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

Case Number: A39/2023

In the matter between:

BELLA ROSA THREE
HOME OWNERS ASSOCIATION
(Registration Number: 1951/000009/06)

Appellant

and

ANNEKE BRANDT
(Identity Number: 6[...])

First Respondent

THE COMMUNITY SCHEMES
OMBUD SERVICE

Second Respondent

MNINAWA BANGILIZWE

Third Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 06 SEPTEMBER 2024

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The appellant seeks review and an appeal against the decision of the third respondent in his capacity as an adjudicator appointed by the second respondent (*“the CSOS”*). Although the matter was not opposed, after hearing argument on behalf of the appellant the Court issued Directives inviting the CSOS to deliver an explanatory affidavit in respect of certain questions, and to attend the postponed proceedings, which was complied with. After the hearing, both the appellant and the CSOS were permitted to submit further written submissions, for which we are grateful.

[2] The appellant is a homeowners’ association which is a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (*“the Act”*). On 20 September 2021 the first respondent became owner of erf 3[...], Unit 1[...] situated in Bella Rosa Bellville, Western Cape, and accordingly became a member of the community scheme. At the time, the property was vacant, with no construction ever having been undertaken by the previous owner. From October 2021 the appellant imposed a building penalty against the account of the first respondent, on the basis that no building construction had commenced on the property within the period prescribed in the appellant’s constitution.

[3] It is not disputed that the first respondent did not receive the monthly statements until 13 December 2021, apparently due to an email address error, by which time three months’ worth of building penalties were reflected in her monthly statement, together with interest. Almost immediately, she addressed emails to the appellant challenging the imposition of the building penalty. The parties were not able to resolve the issue, and on 31 May 2022 the first respondent referred a complaint to the CSOS by completing the prescribed dispute resolution form.

[4] The relief sought by the first respondent was that *“the unreasonable and therefore incorrect imposed fines/penalties be rescinded”*. The complaint was accepted by the CSOS in terms of section 38(1) of the Act. The appellant was granted an opportunity to deliver written submissions in response to the complaint in terms of section 43, which were delivered on 21 November 2022 and set out its

basis for charging the building penalties, based on section 10(b) and (c) of its constitution, the contents of which I deal with below. The first respondent submitted a reply on 28 November 2022, and on 16 January 2023 the appellant submitted final written submissions. The matter was referred to conciliation in terms of section 47 but remained unresolved, and a certificate of non-resolution and referral to adjudication was issued on 14 December 2022, in terms of section 48.

[5] The adjudicator defined the dispute as an application which sought relief in terms of section 39(1)(c) of the Act. He held that, although the appellant was entitled to levy the building penalties against the first respondent, no fair procedure had been followed. It was because of the unfair procedure, and specifically section 39 of the appellant's Master Owners' Association constitution ("*the master constitution*"), that he found that the penalties were invalid. The order granted by the adjudicator was that "*the fines against [the first respondent] are invalid; and [the appellant] is ordered to remove the fines from the [first respondent's] levy statement, within 14 days of this order*".

B. THE REVIEW

[6] Although the appellant adopted the double-barrelled approach endorsed in *Kingshaven Homeowners' Association v Botha*¹ in terms of which a party in its circumstances may bring both an appeal and a review, it argued that the review ground deserved consideration first because, if successful, it would obviate the need to determine the appeal. The review is based on section 6(2)(a)(i) of the Promotion of Administration of Justice Act 3 of 2000 ("*PAJA*"), and it is argued that the adjudicator was not authorised by the Act to make the decision that he did.

[7] The appellant relies on two grounds in this regard, and both were not raised at the CSOS proceedings, with the latest one only being raised after the hearing of the matter in this Court. Both grounds seek to challenge the jurisdiction of the CSOS and the adjudicator to determine the matter. The first belated challenge to jurisdiction was the main reason that this Court invited the CSOS to participate in these proceedings

¹ *Kingshaven Homeowners' Association v Botha and others* [2020] ZAWCHC 92 (4 September 2020) para [25]. See also *Manor Body Corporate v Pillay and Others* [2020] ZAGPJHC 190 (6 March 2020).

because in terms of section 42(1) of the Act, it is the body that performs the sifting function of rejecting an application if the relief sought is not within its jurisdiction.

[8] Although the issues raised by the appellant are questions of law which could ordinarily be the subject of an appeal in terms of section 57 of the Act, the fact that they were not raised previously raises questions of fairness, in particular, towards the first respondent who did not participate in these proceedings. As a result, the Court is mindful of the caution sounded by the Constitutional Court in *Barkhuizen v Napier*², where the following was stated:

“The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.”³

[9] A similar statement was recently made by the Constitutional Court in *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga*⁴, where it was stated that a court may raise a point of law *mero motu* if the point does not need any new evidence to be led and if it would not be unfair to one or both parties for the court to consider and take into account that point of law. The parties agree that these principles find application to these proceedings even though they were made in slightly different contexts. I agree.

[10] With this background in mind, I now consider the grounds of review. The first ground, as set out in the founding affidavit, is that the first respondent’s application to

² *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) (4 April 2007). Footnotes omitted. See also *Naude and Another v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 at 558 B-C.

³ See also *Naude and Another v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 at 558 B-C.

⁴ *Regenesys Management (Pty) Ltd t/a Regenesys v Ilunga and Others* (CCT 220/22) [2024] ZACC 8; 2024 (7) BCLR 901 (CC); [2024] 8 BLLR 777 (CC); (2024) 45 ILJ 1723 (CC) (21 May 2024) para 43.

the CSOS fell within the ambit of section 41(1) of the Act, which provides that “*an application for an order declaring any decision of an association or an executive committee to be void may not be made later than 60 days after such a decision has been taken*”. The appellant states that its decision to levy the building penalties was made in September 2021, and the first respondent’s application was only submitted to the CSOS on 31 May 2022, more than 60 days had elapsed, and accordingly it was out of time. The argument continues that, since no condonation application was made in terms of section 41(2) for the ombud to condone the late submission of the first respondent’s application, the adjudicator did not have the jurisdiction to determine the complaint and acted *ultra vires* when he did so.

[11] The first issue arising is whether the first respondent’s complaint is one in which she sought a declaratory order that a decision of the appellant or its executive committee was ‘void’. Although the terms are not defined in the Act, it nevertheless draws a distinction between void and invalid decisions. That is apparent when one has regard to the provisions of subsections 39(4)(b), 39(4)(c) and 39(4)(e) ⁵ in which decisions may be declared as either void or invalid. Two instances of void decisions are mentioned, and that is in sections 39(4)(c)(i) and 39(4)(e). In terms of the former, an applicant may seek an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association was void. In terms of section 39(4)(e) an applicant may seek an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.

⁵ The relevant provisions in section 39(4) provide as follows:

“In respect of meetings –

...

(b) an order declaring that a purported meeting of the executive committee, or a purported general meeting of the association, was not validly convened;

(c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association

(i) was void; or

(ii) is invalid;

...

(e) an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.”

[12] The first respondent sought neither of the two forms of relief. What she sought was an order that *“the unreasonable and therefore incorrect imposed fines/penalties be rescinded”*. She did not seek an order setting aside the contents of a resolution reached at a meeting. She could not have made such a request, because she was referred to no contents of a meeting or resolution as a basis for imposing the penalties against her.

[13] Properly understood, her complaint was that the penalties were imposed unfairly and unreasonably upon her. In the correspondence attached to her complaint, she made clear that she understood the rationale for the rules relating to the building timeframes having previously lived in a community scheme. It is therefore difficult to conclude that the first respondent sought an order declaring that a decision was void, within the meaning of the Act. Rather, what she sought was an order to the effect that the imposition of the fines was unfair and unreasonable and accordingly invalid, as opposed to void. This is why it is understandable that the adjudicator held that the penalty fines against her were ‘invalid’.

[14] Whilst section 41(1) imposes a time limit of 60 days for applicants seeking an order declaring a decision of an association or an executive committee to be void, there is no similar time limitation in respect of invalid or unreasonable decisions. One can understand the rationale for creating a distinction in this regard. Where a decision is possibly void, the need for legal certainty is greater, hence the time limit of 60 days. Here, the appellant relies on provisions contained in a constitution which on its face is dated October 2011. At the very least, the content of the specific provisions relied upon indicates that they were in place by 10 February 2010. Accordingly, by 31 May 2022 when the first respondent referred her dispute to the CSOS there could have been no concerns about the legal certainty of the provisions of the constitution, and there would have been no reason for the express time bar in section 41(1). I am accordingly unable to agree that the first respondent sought an order in terms of section 41(1).

[15] To make matters worse, the appellant’s challenge based on section 41(1) and (2) is accompanied by a complaint in the founding papers that its decision was *“made in September 2021”*, and came to the first respondent’s attention *“as early as*

October 2021". There is no support in the record for a decision made by it in September 2021. No such decision was referred to, even in its heads of argument.

[16] There is also no evidence that such a decision came to the attention of the first respondent as early as October 2021. That averment is refuted by the appellant's own version at the CSOS, where it clarified in its submissions dated 21 November 2022 that due to a "*bona fide* error" the first respondent's account statements for the months of October and November 2021 had been sent to the incorrect e-mail address. This was confirmed by the correspondence attached in the CSOS proceedings in which the first respondent complained that she only became aware of the accounts on 13 December 2021 after they had been addressed to the incorrect email address. As a result, there was no dispute before the adjudicator that the first time that the first respondent became aware of the accounts was in December 2021.

[17] It is correct that there is no evidence of a condonation application having been made by the first respondent, given that the complaint was only referred on 31 May 2022. While it is not for this court to determine any such condonation application given the narrow ambit of powers it is accorded in terms of the Act, there are some significant considerations which warrant consideration.

[18] The application to the CSOS was made with reference to the correspondence between the first respondent and the appellant, all of which was attached to the dispute referral. It is evident from that correspondence that the first respondent disputed the penalty immediately upon discovering it and conveyed that she would seek advice on the matter. She sent another e-mail on 8 March 2022, setting out the essence of her complaint to the appellant. In the email of 8 March 2022, she stated that since she had just bought the property and was awaiting approval of building plans and rights, it was physically impossible to expect her to start building immediately upon registration of the property into her name. In light thereof, she argued that it would have been reasonable to have been awarded the same time periods as the previous property owners before penalties could be charged. Furthermore, she argued that she could not be held liable for the previous owner's

failure to build within the prescribed time period. There was no response from the appellant until 12 May 2022. The dispute was referred just under 3 weeks later.

[19] The contents of the e-mail of 8 March 2022 indicate that the first respondent was seeking to persuade the appellant to rescind the imposition of a penalty against her by considering the arguments she raised. It is not unreasonable to infer that, after the e-mail of 8 March 2022 she was awaiting the outcome of her request for the appellant to set aside the penalty. That is not an unreasonable inference given that, up until the correspondence of 12 May 2022, there is no evidence that the appellant had provided the first respondent with any explanation for the building penalties, or responded to her queries relating to the reasonableness of the timing thereof. That is particularly significant given that the very constitutional provisions - clauses 10(b) and (c) - that the appellant relies upon provide for possible agreement for extension of the building timeframes between the parties. It provides, amongst other things, that the purchaser or its successor in title may negotiate with the appellant for an extended period for the completion of the construction on the property. Her conduct of awaiting a response fell within the ambit of that clause.

[20] The first explanation for the penalties from the appellant appeared in the communication of 12 May 2022, in which the appellant set out the contents of subsections 10(b) to (d) of its constitution. Thereafter, the appellant stated as follows: *“Based on the above extract from the constitution, even though you are a new owner you are bound to the penalty until completion of your house. This is something that the sellers of the property should have disclosed to you. Therefore we unfortunately cannot reverse the penalty on your account or provide you with any form of relief.”* The highlighted portion makes clear that the appellant understood that the first respondent was prevailing upon it to reverse the penalty or to provide some form of relief. This understanding was confirmed by the first respondent’s response of 23 May 2022 in which she firstly complained that the appellant had taken two and a half months to reply. Then she stated as follows: *“Despite our serious concerns and objections, which you seem to completely ignore and fail to address, we now know your position and decision. We will make use of our option to raise this issue with the CSOS”.*

[21] It is therefore clear from the correspondence that in both parties' minds at the time, the first respondent sought to change the appellant's mind regarding the imposition of the penalties, and a decision in that regard was only conveyed to her on 12 May 2022, albeit unsatisfactory to the first respondent. In my view, that is the decision that would be the subject of an application in terms of section 41(1), if that provision were held to be applicable to this matter, especially if one has regard to the provisions of the constitution already referred to which contemplate possible engagement between the parties.

[22] All of this was before the adjudicator, and was known to the appellant, which explains why it did not complain about the delay in that forum. This is why I consider it unfair for the appellant to now raise the issue in these proceedings, because the facts were so starkly obvious between the parties that the issue of delay never arose. Had the appellant raised it there the first respondent and the adjudicator would have had regard to the contents of the correspondence outlined above, in arriving at the conclusion that there was no delay or that there was a good explanation for any delay which might have ensued.

[23] The appellant later expanded its grounds for review, and this was after the appeal hearing, apparently pursuant to an exchange with the bench. I preface this part of the discussion by stating that, even though the CSOS was permitted to deliver written submissions in reply, the first respondent, who did not participate in the proceedings, did not obtain such an opportunity and did not receive notice of the new argument. Neither was the argument raised at the CSOS proceedings, similar to the earlier jurisdiction point already discussed.

[24] The appellant's new argument is that the relief sought by the first respondent is not catered for by the Act because it (the Act) does not provide relief relating to a contractual penalty, which was the subject of the dispute. Furthermore, the relief granted by the adjudicator does not fall within any of the relief available in terms of section 39(1)(c) because the first respondent was not seeking the setting aside of a 'contribution' which is the subject-matter of subsection (c). Accordingly, the adjudicator lacked the jurisdiction to determine the dispute, and the only relief available to the first respondent was to approach the High Court.

[25] The adjudicator gave no reasons for characterizing the dispute as one falling within the forms of relief available in terms of section 39(1)(c). Since the appellant did not raise the issue before the CSOS, neither of the parties paid any attention to it in their written or oral submissions. And the CSOS did not reject the application in terms of section 42, as it was entitled to do, on the basis that it lacked jurisdiction to determine the dispute, or that the dispute should rather have been dealt with in a court of law. In other words, all the parties, including the appellant accepted that the CSOS and the adjudicator had jurisdiction to determine the matter.

[26] The issue requires interpretation of the provisions of the Act, taking into account the well-known interpretative principles espoused in *Endumeni*⁶ and *Capitec*⁷. The stated purpose of the Act includes the need “to provide for a dispute resolution mechanism in community schemes”. A ‘dispute’ is defined as “a dispute in regard to the administration of a community scheme between persons who have a material interest in that scheme, of which one of the parties is the association, occupier or owner, acting individually or jointly”. There is no dispute that the matter between the parties in this matter meets the requirements of this definition.

[27] In terms of section 38, read with section 39, any person to make an application if such a person is a party to or is affected materially by a dispute, provided that the application must set out relief that is within the scope of one or more of the prayers for relief contemplated in section 39 and must include one or more of the orders set out in section 39. Section 39(1)(c) provides as follows:

“An application made in terms of section 38 must include one or more of the following orders... in respect of financial issues -

...

(c) an order declaring that a **contribution** levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an

⁶ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

⁷ *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA).

order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way...” (my emphasis)

[28] The appellant argues that the dispute did not involve a contribution but a penalty. In this regard it refers to the definition of ‘contribution’ which is contained in section 3(1) of the Sectional Titles Schemes Management Act 8 of 2011⁸. The Act defines neither term, and creates no distinction when defining the bounds of jurisdiction. It also does not oust the jurisdiction of the CSOS relating to penalty disputes. And as I have already indicated, it defines a dispute in wide terms, which implies that penalties are included in its ambit. The same may be observed regarding the term ‘financial issues’ employed in the opening sentence of section 39(1). It is similarly not defined and is cast in wide terms. It has not been suggested that the first respondent’s dispute does not involve financial issues. The first respondent queried amounts levied on her as being incorrectly and unfairly determined and unreasonable, and what she sought as relief was rescission of what she termed “*unreasonable and incorrect imposed fines/penalties*”.

[29] Nor does the Act exclude disputes relating to contractual disputes, whether expressly or impliedly. As the CSOS correctly observes in its written submissions, such an exclusion would undermine its mandate and would severely limit the options available to parties, and would force them to approach the High Court whose proceedings can be prohibitively expensive. Such an approach would be contrary to the stated objectives of the Act, which include the promotion of quick and affordable access to justice through a relatively cheap and informal dispute resolution mechanism.⁹

[30] There furthermore does not appear to be a rational basis for distinguishing between contributions and penalties if one has regard to the fact that, in either event, one is dealing with a contractual issue. The case law confirms that an instrument such as a constitution between a homeowners’ association and its members

⁸ A ‘contribution’ was previously defined and levied in terms of the now repealed Sectional Titles Act 1986.

⁹ See *Coral Island Body Corporate v Hoge* 2019 (5) SA 158 (WCC).

constitutes a contract between them.¹⁰ The relationship between them is contractual in nature. If penalties were excluded from the jurisdiction of the CSOS because they are contractual in nature, that would apply to all disputes affected by what is described in the Act as ‘scheme governance documentation’.

[31] Most significantly, our courts have endorsed the adjudication of disputes relating to building penalties by adjudicators acting under the auspices of the CSOS. One such matter is *Chapman's Bay Estate Homeowners' Association v Lotter*¹¹ which was decided in this Division. The matter turned on the interpretation of a building penalty clause contained in the constitution of a homeowners' association. In terms of the relevant provision in that constitution, a building penalty was imposed because the previous owner had failed to develop the property within the time stipulated in the constitution of the homeowners' association, which, in that case was a period of three years after transfer.

[32] The court held that the responsibility to construct a dwelling within three years after transfer is a personal obligation undertaken on the basis of the contractual nature of the constitution. However, based on the interpretation of the specific clause, the court held that the obligation in that case could not be transferred to new owners.¹² Significantly, the relief granted by the court was a substitution order, because the court was of the view that it was “*entitled to grant an order which the adjudicator would have been entitled to grant under section 54 of the Act, mutatis mutandis*”¹³. It was on that basis that the homeowners' association in that case was ordered 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. Thus, the court confirmed the power of an adjudicator to determine a dispute relating to building penalties.

¹⁰ *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and others* 2019 (4) SA 471 (SCA) at para [19].

¹¹ *Chapman's Bay Estate Homeowners' Association v Lotter and Others* (9387/2022) [2023] ZAWCHC 35 (24 February 2023).

¹² See paras 42 and 45.

¹³ See para 58.

[33] Another relevant matter is the recent case of *Stone River Management Association NPA v Mashoko and Others*¹⁴ in which a homeowners' association sought, amongst other forms of relief, the payment of unpaid building penalties.¹⁵ Similar to this matter, the penalty levies were imposed due to failure to complete building operations within the period specified in the memorandum of incorporation ("MOI") of the homeowners' association. The adjudicator granted an order for the payment of the arrear levies and interest but ordered the appellant to remove the building penalty from the first respondent's levy statement, within fourteen (14) days upon receipt of the order.

[34] After interpreting the provisions of the MOI, the court held¹⁶ that the first respondent was contractually bound to its terms, which provided for the building penalty, and that the adjudicator had failed to give effect to the terms thereof. Importantly, the court referred the dispute relating to the building penalty back to the adjudicator¹⁷, because the adjudicator had failed to consider the defence raised by the first respondent regarding why he failed to comply with the period prescribed in the MOI for commencing building works.

[35] Thus, the court in that matter confirmed the power of an adjudicator to determine a dispute relating to a building penalty. Although it did not specify the provisions of the Act in terms of which an adjudicator is entitled to adjudicate such a matter it did refer to the following in its discussion: section 2 which provides that the purpose of the Act is to provide for a dispute resolution mechanism in community schemes; section 39 which sets out the relief that can be sought from the adjudicator; section 39(1)(e) which relates to financial issues and provides for an order for the payment or re-payment of a contribution or any other amount; and section 50 which sets out the adjudicator's duties during the investigation.¹⁸

¹⁴ *Stone River Management Association NPA v Mashoko and Others* (A2023/035929) [2024] ZAGPJHC 800 (23 August 2024).

¹⁵ See para 3.

¹⁶ See paras 24, 28-29 and 31.

¹⁷ At para 37.3.

¹⁸ See para 32.

[36] The case law is accordingly against the latest argument raised by the appellant on this issue. In my view, the review must be dismissed, based on all the considerations discussed in this section.

C. THE APPEAL

[37] Section 57(1) of the Act provides for a statutory right to appeal as follows: “*An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.*” Thus the provision allows for the setting aside of a decision on the narrow ground that it was founded on an error of law.¹⁹ It is akin to the third type of appeal identified in *Tikly v Johannes*²⁰ which amounts to “*a review, that is, a limited rehearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly.*”²¹

[38] The ground of appeal as contained in the founding affidavit is that the adjudicator failed to have regard to the fact that the appellant's constitution, and specifically clause 10(b) and (c) thereof, is a contract between the appellant and the first respondent in terms of which the latter agreed to be bound. And by focusing on the procedure followed by the appellant, the adjudicator effectively amended the constitution, instead of simply applying its provisions. The second basis for appeal is that the adjudicator erroneously referred to the appellant's Conduct Rule 23 and section 39 of its master constitution, and also incorrectly interpreted that rule when he found that the appellant was required to issue a notice before imposing the building penalties.

[39] The relevant clauses of the appellant's constitution, subclauses 10(b) and (c), provide as follows:

¹⁹ See *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) para 25.

²⁰ *Tikly v Johannes* 1963 (2) SA 588 (T) at paras 590 - 591.

²¹ See *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another* para 25; *Chapman's Bay Estate Homeowners' Association v Lotter and Others* (9387/2022) [2023] ZAWCHC 35 (24 February 2023) paras 8 -12.

“(b) The following condition is applicable to all the owners of single title erven and will also bind their successors in title, namely:

Should the construction of the buildings to be erected on the within mentioned property not be commenced with within a period of 18 months from date of original sale of the property from the Developer, Bella Rosa Development (Pty) Ltd, to the first buyer thereof, and completed within 30 months from date of original sale of the property from the Developer, Bella Rosa Development (Pty) Ltd, to the first buyer thereof (or such extended period as may be agreed upon by the Purchaser or its successor in title and the Bella Rosa Three Homeowners Association) the Bella Rosa Three Homeowners Association will be entitled to levy a penalty equal to 10% of the original purchase price of the Property, which penalty shall be payable after 30 months from date of sale as aforesaid and thereafter every year until the buildings are completed to the satisfaction of the Local Authority and the Bella Rosa Three Homeowners Association. All buildings on the Property shall be constructed in accordance to the architectural design guidelines as laid down by the Bella Rosa Three Homeowners Association.

(c) From the 10th of February 2010, the penalty specified in clause (b) shall be reduced to twice (2 times) the monthly levy payable monthly in advance on or before the 1st day of each month, until the buildings are completed to the satisfaction of the Local Authority and the Master Owners’ Association. The penalty shall be payable in addition to the ordinary monthly levy pay-able by the Owner of the Erf. All buildings on the Erf shall be constructed in accordance to the Design Guidelines of the Master Owners’ Association.”

[40] There was no dispute about the interpretation of the above provisions between the parties. From their plain wording, the clauses bind all owners of single title erven as well as their successors in title. A construction upon property is required to commence within 18 months of the date of the original sale of the property from the Developer to the first buyer, and must be completed within 30 months of the original sale of the property from the Developer to the first buyer. The purchaser or its successor in title may negotiate with the appellant for an extended period for the

completion of the construction on the property. The applicable penalty levy is equal to 10% of the original purchase price of the property, and is payable after 30 months from date of sale, and thereafter every year until the building work is completed to the satisfaction of the Local Authority and appellant. Furthermore, with effect 10 February 2010, the penalty levy is calculated at twice the monthly levy payable, monthly in advance on the first day of each month, until the building construction is completed to the satisfaction of the Local Authority and the Master Owners' Association. The penalty is payable in addition to the ordinary monthly levy payable by the owner of the erf.

[41] As I have already mentioned, the adjudicator accepted that the first respondent was bound by these provisions.²² In that regard, he specifically mentioned the case of *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others*²³ - also relied upon by the appellant in these proceedings - in which it was held²⁴ that when home-owners purchase property and become members of a homeowners' association, they agree to be bound by its rules and the relationship between them is contractual in nature. Accordingly, I cannot find that the adjudicator failed to have regard to the contractual nature of the relationship between the parties, or to the contractual implications of the appellant's constitution.

[42] The adjudicator also held that the appellant failed to follow a fair procedure before imposing the penalties against the first respondent because it failed to issue a notice in writing and to afford the first respondent an opportunity to remedy the breach or to make submissions in writing if she disputed the breach. In this respect the appellant argues that that the adjudicator erred by not stopping his inquiry once he made a finding that the first respondent is bound by the constitutional provisions.

[43] Such an approach, however, would be contrary to the appellant's constitutional provisions. In terms of clause 10(b), the prescribed period for commencement and completion of the building works is subject to "*such extended*

²² See paragraphs 6.19, 6.20, 6.22, 6.27 of the adjudication order.

²³ *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others* (323/2018) [2019] ZASCA 30; 2019 (4) SA 471 (SCA) (28 March 2019)

²⁴ See para 19.

period as may be agreed upon by the Purchaser or its successor in title and the [appellant]". This provision contemplates that an agreement might be reached between the parties regarding the possible extension of the prescribed periods for building works. It is not difficult to understand why a successor in title might seek to extend the prescribed timeframes, because they would only obtain transfer of the property after sale from the original buyer. By then, time would be working against them, and the timeframes would need to be adjusted, especially where no building work has commenced, as was the case here. Thus, the premium of engaging with the homeowners' association in those circumstances with a view to reaching agreement regarding adjusted timeframes is high. This the constitution recognized by including a provision allowing for possible agreement to extend the timeframes.

[44] The need for such a clause is demonstrated by the facts of this case, because the first respondent pointed to impossibility of performance within the prescribed times. In her email of 8 March 2022, she stated as follows:

"...we had just bought the land, so there is no way physically possible that we could have had plans passed and... the property instantaneously. Since we can(sic)not be expected to perform inhuman feats, your company will be hard pressed proving the legality of your demand."

[45] In her submissions dated 28 November 2022, she set out the practical difficulties she experienced in obtaining building approval which were due, in part, to covid-19. It is relevant in this regard that the computation of the timeframe prescribed for the commencement and completion of building works involves the tenure of the old owner as well as that of the first respondent. Even if the penalties themselves are not inherited or accrued from the previous owner, the computation of the prescribed period involves both tenures. Commencement is calculated from 18 months of the original sale, and completion must be within 30 months of the original sale. And yet, contrary to what was argued before us, the constitutional provisions place a personal contractual obligation upon the first respondent because effectively the non-compliance of the previous owner, whether in part or in full, is attributed to her as a breach of the constitutional obligations.

[46] That being so, it is self-evident that the first respondent as the new owner would, at the very least, have had to be afforded an opportunity to remedy the alleged breach. It is common cause that this was not done. Instead, when the first respondent received the first statement, it was backdated by three months' worth of building penalties, plus interest. This, in circumstances where the very constitutional provision upon which the appellant relies contemplates that an agreement might be reached between the parties regarding the possible extension of the prescribed periods for building works, as contemplated in clause 10(b).

[47] The correspondence already referred to clearly indicates that the first respondent attempted to engage the appellant in this regard. Specifically, the first respondent referred to the timing of imposing the penalties, stating as follows:

"We have no issue with the rule per se and understand the importance of this rule and we will be abiding by a requirement to start building within a reasonably prescribed. And to have finished the build before the end of the second year of our ownership of this ground."

[48] Later, she stated –

"[The appellant] has issued our fine/penalty included in the first statement we ever received and even backdated it. There has never been a meeting with us and [the appellant] in connection with this unilaterally imposed fine. We have not been granted a reasonable opportunity to make representations. This fine was imposed despite not following correct procedures... The fine is in contravention of our constitutional rights as we cannot be held liable for the previous owner's failure to build within the prescribed period. It would however have been reasonable to have awarded us the same time periods as the first owners were awarded and we would have gladly adhered to such a demand".

[49] It is evident from these quoted portions that the first respondent's conduct of seeking to engage the appellant was within the contemplation of the constitutional provision that provides for agreement regarding possible extension of the timeframes. The provision contemplates submissions such as the ones she made,

for consideration by the appellant. How else would agreement be reached otherwise, within the contemplation of the constitutional provisions?

[50] Regrettably, the first respondent's pleas fell on deaf ears. The correspondence indicates that the appellant was impervious to the possibility of extending the timeframes, let alone setting aside the penalties. It instead set out the contents of clause 10, and informed her that the penalties could not be reversed and that no other form of relief could be provided to her and she was advised to contact the CSOS if she wished for the penalties to be reversed. This conduct by the appellant was unreasonable and contrary to the spirit of the constitutional provision in question.

[51] It is no wonder that the the adjudicator raised the issue of procedural fairness. The appellant had effectively determined a penalty for a breach of its constitutional provisions, without ever having afforded the first respondent an opportunity to remedy it. In terms of the constitutional provisions, she had a right to make representations regarding possible extension of the timeframes, and was not afforded such opportunity by the appellant. For example, it only came out during the CSOS proceedings that she eventually obtained building approval on September 2022. Having denied the appellant the opportunity to make such representations, the question that arises is whether, and on what basis, the appellant was entitled to impose the penalties against the first respondent. On application of the constitutional provision in question, it had no such right until it had at least engaged with the first respondent's concerns. Accordingly, I am inclined to agree with the conclusion of the adjudicator that building penalty was unreasonably and unfairly imposed and was as a result invalid.

[52] It is true that the adjudicator incorrectly applied the provisions of section 39²⁵ of the appellant's master constitution and conduct rule 23²⁶. Those provisions are not

²⁵ Section 39 of the master provision provides as follows:

"(a) If the conduct of a Member or Occupier or his family members, guests, visitors, clients, employees, workers or contractors constitute a nuisance in the opinion of the Trustees or the Subcommittee as may be appointed by the Trustees, or a breach of the Conduct Rules, the Trustees or the Sub-committee, may:

(i) informally (in person, or via telephone call, e-mail, or postal mail) notify the Member and Occupier (if applicable) of the nuisance or contravention, and request the Member and Occupier (if applicable)

relevant to the interpretation of clause 10 because they concern behavioural issues, not building penalties. Thus the adjudicator made an error when he held that the appellant was required to follow the procedure in terms of conduct rule 23 as read with clause 39 of the master constitution, before imposing the penalty levy in terms of clause 10 of the constitution. However, given that this Court has reached the same conclusion as he did, I do not consider the error to be material.

[53] Since the matter was not opposed, the appellant did not seek a costs order. However, as I have indicated, the court invited the CSOS to participate in these proceedings primarily because of the jurisdiction points argued by the appellant, which required explanation by the CSOS. Then, after the appellant's request to submit further written submissions after the hearing, the CSOS also requested an opportunity to reply thereto. Although the Court is grateful for the reply, it is not sufficient grounds in my view to award a cost order in their favour.

D. ORDER

[54] For all the above reasons, the review and the appeal are dismissed, with no order as to costs.

N. MANGCU-LOCKWOOD
Judge of the High Court

I agree, and it is so ordered.

V. SALDANHA

to offer a clear resolution of the issue, or

(ii) by written notice inform the Member and Occupier (if applicable) of the nuisance or contravention and warn the Member of Occupier (if applicable) that if he fails to remedy the contravention and/or if he persists in such conduct or contravention, a penalty will be imposed on the Member, or

(iii) by written notice impose a penalty on the Member.”

²⁶ Conduct Rule 23 provides as follows:

“If the conduct of an owner or occupier or his family members, visitors, guests, clients, employees, workers or contractors constitute a nuisance or a contravention of these rules, the Trustees may impose a penalty on the owner in accordance with clause 39 of the Constitution.”

APPEARANCES

For the appellant : Adv A Brink

**Instructed by : Bornman and Hayward Attorneys
R Mortz**

For the respondents : Adv T Mpahlwa

**Instructed by : Mapongwana Attorneys Inc.
S Mchunu**