liable for penalty levies if, at the time an erf is acquired, the three years stipulated in clause 9.10 has already expired, and the construction of a dwelling has not commenced or been completed on the property. Mr Lötter confirmed these averments in his papers.

[6] Immediately after receiving transfer of the erf, Mr Lötter started building the house and completed it without delay. Despite this, the HOA continued to impose penalty levies on him in terms of this clause from the date he received the transfer, even though the previous owner had duly paid the levies imposed on him in full. Mr Lötter refused to pay the penalty levies and only paid the regular levies charged. The aggregate sum of the outstanding penalty levies was R58 905.

[7] Approximately 14 months after Mr Lötter took transfer of his erf, he made an application to the CSOS for, amongst other relief, that the HOA ‘be stopped from enforcing penalty levies on new owners who made every effort to develop their property expeditiously’. He complained that imposing penalty levies on owners who are not to blame for not completing a dwelling within the three-year period stipulated in clause 9.10 is unfair. In the alternative, Mr Lötter contended that the interpretation of the clause should not be that it imposes penalty levies on owners such as him, who completed their dwellings within three years of acquiring the property. He also urged the adjudicator to interpret the clause to the effect that the three-year period should commence afresh upon each transfer of an erf in the Estate.

[8] It is common cause that the interpretation of the clause by Mr Lötter is at odds with that of the HOA. The HOA maintained that the clause provides for a single

three-year moratorium period for each erf, during which the HOA will not impose penalty levies against the owner of an undeveloped erf. According to the HOA, that period commences on the date of transfer from the developer and expires on the third anniversary of that date. The effect is that, the submission continued, the HOA can impose penalty levies on subsequent owners who acquire an erf in the Estate, if the three-year moratorium period has already expired in circumstances where a dwelling has not yet been built or completed. As explained by the HOA, this is because penalty levies will start when the subsequent owner takes transfer and continue until he or she completes a dwelling on the erf.

[9] The HOA further submitted that clause 9.10 is attached to the property in question and not to persons or owners, which is why subsequent owners are held liable for paying the penalty levies. The purpose, as contended by the HOA, is to motivate owners, irrespective of the fact that they took the transfer of an erf from the developer or a subsequent owner, to construct and complete construction work on the relevant erf as soon as possible.

[10] As already indicated, the adjudicator found in favour of Mr Lötter. On appeal, the high court rejected both the interpretations proffered by the HOA and by Mr Lötter. However, the high court found in favour of Mr Lötter on different grounds. In rejecting the HOA's argument that the penalty levies attach to the property and not to a person, the high court reasoned that '[o]n a proper interpretation of clause 9.10, it is the responsibility of the member who takes transfer from the developer to construct a dwelling within three years after transfer. It is a personal obligation undertaken on the basis of the contractual nature of the constitution. It does not attach

to the property, but to the contracting member. For that reason, such obligation cannot be transferred to new members, as is acknowledged by clause 7.5.'[1]

[11] After analysing the purpose of the provisions of clause 9.10, the high court found that:

'[43] The provisions of clause 9.10 would have no business efficacy if the applicant's contentions were upheld. . .This is because, if the purpose is (on the plain wording of the clause) to encourage owners to build within three years of taking transfer from the developer, that purpose can never be served by imposing penalties on subsequent owners where the three-year period has expired. In such circumstances, it is impossible for subsequent owners to comply with the clause. Imposing penalties in perpetuity from year 4 onwards does not give effect to the purpose of the clause. It simply provides an additional, and probably substantial, source of income for the applicant – one that is not necessarily authorised by the provisions in the constitution setting out the Trustee Committee's rights and duties in relation to the levying of rates. . .

[44] The power to impose levies is primarily focused on meeting the reasonably incurred expenses of the applicant. The automatic (and indiscriminate) imposition of penalty levies on subsequent owners by reason of a first owner not having fulfilled its obligation under clause 9.10 to the applicant, falls outside of the powers of the trustees in circumstances where clause 9.10 itself does not provide such an entitlement.'

[12] The high court concluded by finding that the express words contained in clause 9.10 do not authorise the HOA to impose penalty levies on subsequent owners, but only upon owners who purchased the properties directly from the developer. For the clause to state what the HOA contends, redrafting is required. It issued the following order:

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[1] Clause 7.5 provides that:
'7.5 The rights and obligations of a Member shall not be transferable and every Member shall:
7.5.1 to the best of his ability further the objects and interests of the Association;
7.5.2 observe all by-laws, rules and regulations made by the Association or the Trustee Committee.'

‘The [HOA] is ordered, with immediate effect, to desist from imposing penalty levies in terms of clause 9.10 of its constitution upon any owners in the Estate other than those who took transfer of their properties from the developer.’

[13] Before this Court, the HOA argued that the high court's ruling was incorrect in that it misdirected itself by not applying the principles applicable to contractual interpretation. The HOA repeated all the submissions it made before the high court to persuade this Court that the order of the high court undermines the purpose of this clause. According to the HOA, its interpretation is consistent with the text, the context for which the clause is being used, and the purpose it seeks to achieve. It emphasised that in terms of the clause, the period within which the construction of a dwelling is to commence and be completed starts from the date of the first transfer of the property from the developer. It does not begin when a subsequent owner, such as Mr Lötter, takes transfer.

[14] In addition, the HOA submitted that, on the interpretation pronounced by the high court, the purpose of the clause is rendered nugatory. The HOA is thus left powerless to encourage subsequent owners to develop their property in the Estate as quickly as possible. On such interpretation, the argument continued, a cynical speculator may, for instance, avoid clause 9.10 by simply transferring the erf from one of his corporate entities under his control to another. According to the HOA, such an interpretation is not sensible or business-like. It was the contention of the HOA that other HOA members endorsed this interpretation and are complying.

[15] The crisp issue before this Court is whether the high court was correct in interpreting the clause as not being applicable to Mr Lötter. In other words, whether the clause authorises the HOA to impose penalty levies on subsequent owners who

did not acquire a transfer from the developer but from a previous owner.

[16] In *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others (South African Airways)*,[2] this Court referred to several outcomes that circumscribed the limits of judicial interpretation. This Court said:

'Harms DP in *Minister of Safety and Security v Sekhoto* most recently summarized these principles, in so far as relevant here, as follows:

. . . There is a distinction between interpreting legislation in a way which "promote[s] the spirit, purport and objects of the Bill of Rights" and the process of reading words into or severing them from a statutory provision under s 172(1)(*b*), following upon a declaration of constitutional invalidity under s 172(1)(*a*).

. . . *The first process, being an interpretative one, is limited to what the text is reasonably capable of meaning.* The second can only take place after the statutory provision, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid.

And of course in *S v Zuma* the Constitutional Court cautioned against using the Constitution to interpret the language of legislation to mean whatever a court wants to mean. It would appear that in *Cosawu* and this case the courts considered that a particular outcome promoted the objects of the Act and the section in particular, and disregarded the intention of the legislature as manifested in the clear language of the section.

There was no challenge to the constitutionality of s 197 in this matter. A collateral challenge in the guise of reading a word to mean something different is simply not legitimate. See in this regard *The Law Society of the Northern Provinces v Mahon*. It would be tantamount to usurping the role of the legislature.

In *Standard Bank Investment Corporation Ltd v Competition Commission & others; Liberty Life Association of Africa Ltd v Competition Commission & others* this court dealt with the interpretation of the Competition Act 89 of 1998, the issue in the appeal being whether the Competition Commission is one of the regulatory authorities whose approval of a bank merger and an insurance merger is required. *Various arguments against a literal interpretation of the*

[2] *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* [2011] ZASCA 1; [2011] 2 BLLR 112 (SCA); 2011 (3) SA 148 (SCA); (2011) 32 ILJ 87 (SCA); [2011] 3 ALL SA 72 (SCA) paras 26-29. (Citations omitted from quote.)

section were raised in favour of a purposive construction. Whilst recognizing the need to give effect to the object or purpose of legislation, the court stressed that it is not the function of a court to do violence to the language of a statute and impose its view of what the policy or object of a measure should be.' [Emphasis added.]

[17] In *Lötter N O and Others v Minister of Water and Sanitation and Others (Lötter)*,[3] this Court said:

'The correct approach to the interpretation of written documents, be they statutes or contracts, was set out authoritatively by this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*. Essentially, what is required is an objective, unitary exercise that takes into account the language used, the context in which it is used and the purpose of the document concerned. Unterhalter AJA, in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*, added the following:

"I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasized, citing well-known cases, *"[t]he inevitable point of departure is the language of the provision itself"*.' [Emphasis added.]

[18] At the onset, it is essential to point out that Mr Lötter was not required to pay any penalty levies 'inherited' from the previous owner. As indicated, the previous owner paid the penalty levies imposed on him. The penalty levies imposed on Mr Lötter were additional, based on the HOA's interpretation of the provisions of the clause, irrespective of the fact that Mr Lötter completed building his property shortly after the transfer.

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[3] *Lötter N O and Others v Minister of Water and Sanitation and Others* [2021] ZASCA 159; [2022] 1 All SA 98 (SCA); 2022 (1) SA 392 (SCA) para 43. (Citations omitted from quote.)

[19] I disagree with the interpretation proffered by the HOA. Applying the trite principles of interpretation as espoused above, this Court is enjoined to start with the ordinary language in the provision itself, in other words, what the text is reasonably capable of meaning. First, there is no indication in the text that once the three-year period has lapsed before a building is completed, the subsequent owner will pay penalty levies. The clause is silent on this issue. The words in the clause are clear and specific; they expressly refer to two persons, the '*owner who received transfer*' and the '*developer'*. The clause also refers to the non-completion of the building within three years from the '*date of transfer from the developer*.' There is no ambiguity in this text. What is apparent from a plain reading of the clause is that the three-year period within which the dwelling is to be developed is expressly linked to the date of transfer from the developer.

[20] Subsequent owners, such as Mr Lötter, do not take transfer from the developer but from the owner. The high court was correct in finding that there is thus nothing in the clause that authorises the HOA to continue to impose penalty levies on them. The subsequent owners are, in any event, incapable of ever complying with the obligation placed on the first owner, namely, to start and complete the development of the property within three years of the date of transfer from the developer, if they only took transfer of the property more than three years after its transfer from the developer.

[21] Second, the high court was further correct to conclude that the obligation to pay penalty levies does not, as the appellant argued, attach to the property, but rather attaches to the members of the HOA as contracting parties to the constitution. Clause 9.10, seen in the context of the scheme created by the constitution as a whole,

regulates the rights and obligations of the HOA and its members *inter se*. The fact that such rights and obligations pertain to a specific property, does not change this.

[22] Third, the clause is silent on when the obligation to pay penalty levies terminates under clause 9.10. The termination period also cannot be found anywhere else in the HOA's constitution. It is important to state that the HOA's constitution clearly differentiates between regular and penalty levies. Unlike penalty levies, regular levies are self-evidently payable for as long as any individual or entity is a member of the HOA. Both the onset and the termination of liability for the member's successor in title in respect of the regular levies are provided by clause 9.7.[4]

[23] The termination of the liability for penalty interest was also not addressed in the HOA's papers. This issue is not expressly addressed in clause 9.10 of the constitution. When this Court engaged the HOA's counsel on this issue, he submitted that it could be tacitly or implicitly inferred from the clause that it terminates once a property owner builds on the property. There are several reasons why this submission cannot extricate the case of the HOA. The first reason is that, given that the relationship between the HOA and its members is regulated by contract, being the constitution, it needs to be considered whether the term is implied or tacit as contended. The problem with this contention is that the HOA never relied on such tacit or implied term, and it does not appear in the pleadings. It is trite law that if a party wants to rely on a tacit or implied term, the term and the facts on which reliance

[4] Clause 9.7 provides that:
'Any amount due by a Member by way of a levy shall be a debt due by him to the Association, *the obligation of a Member to pay a levy shall cease upon his ceasing to be Member of the Association,* without prejudice to the Association's right to recover arrear levies. No levies paid by a Member shall under any circumstances be repayable by the Association upon his ceasing to be a Member. *A Member's successor in title to a Residential Erf shall be liable as from the date upon which he becomes a Member pursuant to the transfer of that erf, to pay the levy attributable to that erf.* No Member shall transfer his Residential Erf until the Association has certified that the Member has at the date of transfer fulfilled all his financial obligations to the Association.' (Emphasis added.)

is placed should be specifically pleaded. Therefore, no such case was made out on the papers.

[24] The second reason is that, even if the purpose of levying the penalties is obvious, I am not persuaded that, on this basis alone, it can simply be implied that the penalty levies will cease once the building is completed. If we interpret the clause as the HOA contends, it will lead to an absurdity. In my view, apart from the fact that subsequent owners will not be able to comply with the clause as the high court found, it will, in practical terms, mean that subsequent owners, to avoid being mulcted with penalty levies, should build and complete their houses within a day after they obtained transfer of the property from the first owner, which is impossible.

[25] The other difficulty is that there is no indication in the text of the clause whether, if the erf is still vacant when it is transferred to a subsequent owner after the expiration of the three years, the penalty levies will continue in perpetuity, notwithstanding that the owner who received a transfer from the developer paid the penalty levies imposed on him, as is the case in this matter. The HOA appears to be acutely aware of the implications of omitting these crucial averments in the clause. If this were not the case, it would not have been necessary for the HOA to explain the meaning and consequences of the clause to every prospective subsequent owner. The relevant penalty levies, in fact, according to the constitution, increase after year 4 from the date of transfer of the property from the developer.[5]

[5] Annexure E to constitution (Transgressions and Penalties table) provides under clause 1.5 thereof, that a penalty levy of 1x the Ruling Levy in year 4 after transfer of the property from the developer and 2 x the Ruling Levy, be imposed in year 5.

[26] The fact that the first owner who obtained a transfer from the developer paid the levies imposed on him in this matter exacerbates the difficulty the HOA is facing with their interpretation. The reason is that the continuous imposition of the penalty levies on Mr Lötter results in a double payment being charged from the same erf as the penalty levies were paid in full. As indicated earlier and with the risk of repetition, it is impossible for subsequent owners like Mr Lötter, who started building the house on the erf shortly after transfer, to complete the building in one day, let alone a month after transfer. Unsurprisingly, the high court regarded the additional penalty levies as a 'money-making scheme'.

[27] In addition, it also does not appear from the version of the HOA that Mr Lötter was made aware that the previous owner paid the penalties. The only thing that emerged clearly from the HOA's papers was that 'he was informed that the previous owner had incurred penalty levies. . . and that he would inherit these penalty levies' in terms of clause 9.10. Be that as it may, I am constrained by the conclusion I reach below from making any finding on the unfairness of the clause; suffice it to state that the fairness of this clause is questionable despite the good intention of the purpose of the clause as alleged by the HOA.

[28] In summary, the wording of the clause does not bear out the expansive interpretation given to it by the HOA in support of the purpose for which it has been included in its constitution. There is no room for such interpretation, given that the interpretation process is limited to what the text is reasonably capable of meaning. The purpose of the clause cannot override the reasonable meaning of the text employed, seen in the context of the constitution as a whole. It is also impermissible for this Court to make a contract for the parties as enunciated in *Natal Joint*

Municipal Pension Fund v Endumeni Municipality (Endumeni)[6] and *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others.*[7] This Court also emphasised in *Endumeni* that the inevitable point of departure is the language of the provision itself.[8]

[29] What the HOA is effectively seeking is the 'reading-in' of words in the clause to make provision for the imposition of penalty levies on subsequent owners for as long as the property remains undeveloped, ie, to serve the purpose that the HOA had in mind in including clause 9.10 in the constitution. Following the principles espoused in *South African Airways*,[9] 'reading-in,' as the HOA suggests, will be doing violence to the express words in the clause. On a proper interpretation of clause 9.10, as it stands, the HOA is entitled to impose penalty levies only upon owners who purchased properties in the Estate directly from the developer. The high court was correct in stating that redrafting is required.

[30] In conclusion, I am of the view that the ordinary grammatical expression of the words in the clause is sufficient to dispose of the matter. Therefore, the need to analyse the reasons pertaining to the other aspects the high court identified and took into consideration falls away. The high court was correct to conclude that whether the clause is unfair, unreasonable, or harsh does not affect the debate. Similarly, this Court was required to interpret the clause and not to make a declaration on it.

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[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[7] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 26.
[8] Op cit fn 7 para 18.
[9] Op cit fn 2 para 29.

[31] In the circumstances, the appeal is dismissed.

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A M KGOELE

JUDGE OF APPEAL

Appearances

For appellant:	J Dickerson SC (with J Engelbrecht)
Instructed by:	Bernadt Vukic Potash & Getz Attorneys, Cape Town
	Honey Attorneys, Bloemfontein.