



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

Case NO: A2023-035929

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
23 AUGUST 2024	
DATE	SIGNATURE

In the matter between:

**STONE RIVER ESTATE MANAGEMENT
ASSOCIATION NPA**

Appellant

and

TINASHE MASHOKO

First Respondent

A. ANDREAS N.O

Second Respondent

THE COMMUNITY SCHEMES OMBUD SERVICE

Third Respondent

ORDER

1. The appeal is upheld with costs.
2. Paragraphs (g) and (h) of the adjudicator's award is set aside.

3. The disputes relating to the building penalty (paragraph (g) of the award; and the costs and interest (paragraph (h) of the award), are referred back to the adjudicator.

JUDGMENT

WINDELL, J

Introduction

[1] This is an appeal in accordance with section 57 of the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act) against a portion of an award that was granted by the second respondent (the adjudicator) against the first respondent on 28 March 2023. It is trite that the only relief that may be sought in terms of section 57, is an order setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law.¹

[2] The appellant is a non-profit homeowners association of the Stone River Estate (the Estate). The appellant is tasked to manage the Estate in terms of the appellants memorandum of incorporation (MOI). The first respondent is a registered homeowner in the Estate. Every registered owner, such as the first respondent, is a member of the appellant and is contractually bound by the MOI and the Rules made by the directors of the appellant from time to time.

¹ *KPMG Chartered Accountants v Securefin Ltd* 2009 (4) SA 399 (SCA) at para [39]; *Trustees for the time being of the Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) at para [25].

[3] The appellant filed a dispute with the first respondent in August 2022 regarding the collection of arrear levies, building penalty levies and interest. The appellant's sought an order against the first respondent for payment of R92 678.00 in respect of ordinary levies levied (prayer (a)) and R189 345.00 in respect of penalty levies (prayer (b)), as well as interest and costs on an attorney-client scale in accordance with clause 10.3 of the MOI, including collection commission (prayer (c) and (d)). The penalty levies were imposed by the appellant due to the first respondent's failure to complete building operations within the 12-month period specified in clause 8 of the MOI.

[4] The adjudicator granted an order for the payment of the arrear levies and interest but ordered the appellant to remove the building penalty in the amount of R189 345.00 from the first respondent's levy statement, within fourteen (14) days upon receipt of the order. The adjudicator found that the appellant was not entitled to impose the penalties because it was required to comply with clause 10 of the MOI, which, inter alia, provides for notice to the member, before doing so. Additionally, the adjudicator did not issue any orders regarding interest or costs. For completeness's sake adjudicator's award is quoted below:

“(a) The relief sought by the appellant against the first respondent is upheld, insofar as it relates to prayer (a).

(b) The first respondent is held to be indebted to the appellant in the amount of R 92 678.00 in respect of arrear levies and interest.

(c) The first respondent is ordered to pay R10 000.00 monthly from the end of May 2023, until the arrear levies is settled in full.

(d) No interest shall accrue to the outstanding amount within this period allowed for the payment.

(e) The above amount excludes the first respondent's monthly levy.

(f) Should the first respondent fail to pay any instalment due to the appellant on the due date, the full outstanding balance of R92 678.00 shall immediately become due and payable, and the first respondent must also pay the appellant the applicable interest on the full outstanding balance of R92 678.00 calculated from the date that the full outstanding balance becomes due and payable to date of payment.

(g) The appellant is hereby directed to remove the building penalty in the amount of R189 345.00 (One Hundred and Eighty-Nine Thousand Three Hundred and Forty-Five Rand) from the first respondent's levy statement, within fourteen (14) days upon receipt of this order.

(h) No findings are made in respect of the appellant's prayers (d), (e) and (f).

(i) No order is made as to costs."

[5] The appellant appeals against the findings and order that the appellant is directed to remove the building penalty and the finding in respect of interest and costs (paragraphs (g) and (h)). It is submitted that the adjudicator failed to interpret the MOI correctly. Only the first respondent opposes the appeal. Both the second and third respondents have filed notices to abide the decision of this court.

Condonation

[6] The appellant seeks condonation for the late filing of the notice of appeal. The notice of appeal ought to have been lodged by 28 April 2023, but it was only lodged on 23 May 2023, and uploaded on 21 July 2023.

[7] In *Baxter v Ocean View Body Corporate and Others*² the Court concluded that upon a proper contextual consideration of the provisions of section 57(2) of the CSOS Act, the court does have the power, on good cause shown, to condone non-compliance with the 30-day time limit therein prescribed.

[8] The appellant explains that the reason for the delay is that the notice of appeal was first served on the second respondent and CSOS at their previous address in Wierda Road East, Johannesburg on 25 April 2023. When the appellant became aware that this address was no longer in existence, the notice of appeal had to be re-served at the current Centurion address. This was done on 23 May 2023.

[9] The attorney for the appellant had previously used the Wierda Road East address in previous matters and had been unaware that the CSOS offices had moved to Centurion, until she attempted service on the previous address. She could only re-serve when she was back from overseas on 23 May 2023.

[10] I am satisfied that the appellant has adequately explained the reasons for the delay. The period is relatively short and is no prejudice to the respondent. There is no reason in the circumstances why condonation should not be granted.

² *Baxter v Ocean View Body Corporate and Others* 2023 (2) SA 205 (WCC) at para [9].

Grounds of appeal

[11] Any owner who begins to build must complete the build within twelve months of date of commencement of the building operation. Clause 8 of the MOI provides that if the member has not completed the build within the twelve-month period, a non-completion fine of twice the annual levy is payable from the date the twelve-month period runs out, until the date that the Association issues the member with an occupation certificate in respect of the property.

[12] Clause 8 is headed "BUILDING COMPLETION and VACANT STANDS" and provides as follows:

"8.1 In keeping with the Association's previously existing Articles of Association (which this document replaces) and rules, all owners who have not yet commenced building operations on their properties (vacant stands) are immediately subject to a non-commencement fine per month of non-compliance, of twice the annual levy payable in respect of the property.

8.2 Any owner who begins to build must complete the build within twelve months of date of commencement of the building operation. A member who submits plans for plan approval is entitled to a stay of non-commencement fines from the date of approval of that member's plans, for a period of twelve months.

8.3 If the member has not completed the build within the twelve month period, a non-completion fine of twice the annual levy payable in respect of the property will be payable from the date the twelve month period runs out, until the date that the Association issues the member with an occupation certificate in respect of the property. (My underlining).

[13] The main contention in this appeal is that the adjudicator failed to interpret the MOI correctly, by finding that clause 10 of the MOI applies to a penalty contained in clause 8 of the MOI. Clause 10 of the MOI is headed "ASSOCIATION'S POWER TO ENFORCE THE RULES" and provides as follows:

"10.1 If a member or resident or any person for whom a member or resident is responsible, has broken the Rules of the Association, the Directors may—

10.1.1 give notice to the Member or Resident concerned which requires him to rectify the breach or make payment of any amount claimed by the Association, within such reasonable period as the Directors may decide.

10.1.2 take or cause to be taken any steps as may be considered necessary to rectify the breach of the Rule that the Member or Resident may be guilty of breaching, or recover the debt, and recover any costs of doing so from the Member or resident concerned, which amount shall be deemed, without the necessity of taxation or debate, to be a debt owing by the Member."

[14] The appellant argues that clause 8 of the MOI deals with the timeframe allowed for building and the penalties imposed if the owner fails to meet these time constraints. Clause 10, so it is argued, pertains to penalties that come into effect when there is a breach of the "Rules of the Association" set out in clause 7. The adjudicator did not apply clause 8 (which the appellant believes to be relevant) and instead applied clause 10.

[15] The respondent contends that this argument is not sustainable as same is not supported by the reading of the MOI as a whole, or the wording and the intended purpose of clause 10. It is submitted that on proper reading of the MOI as a whole,

clause 10 is applicable and introduces the all-important natural justice rule. The intended purpose of which is to curtail the powers of the appellant and provide tenants with an opportunity to engage before fines and penalties are wrongfully issued. It is submitted that any provision which purports to place a limitation upon a clearly expressed obligation must be restrictively interpreted.³

The interpretation of clause 8 and clause 10 (and clause 7) of the MOI

[16] In *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and Others*,⁴ the SCA held that ‘when the respondents chose to purchase property within the estate and become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature.’

[17] At the crux of the appeal lies the interpretation of the contract between the parties (the MOI). The interpretation of documents as it stands is set out in the oft-quoted passage in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.⁵

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax;

³ *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (AD) at 108C and *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (AD).

⁴ 2019 (4) SA 471 (SCA) at para [19].

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used."

[18] In *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,⁶ the Court elaborated as follows:

"[25] It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. 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 emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'.

[26] None of this would require repetition but for the fact that the judgment of the high court failed to make its point of departure the relevant provisions of the subscription agreement. Endumeni is not a charter for judicial constructs premised

⁶ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) at paras [25] to [26].

upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable."

[19] The process to be implemented in the event that a member or resident violates the "Rules of the Association" is outlined in Clause 10.1 of the MOI. The "Rules of the Association" are defined and detailed in clause 7 of the MOI, which is titled "ASSOCIATION'S RULES AND REGULATIONS."

[20] Clause 7.2 states that the members of the appellant give the Board of Directors of the appellant, unlimited power to make, amend or add to the Rules for the Association and to set fines for breaking the Rules. Separate sets of Conduct Rules for the Association (Rule Pack 1: Conduct, Sales & Security Rules) and Architectural and Building Guidelines and Rules (Rule Pack 2: Architectural, Building & Plan approval) are attached to the MOI, containing a comprehensive list of Rules, fines and administration charges. These Rules and fines can be amended from time to time by the Directors by resolution and then published to the members. The Rules mentioned in Clause 7 differs from the building penalty contained in clause 8, which may only be amended by special resolution or in terms of section 16 of the Companies Act, 2008.

[21] When the MOI is read as a whole it becomes clear that the Rules of Association and the MOI are two separate documents. Therefore, when the MOI refers to the "Rules", it refers to Rule Pack 1 or Rule Pack 2. For example, Clause 4.10 of the MOI states that *"Members must at all times further the objects and interests of the Association to the best of their ability; and obey the Rules of the*

Association made by the board in terms of the agreement." Clause 5.1 states that: "The Directors may by resolution appoint any number of committees of the Board and may delegate any of their authority to any such committee. Any committee so formed shall, in the exercise of the powers so delegated, conform to the provisions of the Act, this Memorandum and any Rules or Regulations that may from time to time be imposed on it by the Board." My underlining.

[22] Clause 5 in Rule Pack 1, specifically states that any member who transgresses the Rules will receive a warning letter from the Directors, following the procedure in the MOI. This is a clear reference to clause 10 of the MOI. Whilst clause 10.4 in Rule Pack 2, under the section "Building Contractor Agreement" states that owners are referred to the MOI, which contain the specific time limits and fines related to the beginning, duration and end of construction (clause 8).

[23] It is therefore clear that clause 8 is a stand-alone penalty clause for late building. It is included in the MOI and is not contained in the Rule packs other than to refer the member back to the MOI. If the penalty was subject to the procedure contained in clause 10 of the MOI, it would have been included in the Building Rules.

[24] The adjudicator erred in law by finding that the appellant had not applied clause 10.1.1 by giving written notice of the penalty, before imposing the fine. The first respondent is contractually bound to the terms of the MOI which includes clause 8.3 that states that if a member has not completed the build within the twelve-month period, a non-completion fine of twice the annual levy will be payable.⁷ (Emphasis added).

⁷ AR page 57 para 8.3

[25] The first respondent commenced with the build on or about 17 October 2018. He had until 1 October 2019 to complete the build. He does not dispute that the build was not completed within 12 months. He however pleads that there were circumstances beyond his control that resulted in no construction taking place between April 2019 until around 2022.

[26] The purpose of clause 8.3 is (on the plain wording of the clause) to encourage owners to build within 12 months of date of commencement. That purpose cannot be served by allowing a system of providing that person an opportunity to argue its case or rectify its breach. Firstly, this purpose would have no business efficacy if, as the adjudicator found, it is subject clause 10.1.1 of the MOI, and secondly, sending a notice to the person in breach, asking them to rectify their failure to meet the deadline, would be pointless. Once the breach has occurred (e.g., once the 12-month period has passed), it would be unrealistic or impossible for the person to remedy the situation in a way that rectifies the breach.

[27] The purpose and importance of building penalties was affirmed in *Chapman's Bay Estate Homeowners's Association v Lotter and others*.⁸ The court held as follows:

"The purpose of a provision such as clause 9.10, which is often to be found in the constitutions for residential developments in community schemes, is to serve as an incentive to owners to start and complete building works as soon as possible. Building works inherently cause prejudice to the homeowners' association and the owners of the Estate (whose interests the homeowners' association represents) as a result of the

⁸ 2023 JDR 0523 (WCC).

nuisance (such as noise and dust) caused by such works, the security risk it presents and the potential for damage to common property (for example, because of the use of heavy vehicles). It also affects the attractiveness and hence the market value of properties in the Estate since prospective buyers do not want to live next to or near a building site for an indefinite period. The homeowners' association and its members thus have an interest in building works within the Estate being completed within a reasonable time — the present matter, the time stipulated clause 9.10.”

[28] The building penalty fines have been imposed on the first respondent based on the MOI.⁹ The appellant has a “rightful interest” in ensuring and obtaining compliance with the terms of its contract and is entitled to impose a penalty clause to compel homeowners to carry out their obligations under the contract by providing “harsh consequences” should they default. It is a penalty that is intended to create a deterrent rather than as a provision which provides compensation for default.¹⁰

[29] Accordingly, the adjudicator failed to give effect and interpret clause 8 of the MOI as providing a penalty interest when it is proven that the member has not complied with the time limits contained in clause 8.

Failure to apply clause 6.14 of the MOI

[30] Clause 6.14 of the MOI entitles the appellant to charge interest on any amounts owing to it.¹¹ It follows that had the adjudicator correctly interpreted the MOI, he ought to have applied clause 6.14 read with the resolution at POC5 of the

⁹ See *Murcia Lands CC v Erinvale Estate Home Owners Association* [2004] 4 ALL SA 656 (C); *Walker v Cilantro Residential Estate* 2016 JDR 2146 (GJ); *De Wet N.O and others v Waters Edge Homeowners Association* 2022 JDR 2439 (WCC); *Chapman's Bay Estate Homeowners' Association v Lotter and Others* 2023 JDR 0523 (WCC).

¹⁰ *Murcia Lands CC v Erinvale Estate Home Owners Association* [2004] 4 ALL SA 656 (C) at paras [24] and [25].

¹¹ AR page 54 clause 6.14.

claim and charged interest on the building penalty claim of 11.5% per annum, compounded monthly.¹²

Conclusion

[31] The adjudicator misinterpreted the MOI and ordered the appellant to remove the building penalty. The adjudicator made the finding on a point of law without entertaining or considering the merits of the dispute.

[32] The purpose of the CSOS Act is to provide for a dispute resolution mechanism in community schemes.¹³ Section 39 of the CSOS Act sets out the relief that can be sought before the adjudicator. In respect of financial issues, section 39(1)(e) provides for “an order for the payment or re-payment of a contribution or any other amount.” Sections 50 of the CSOS Act sets out the adjudicator’s duties during the investigation:

“50 Investigation by adjudicator

The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator-

- (a) must observe the principles of due process of law; and*
- (b) must act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application; and*
- (c) must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts.*

¹² AR page 23.

¹³ Section 2 of the CSOS Act.

[33] The building penalty was issued in terms of the contract between the appellant and the first respondent. The first respondent averred that the circumstances resulting in the issuing of the penalties which brought about the delay in this case are material. He raised a defence namely that it was the actions of the appellant that made it impossible to complete the build within the 12-month period and had the appellant resolved the other issues between the parties timeously, there would have been no breach. It is alleged that the first respondent was “*unreasonably and unjustly restricted to access to the premises solely for him to miss the October 2019 completion deadline*”.

[34] Whether such defence constitutes a valid defence in law, is not for this court to decide. It is not open to the court hearing the appeal to consider the facts and the applicable law that flows from it. That is the task of the adjudicator. In *Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another*,¹⁴ the Full Court held that the “*determination of the questions of fact is exclusively afforded to the adjudicator who conducts the proceedings inquisitorially and has powers to investigate, examine documents and persons, and to conduct inspections*”. The court held that it was for this reason that an appeal court “*should adopt a deferential attitude to the determination of the adjudicator on questions of fact*”. The only issues an appeal court can consider is whether the adjudicator applied the correct law; interpreted the law correctly, and/or properly applied the law to the facts as found by the adjudicator.¹⁵

[35] The adjudicator is employed to hear evidence and arguments from both parties to settle the dispute. That would include any defences raised by a

¹⁴ 2020 (1) SA 651 (GJ).

¹⁵ *Stenersen & Tulleken supra* at para [33].

respondent. In this regard the adjudicator has wide powers to ascertain the facts and law related to the dispute. Because it is a contract, the adjudicator must consider the defence of the first respondent and make a decision on the facts and then apply the applicable law to the established facts.

[36] It is in the interest of both parties that the merits of the dispute be referred back to the adjudicator to make a finding on the facts and the law.

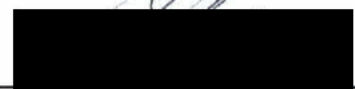
[37] In the result the following order is made:

1. The appeal is upheld with costs.
2. Paragraphs (g) and (h) of the adjudicator's award is set aside.
3. The disputes relating to the building penalty (paragraph (g) of the award; and the costs and interest (paragraph (h) of the award), are referred back to the adjudicator.



L WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

I agree



 P.P.
A P DEN HARTOG

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Delivered: This judgement was prepared and authored by the Judges whose name are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 August 2024.

APPEARANCES

Counsel for the appellant:	Advocate C.A. Read
Instructed by:	Heather van Niekerk Attorneys
Counsel for the first respondent:	Advocate M. Matodzi
Instructed by:	Nyachowe Attorneys.
Date of hearing:	30 April 2024
Date of judgment:	23 August 2024