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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

APPEAL CASE NO: AR39/2024

In the matter between:

MELKI PROPDEV INITIATIVES (PTY) LTD

APPELLANT

and

EILEEN CUNNINGHAM

RESPONDENT

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Ncube J, sitting as the court of first instance):

1. The appellant is granted condonation for the late filing of its notice of appeal with no order as to costs.
2. The lapsed appeal is reinstated with no order as to costs.
3. Save to the extent set out below, the appeal is dismissed.
4. Paragraph 1 of the order of the court *a quo* is amended to read as follows:
'It is declared that clause 11.7 of the terms and conditions of the sale agreement between the applicant and the respondent unfairly restricts the applicant's right to vote.'
5. Paragraph 2 of the order of the court *a quo* is set aside and replaced with the following order:

'Clause 11.7 of the terms and conditions of the sale agreement between the applicant and the respondent is declared unlawful and unenforceable and as such is severed from the contract in terms of clause 2.9 thereof.'

6. The appellant is directed to pay the costs of the appeal on scale B.

JUDGMENT

Henriques J and N Nako AJ (Mlaba J concurring):

Introduction

[1] The appellant appeals against the entire judgment and order of Ncube J granted on 2 May 2023 pursuant to an opposed application. The appeal is with the leave of that court granted on 14 August 2023.

The facts

[2] The appellant is the developer in respect of the Greenhaven Estate (the scheme) and as such holds development rights in terms of section 25 of the Sectional Titles Act 95 of 1986 (the STA).

[3] The respondent is the owner of sectional unit 3 (having concluded a purchase and sale agreement with the appellant) within the scheme and one of three trustees selected by the members of the body corporate. The respondent is a holder of rights in terms of the STA and the Prescribed Management Rules (the management rules) which are contained in annexure 1 of the Sectional Titles Schemes Management Regulations.¹

[4] It is not in dispute that the appellant, who is the developer, has elected trustees, who are not owners in the scheme, while the chairperson of the body corporate is the appellant's attorney of record.

¹ Sectional Titles Schemes Management Regulations, GN R1231, GG 40335, 7 October 2016.

[5] In a special general meeting held on 6 November 2021, a concern was raised by the members of the scheme regarding the composition of the board of trustees in terms of clause 11.7 of the purchase and sale agreement. The bone of contention was the fact that the appellant holds 50% of the positions of trustees, as well as the chairmanship, which casts the deciding vote in the event of an impasse. The result being that the appellant always has the deciding vote, to the exclusion of others. It was placed on record that a legal opinion had been obtained that clause 11.7 was against public policy.

[6] Clause 11.7 of the purchase and sale agreement reads as follows:

'11.7 For so long as the Seller or its successor as developer of the Scheme is the holder of the development rights in the Scheme in terms of section 25 of the Act, the Purchaser irrevocably appoints a duly authorised representative of the seller or its successor as the Purchaser's duly authorised attorney agent and proxy on the purchaser's behalf and to the Purchaser's exclusion and to do all such things as are necessary to:

11.7.1 specifically exercise the Purchaser's voting rights with regard to:-

11.7.1.1 the appointment of at least 50% (fifty percent) of the Trustees, (including the Chairman) of the body corporate;

11.7.1.2 ratify the use of the designated portion of the common property for the conduct and operation of the care centre, and the appointment of MyCare SA (Pty) Ltd as the operator of the care centre upon the terms and conditions set out in the Service Level Agreement concluded between the Seller and MyCare SA (Pty) Ltd, as more fully set out in 19.6; and

11.7.1.3 the Seller making application, including for town planning approval to allow for the establishment of a medical centre within the Scheme as more fully referred to in 18.5, the operators of which shall be selected by the Seller, as the Seller decides in its absolute discretion;

11.7.2 ensure that no amendment of the Rules is made without the Seller's prior written consent.'

[7] The issue remained unresolved after the meeting because the chairperson disagreed that the owners' rights to vote were taken away by the provisions of clause

11.7 and advised that the status quo would remain until the provisions of clause 11.7 were set aside by a court order.

[8] There are currently six trustees in the scheme and all three developer selected trustees do not own sectional units in the scheme.

[9] There have been issues in the body corporate, necessitating a referral to the Community Schemes Ombud Service (CSOS), which included a request to pronounce on the validity of clause 11.7 and its removal. The appellant indicated that, in its response to the application to CSOS, it needed the provisions of clause 11.7 to '... ensure that the developer is not hindered or delayed in carrying out and completing the development in terms of the developer's vision'.

[10] The matter was determined against the respondent on the basis that she lacked *locus standi* as a concerned resident and that the application could not be determined without a resolution from the trustees authorising the bringing of the application.

Proceedings in the court a quo

[11] Pursuant to hearing an opposed application, the court a quo granted the following relief:

- '1. It is declared that clause 11.7 of the terms and conditions of all sale agreements between the respondent and all existing and prospective purchasers of units in the Greenhaven Estate at 1[...] P[...] Road, Padfield Park, Pinetown unfairly restricts the members' rights to vote.
2. Clause 11.7 of the terms and conditions of all sale agreements between the respondent and all existing and prospective purchasers of units in the Greenhaven Estate at 1[...] P[...] Road, Padfield Park, Pinetown is hereby set aside.
3. The respondent is ordered to pay the costs of this application on attorney and client scale.'

[12] This is not in line with the original notice of motion which sought a declaratory order declaring clause 11.7 of the terms and conditions of all sale agreements between the respondent and existing and prospective purchasers of units in the

scheme as being ultra vires the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA).

[13] The appellant had also raised a point in limine in respect of the non-joinder of the current and prospective owners, and the body corporate. In this regard, the court a quo, with reliance on *South African History Archive Trust v South African Reserve Bank and another*,² found that having regard to the test for joinder, a party must have a direct and substantial interest in the subject-matter of litigation and must have a legal interest which might be prejudicially affected by the judgment of the court. It further found, relying on *Bowring NO v Vrededorp Properties CC and another*,³ that if the declaratory order and ancillary relief as prayed for in the notice of motion were granted, the owners' voting rights would not be prejudicially affected and because they would not suffer any prejudice and would benefit from that, as they would be able to fully exercise their rights to vote, there was no need to join them in the proceedings.

[14] With regard to the legality of clause 11.7, the respondent contended that once she signed the agreement, she became a member of the body corporate in terms of section 2 of the STA. As a consequence, this entitled her to stand for election as a trustee and to vote for the trustees of the body corporate in terms of the management rules.

[15] The respondent submitted that the provisions of clause 11.7 limit her right to vote for trustees of her own choice and even if she was present and able to vote, the extent and ramifications of clause 11.7 are such that the appellant would have an overriding vote, as the chairperson has a casting vote.

[16] In its judgment, the court a quo found that clause 11.7 of the agreement limited the respondent's right to vote for trustees of her own choice and even if she was present and able to vote, a representative of the respondent would vote on her behalf at a meeting, given the far-reaching provisions of clause 11.7. The import of

² *South African History Archive Trust v South African Reserve Bank and another* [2020] ZASCA 56; 2020 (6) SA 127 (SCA) para 30.

³ *Bowring NO v Vrededorp Properties CC and another* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) para 21.

clause 11.7 would always favour the appellant to the prejudice of the respondent and other owners of the scheme. The court *a quo* took the view that such clause 'could not stand'.

[17] The court *a quo* further reasoned that if clause 11.7 were to be struck out, the owners' voting rights would not be prejudicially affected. It was held that they would in fact not suffer any prejudice but would benefit from that act in the sense that they would be able to fully exercise their rights to vote. As a consequence, the body corporate would also not be prejudicially affected if the clause was struck out of the agreement. The court *a quo* concluded that the clause in its present form benefits the appellant only and accordingly issued a declaratory order and other relief foreshadowed in the notice of motion.

Issues on appeal

[18] The following issues arise for determination in this appeal, namely:

- (a) Whether the appellant ought to be allowed to reinstate the appeal, same having lapsed on 4 December 2023 as a consequence of the appellant not filing the record and a notice of application for a date for the hearing of the appeal timeously in terms of the Uniform Rules of Court;
- (b) Whether the judgment of the court *a quo* is assailable for:
 - (i) the non-joinder of the other owners, prospective owners, and the body corporate of the scheme; and
 - (ii) the finding that clause 11.7 of the purchase and sale agreements unfairly restricts the respondent's and other members' right to vote and that as such it is unenforceable and had to be set aside.

[19] The appellant contends that the effect of the court *a quo*'s judgment is to conclude a contract for the parties. It submits that at the time the purchase and sale agreement was concluded, the respondent and others like her knew what they were signing and had the necessary *animus contrahendi* to enter into the agreement. The fact that the effect of clause 11.7 is to remove their voting rights for as long as the appellant retains development rights is not unconscionable and is in line with good business practice.

The reinstatement of the appeal

[20] Prior to the hearing of the appeal, the appellant brought an application for condonation for the late filing of the appeal record, together with an application for the reinstatement of the appeal. In support of such application, the appellant's instructing attorney of record deposed to a confirmatory affidavit in which she indicated that the file had been diarised for her to make the necessary arrangements and to attend to the appeal record. However, an administrative error occurred in her office as she relied heavily on the support staff and the candidate attorney.

[21] There is a detailed explanation as to why the file was misplaced and did not come to her attention. Regrettably, the affidavit does not indicate what steps she, as the attorney of record, took to remedy the situation or to ensure that the file was timeously brought to her attention.

[22] A further difficulty facing the appellant's attorney of record was her failure to provide an explanation for the entire period of the delay. In fact, it emanates that there was a 40-day delay, as opposed to 'some twenty days only' and/or 'some fourteen days' delay, as explained by her in her affidavit. Mr Khan SC, who appeared for the appellant, was not able to provide an adequate explanation for this disjointed calculation of the period of delay. In fact, when it was pointed out to him, he appeared to brush it off and made light of it by saying that 'these things happened'.

[23] When he was pertinently asked who had drafted the affidavit, he indicated that he had done so and made an error in the calculations. 'Although a court, in the exercise of its discretion, may find that an appeal has not lapsed, an appellant must demonstrate good cause in order for this to occur.'⁴ A litigant, when seeking condonation, must deal with the following:

'the degree of non-compliance with the Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's

⁴ *Thamodran Gouden t/a Trev's Auto v Crawdord Properties CC* [2024] ZAKZPHC 105 para 22.

interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice.⁵

In addition, when dealing with the delay, a litigant must provide an explanation for each period of the delay.

[24] It appears that it was only on receipt of the respondent's attorneys of record's letter dated 15 January 2024 that the appellant realised that the appeal had lapsed.

[25] The remarks of Heher JA in *Uitenhage Transitional Local Council v South African Revenue Service*,⁶ are apposite:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[26] In *Blumenthal and another v Thomson NO and another*,⁷ Joubert JA held the following:

'This Court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even where the blame lies solely with the attorney (*Tshivhase Royal Council and Another v Tshivhase and Another*; *Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at 859E-F).'

[27] In our view, no acceptable explanation has been forthcoming from the appellant's attorney for the delay. In our view, any diligent attorney would not have

⁵ *United Plant Hire (Pty) Ltd v Hills and others* 1976 (1) SA 717 (A) at 720E-G.

⁶ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6.

⁷ *Blumenthal and another v Thomson NO and another* 1994 (2) SA 118 (A) at 1211.

relied on her secretary and candidate attorney to ensure that the file came to her attention. This is more so if one considers the position of the appellant's attorney in this matter, who also happens to be the chairperson of the body corporate. Knowing full well that the matter had been taken on appeal, a diligent attorney in her position ought to have taken adequate and necessary precautions to ensure that the file timeously came to her attention and, more so, that the appeal record was properly prepared.

[28] The delay in applying to reinstate and prosecute the appeal is, however, just one factor to consider. An additional factor which this court must consider is the appellant's prospects of success on appeal. In *Valor IT v Premier, North West Province and others*,⁸ the court held the following:

'One of the factors that must be considered whenever condonation is sought is the applicant's prospects of success on the merits. It must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. So, for instance, very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong prospects of success may excuse an inadequate explanation for the delay (to a point).'

[29] The appellant recites the requirements for a successful application for condonation at paragraph 12 of the reinstatement application but fails to deal with the prospects of success, save for a blanket claim that 'there are reasonable prospects of success of the appeal'. The appellant's approach is a box-ticking exercise, with no real adherence to the applicable legal principles and is unpersuasive. Mr Khan demonstrated a bizarre entitlement to have the appeal reinstated and did not even begin to explain the period that lapsed between 15 January 2024, when the letter was received from the respondent's representative, and 31 January 2024, when the application was eventually brought. The reinstatement affidavit minimises the period of lateness and no real effort is made to meet the prescribed requirements for condonation and/or reinstatement of a lapsed appeal.

⁸ *Valor IT v Premier, North West Province and others* [2020] ZASCA 62; 2021 (1) SA 42 (SCA) para 38.

[30] The condonation application is, however, not opposed by the respondent. There is no real prejudice to the respondent and the issues raised are of considerable importance to both parties and do not only concern the parties involved but may affect other parties. The appeal should, therefore, be reinstated with no order as to costs as it is in the interests of justice to bring finality to the issues raised on appeal.

The issues on appeal

[31] Two aspects arise for consideration in the appeal, namely whether the court *a quo* was correct in rejecting the point *in limine* of non-joinder and secondly, whether the court *a quo* was correct in issuing the declarator and granting the relief sought.

[32] The appellant raised non-joinder as a point *in limine*, contending that the respondent ought to have joined the other purchasers and the body corporate. In the answering affidavit, it contended that the relief which the respondent sought affected sale agreements concluded between existing and prospective purchasers of units in the scheme. None of the existing or prospective purchasers were cited or joined in the proceedings and any order which the respondent obtained would affect prospective purchasers and the body corporate of the scheme.

Non-joinder

[33] The test for non-joinder is whether the party to be joined has a direct and substantial interest in the subject-matter of the litigation. Joinder is required as a matter of necessity when a party may be prejudicially affected by the judgment of the court or if the order cannot be sustained or carried into effect without prejudicing that party. The court must be satisfied that an affected party has waived his right to be joined for the process to continue without the joinder of such a party.

[34] The *locus classicus* for the test for joinder remains *Amalgamated Engineering Union v Minister of Labour*.⁹ The Supreme Court of Appeal in *Bowring NO v Vrededorp Properties CC and another*¹⁰ held the following:

⁹ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

'Though the Trust may well be right in its analysis of the effect of Vrededorp's claim, the enquiry relating to non-joinder remains one of substance rather than the form of the claim. (See eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657.) The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned...'

[35] In *Judicial Service Commission and another v Cape Bar Council and another*¹¹ the Supreme Court of Appeal held the following:

'It has by now become settled law that the joinder of a party is only required as a matter of necessity - as opposed to a matter of convenience - if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned... The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.'

[36] To answer the non-joinder issue, one has to interrogate the impact of the declarator on the body corporate and the prospective purchasers to establish whether the joinder is one of necessity or of convenience.

[37] The Supreme Court of Appeal in the *National Director of Prosecutions v Zuma*¹² held the following:

'... to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal.'

¹⁰ *Bowring NO v Vrededorp Properlies CC and another* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) para 21.

¹¹ *Judicial Service Commission and another v Cape Bar Council and another* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) para 12.

¹² *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 85.

[38] In *Lebea v Menye and another*,¹³ the Constitutional Court, in dealing with intervention and/or joinder in terms of rule 28(1) of the Magistrates' Courts Rules, held that:

'The word "interest" in rule 28(1) has been interpreted to mean a direct and substantial interest which a person is required to have in the subject matter before he or she can be said to have locus standi in such a matter or before such a person may be joined or be allowed to be joined in proceedings. Direct and substantial interest is a direct and substantial interest in the order that a court is asked to make in a matter. It is not enough if a person has an interest in a finding or in certain reasons for an order. The interest must be in the order or the outcome of the litigation.'

[39] In *SA Riding for the Disabled Association v Regional Land Claims Commissioner and others*¹⁴ the Constitutional Court held that:

'It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.'

Although *SA Riding* dealt with intervention, the test set out therein is equally applicable to joinder.¹⁵

[40] The court has no discretion in the issue of joinder where it has been shown that the parties seeking to be joined will or may suffer prejudice as a result of the outcome of the proceedings in which they were not joined. A direct and substantial interest exists if the outcome of the proceedings will prejudicially alter the position of a third party who has not been joined. The joinder of a party who will or may suffer prejudice is necessary. However, the joinder of a party who may be affected by the

¹³ *Lebea v Menye and another* [2022] ZACC 40; 2023 (3) BCLR 257 (CC) para 30.

¹⁴ *SA Riding for the Disabled Association v Regional Land Claims Commissioner and others* [2017] ZACC 4; 2017 (5) SA 1 (CC); 2017 (8) BCLR 1053 (CC) (*SA Riding*) para 9.

¹⁵ See *D E van Loggerenberg Erasmus: Superior Court Practice* (RS 25, 2024) at D1 Rule 10-8.

outcome or may have an opinion on the matter is one of convenience and is not necessary.

[41] The appellant argued that the other owners and/or prospective buyers may have wanted to keep the status quo and have the developer exercise their rights to vote or maintain the majority vote.

[42] The body corporate, while not cited in the proceedings, was served with the papers and chose not to intervene and/or participate. The STSMA empowers the body corporate to act in the interest of its members and vests it with authority to litigate on their behalf. It is not clear why the body corporate, having been served, chose not to participate in the proceedings. One can only speculate that a possible reason is the fact that the majority of trustees have been appointed by the appellant and the chairperson of the body corporate is its attorney.

[43] The necessity of joinder is premised on the basic principle that no order should be granted against a party without affording such party an opportunity to be heard¹⁶ and assert its interests. The Constitutional Court in *SA Riding*¹⁷ held that this principle 'is so fundamental that an order is generally taken to be binding only on parties to the litigation'. However, this is only to the extent that the said party has a direct and substantial interest in the proceedings.

[44] The appellant did not make out a case that the other owners, in the absence of the prejudice to their right to vote, which remains protected absent the provisions of clause 11.7, have a direct and substantial interest in the matter. Mr Khan argued passionately that they may have wanted to join the proceedings and support the developer. The respondent, on the other hand, argued that, on the strength of the minutes of the 6 November 2021 meeting, the majority of owners wanted the clause severed from the agreement and as such, would not have joined the proceedings in support of the appellant. Furthermore, the other owners would suffer no prejudice if the clause is severed from the contract and lastly, that it takes one owner to mount a

¹⁶ *SA Riding* para 10.

¹⁷ *Ibid.*

legality challenge against a clause in the agreement. This is clearly a case of convenience rather than necessity.

[45] It is apparent from the facts of this matter that clause 11.7 advantages the developer only and it is not apparent from the clause why the developer requires the protection contained therein. The STA is replete with the necessary protections for both the owners and a developer. The developer is not without a remedy should the properly appointed trustees 'frustrate the development'. As already alluded to by Mr Khan, on behalf of the appellant, the developer could bring an application for the removal of trustees who breach their fiduciary duties.

[46] In *Leatile Construction and Projects CC v Christo Bekker Inc Attorneys and another*,¹⁸ the court held that when considering joinder, the relief sought against a party plays a central role. The court emphasised that the question of joinder should not depend on the nature of the subject-matter but rather on the manner in which and the extent to which the order may affect the interests of third parties.

[47] In the circumstances, the court *a quo* was correct, in our view, that the rights of third parties are not prejudiced by the declarator and the striking out of clause 11.7 and as such, they have no direct and substantial interest in the subject-matter of litigation warranting them to have been joined in the proceedings. Their joinder would have served only as a convenience.

The striking out of clause 11.7

[48] The respondent argues that clause 11.7 is oppressive, takes away the rights of owners granted to them by the provisions of the management rules and, as such, is contrary to public policy. If clause 11.7 remains, the owners and members of the body corporate are unable to exercise their statutorily protected right to vote for the chairperson of the board of trustees. The respondent contends further that the appellant would always have a right of veto when it comes to the business of the scheme because the chairperson has a casting vote.

¹⁸ *Leatile Construction and Projects CC v Christo Bekker Inc Attorneys and another* [2024] ZAGPPHC 212 para 54.

[49] The appellant does not deny this effect of clause 11.7 or that it affects the members' right to vote for trustees and the chairperson but seeks to assert the supremacy of free and voluntary contracts, even when considered unfair. The appellant argues further that the clause was operative only for the limited period of the development of the scheme. However, the contract does not reflect a date for the completion of the development and the clause itself is perpetual.

[50] The appellant contends further that the respondent and other owners 'freely and voluntarily' agreed to clause 11.7 and that in terms of clause 32 of the agreement, the members agreed that the agreement is 'fair and reasonable' and that the members took legal advice on the contract or dispensed with the right to do so. Clause 32 reads as follows:

'The purchaser acknowledges that:-

32.1 the purchaser has been free to secure independent legal advice as to the nature and effect of all the provisions of this Agreement, and that the Purchaser has either taken such independent legal advice or dispensed with the necessity of doing so;

32.2 all the provisions of this Agreement are fair and reasonable in all the circumstances and are part of the overall intention of the parties in connection with this Agreement.'

[51] To lighten the sting of clause 11.7, the appellant contends that the trustees are bound by the provisions of the STSMA and should the members be of the view that they are abusing their fiduciary duties towards the body corporate, the members could apply for the trustees' removal

[52] It is established law that a court may refuse to enforce valid contractual terms when it considers its enforcement to be unfair, unreasonable or unduly harsh and as such contrary to public policy. The Constitutional Court has 'recognised as sound the approach adopted by the Supreme Court of Appeal that the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases'.¹⁹

¹⁹ *Beadica 231 CC and others v Trustees, Oregon Trust and others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) para 89.

[53] The Constitutional Court in *Beadica 231 CC and others v Trustees, Oregon Trust and others* held as follows:²⁰

'In our new constitutional era, *pacta sunt servanda* is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are informed by a wide range of constitutional values. There is no basis for privileging *pacta sunt servanda* over other constitutional rights and values. Where a number of constitutional rights and values are implicated, a careful balancing exercise is required to determine whether enforcement of the contractual terms would be contrary to public policy in the circumstances.'

[54] The Constitutional Court emphasised that this principle should not be understood 'to say that a constitutional right must be implicated for a contractual term to be contrary to public policy'.²¹

[55] In *Barkhuizen v Napier*,²² the Constitutional Court, in dealing with the enforceability of contract terms that are contrary to public policy, directed how to assess what public policy entails:

'What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.'

[56] The dissenting judgment by Moseneke DCJ in *Barkhuizen*,²³ dealing with the concept of the analysis of terms of contracts for purposes of determining whether they offend against public policy, held as follows:

While there is often merit in contextual analysis, it is clear that contractual terms should not be tested for their consistency to public norms by merely observing the

²⁰ Ibid para 87.

²¹ Ibid footnote 200.

²² *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*) para 29.

²³ Ibid para 104.

peculiar situation of contracting parties. The enquiry must rather focus on the arrangement that the stipulation contemplates, on its impact on the parties, whoever they may be, on its tendency or likely outcome and ultimately, on its fairness between the parties as measured against public notions of fairness. This approach is particularly apposite in our constitutional setting. Trite as it is that our constitutional values allow individuals the dignity and freedom to regulate their affairs, they also require that bargains, even if freely struck, may not steer a course inimical to public notions of equity and fairness, which are now sourced from constitutional values. To defeat a complaint that a contractual term offends public policy by holding that the complainant has not shown individual unfairness is in effect to extol the *laissez faire* notions of freedom of contract at the expense of public notions of reasonableness and fairness.'

[57] The dissenting judgment by Sachs J in *Barkhuizen* recommended that '[a]greements that are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced'.²⁴

This is an attractive proposal, in our view, and it is not contrary to the majority judgment

which concluded that:

'what public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable'.²⁵

[58] The Constitutional Court in *Barkhuizen* agreed with the Supreme Court of Appeal that *pacta sunt servanda* is not the overriding principle but should be balanced with other considerations. This ensures the general rule that contracts should establish mutual exchange of obligations and benefits rather than merely

²⁴ Ibid para 158.

²⁵ Ibid para 29

benefiting just one of the contracting parties at the expense of the other. Confirming this principle, the Constitutional Court held as follows:²⁶

'I do not understand the Supreme Court of Appeal as suggesting that the principle of contract *pacta sunt servanda* is a sacred cow that should trump all other considerations. That it did not is apparent from the judgment. The Supreme Court of Appeal accepted that the constitutional values of equality and dignity may, however, prove to be decisive when the issue of the parties' relative bargaining positions is an issue. All law, including the common law of contract, is now subject to constitutional control. The validity of all law depends on their consistency with the provisions of the Constitution and the values that underlie our Constitution. The application of the principle *pacta sunt servanda* is, therefore, subject to constitutional control.'

[59] These principles weigh heavily against the position adopted by the appellant in our view. The respondent has demonstrated that the clause she seeks to declare unenforceable and severed from the contract is contrary to a law and as such, inimical to the interests of the owners of the units in the scheme and their rights as the community of the scheme, as protected by the legislated management rules.

[60] The respondent further demonstrated the prejudice suffered due to the clause as well as the hardship in referring the matter to CSOS, where she was turned away for lack of *locus standi* in circumstances where there was no resolution authorising the bringing of that application.

[61] This is also laid bare by the chairperson of the board of trustees, an appointee of the appellant, being the attorney for the appellant and not owning a unit in the scheme, and that the interests of the owners are violated and their lawful protections in terms of STA and the management rules are rendered toothless by this clause.

[62] The respondent demonstrated the prejudice suffered as well as the reality that this position would not change for as long as the appellant holds development rights.

²⁶ Ibid para 15.

[63] The appellant's reliance on *pacta sunt servanda* ignores the fact that this principle has been held not to be a sacred cow and/or immune to constitutional scrutiny. The Constitutional Court has pronounced that the hands of justice should never be tied²⁷ and concluded that:

'Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair.'

[64] Therefore, once the court *a quo* found that clause 11.7 was prejudicial to the owners because it removes their statutorily protected right to vote for trustees of their choice and the chairman and that it favoured only the appellant, then it followed that the clause ought to be declared unenforceable and struck out of the agreement.

[65] How will this however affect the remainder of the agreement? Clause 2.9 of the agreement allows for unlawful or enforceable clauses to be severable from the remaining terms of the contract. This clause provides as follows:

'In the event that any of the provisions of this Agreement are found to be invalid, unlawful or unenforceable, such term shall be severable from the remaining terms, which shall continue to be valid and enforceable.'

[66] In the circumstances, clause 11.7 was properly declared unlawful and unenforceable by the court *a quo* for failure to comply with the STA and the management rules governing sectional title schemes and it is thus severed from the agreement.

[67] The court *a quo*, however, went further and went to set aside the clause as between the appellant and past and present owners. This approach exceeds the remits of the application argued before the court *a quo* and is not supported by the affidavits and pleadings. In that respect, the order stands to be amended. A consequential amendment will also have to be effected to paragraph one of the declaratory relief granted by the court *a quo*.

²⁷ Ibid para 73.

Costs

[68] The appellant did not challenge the court *a quo*'s extension of the ambit of the relief sought and appealed on the basis of *pacta sunt servanda* and the protection in clause 32 of the agreement. In amending the order, this court was exercising its powers as an appeal court to confirm, amend or reverse the judgment which is the subject of the appeal. The appellant therefore cannot claim to have been partially successful in this appeal by reason of the substitution of paragraph 2 of the order of the court *a quo* and the consequent amendment of paragraph 1.

[69] The respondent was awarded costs on attorney and client scale in the court *a quo* and sought costs on the same scale in this court. There is no reason to interfere with the discretion of the court *a quo* in awarding costs on a punitive scale. Although the respondent has been substantially successful in defending the judgment of the court *a quo* and the appellant unsuccessful in advancing the appeal on the grounds raised, there is no reason to depart from the usual rule in relation to costs and as such the costs should follow the result. In addition, there is no justification for a punitive costs order on an attorney and client scale on appeal.

Order

[70] In the circumstances, the following order is granted:

1. The appellant is granted condonation for the late filing of its notice of appeal with
no order as to costs.
2. The lapsed appeal is reinstated with no order as to costs.
3. Save to the extent set out below, the appeal is dismissed.
4. Paragraph 1 of the order of the court *a quo* is amended to read as follows:
'It is declared that clause 11.7 of the terms and conditions of the sale agreement between the applicant and the respondent unfairly restricts the applicant's right to vote.'
5. Paragraph 2 of the order of the court *a quo* is set aside and replaced with the following order:
'Clause 11.7 of the terms and conditions of the sale agreement between the applicant and the respondent is declared unlawful and unenforceable and as such is severed from the contract in terms of clause 2.9 thereof.'

6. The appellant is directed to pay the costs of the appeal on scale B.

HENRIQUES J

MLABA J

NAKO AJ

Case Information

Date of Argument : 29 November 2024

Date of Judgment : 24 April 2025

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This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand down is deemed to be 11h00 on 24 April 2025.