



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **A257/2024**

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

10/02/2021
Date


Signature

In the matter between: -

KIAN ASHOORI

FIRST APPELANT

BAYAN ASHOORI

SECOND APPELANT

AND

**CORNWALL HILL HOMEOWNERS ASSOCIATIONS
(NPC)**

RESPONDENT

JUDGMENT

CORAM: BAQWA J et RAUBENHEIMER AJ

BAQWA J

Introduction

- [1] In this appeal the appellants appeal against the whole judgment and order handed down by Magistrate SSE Sambo on 21 June 2024 in terms of Sections 83(3) and 84 of the Magistrates Courts Act 32 of 1944 read with Rules 50 and 51 of the Uniform Rules of Court and the Magistrate's Court Rules.
- [2] The Respondent had by way of action claimed arrear levies in the sum of R266 081.09 which included penalties imposed for the alleged failure by the appellants to commence construction within the prescribed time frame as contemplated in Clause 7 of the respondent's rules.
- [3] The action was opposed by the appellants on the basis that the stand was not buildable due to unresolved geotechnical constraints and that clause 7, read with clause 8, does not authorise penalty levies where construction is objectively impossible.

The Facts

- [4] Summarised, the dispute arose from the interpretation and application of clauses 7 and 8 of the respondent's rules in terms of which:
- 4.1. Double levies are authorised to be charged in terms of Clause 7 on buildable vacant stands where construction has not commenced.
- 4.2. Clause 8 provides for exemption where construction is not possible due to site-specific constraints.

[5] The appellants presented the evidence of Mr Ramdayal, a geotechnical expert and Mr Ashooni who was the applicant's representative.

[6] The respondent tendered the evidence of Dr Heyns (the estate manager), Mr Bester (association manager), Ms Olivier (bookkeeper) and Mr Einkamer (Civil/geotechnical engineer).

Issue to be determined

[7] This court has to determine the proper interpretation of the term "buildable" contained in clause 7 and whether the court a quo erred in finding that the applicant's property fell within the definition contained in the clause.

Grounds of Appeal

[8] The appellants contend that"

8.1. the court a quo misconstrued clause 7 and failed to recognise that it applied to stands which are objectively suitable for development and that its purpose was to prevent delay and not to penalise persons who were legitimately prevented from building

8.2. the court a quo had applied an unduly narrow interpretation of clause 8 and ignored the language and context which contemplated exemption where construction was not feasible due to geological or regulatory constraints.

8.3. the court a quo had failed to adopt the ordinary meaning of "suitable" such as "fit or appropriate for a particular purpose"

8.4. the court a quo overlooked or alternatively misunderstood critical expert and documentary evidence which demonstrated that the relevant stand was not

yet certified as suitable for development which included correspondence from the Council for Geoscience and Local authorities.

8.5. The court a quo misdirected itself in granting attorney-and-client costs where the dispute was bona fide and turned on an ambiguous contractual provision requiring judicial interpretation.

The Law

[9] It is trite that provisions which give rise to administrative penalties must be interpreted restrictively in cases of doubt or ambiguity. *Democratic Alliance v African National Congress and Another*¹ where the following was said:

"[129] ... In case of doubt, we are obliged to interpret their prohibition restrictively. This means that we must resolve any ambivalence in them, or uncertainty about their meaning, against the risk of being penalised.

[130] The restrictive interpretation of penal provisions is a long- standing principle of our common law. The subject must know clearly and certainly when he or she is subject to penalty by the State. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.

[131] This Court has endorsed this approach. And indeed the Bill of Rights gives these considerations added force. It posits the rule of law as a founding value of our Constitutional democracy. It entrenches the common law's protections against arbitrary deprivation of liberty and imprisonment. The common law presumption in favour of interpreting

¹ *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 CC paras 121, 129 and 131 (DA v ANC).

penalty provisions restrictively therefore applies with added force under the Constitution".

[10] It is similarly appropriate to interpret Clause 7 of the agreement not only restrictively but purposively in line with the principles envisaged in *Natal Joint Municipal Pension Fund v Endumeni Municipality*² where a provision is ambiguous, its possible meanings must be weighed against each other.

Analysis

[11] It is evident from a reading of the provisions of Clause 7 that the purpose was to encourage timely development of buildable stands and that it cannot reasonably be interpreted to penalise owners for failing to build where external constraints, whether regulatory or geological make development objectively impossible or impermissible. Such an interpretation would be contrary to both commercial logic and legal principles. This is the kind of result which is warned against by Wallis JA in *Endumeni* which he describes as "unbusiness like".

[12] A brief examination of the evidence of Dr Heyns especially where he responds under cross examination regarding the buildability of the erf in question the and the relevant prerequisites for construction he conceded that "There are a few things needed to be done, I agree with that".

[13] Upon being pursued whether these things were "to make it buildable" he did not hesitate to confirm "ja".

[14] When further confronted with the scenario that "if for instance the City of Tshwane says no, you can't build here, what is the position of the Plaintiff?" he admitted, "we have to accept it".

² 2012 SCA 13 Para 16.

- [15] It is common cause that the City of Tshwane had not given its assent to build on the relevant erf. In those circumstances the admissions by Dr Heyns were dispositive of the matter in that he was confirming that the erf was not buildable at the relevant time. This was not due to any default or delay on the part of the appellant but because of legitimate regulatory or geological impediments.
- [16] The evidence from the respondent's own witness re-enforces the appellant's interpretation of Clause 7 that penalty levies are only triggered where a buildable stand is left undeveloped due to the owner's default and not where objective external constraints render development legally or physically impossible.
- [17] Equally, an examination of the respondent's expert Mr Einkamerer results in more questions than answers regarding the judgment and conclusions arrived at by the court a quo. The appellants argue that his evidence was internally inconsistent, selectively reasoned and in material respects unsupported by the record and some of the documentation he purported to refer to.
- [18] The record shows that Me Einkamerer dismissed the contents of multiple correspondence from Geo Buro, Dolmatec and NHBRC without sufficient substantiation and by merely stating that they were unsupported or incorrect.
- [19] To illustrate the point, when confronted with a letter from Geo Buro dated 4 August 2016 which unequivocally stated that "the stand has been considered not developable" Mr Einkamerer chose to disregard that conclusion claiming that it lacked proper sourcing. This was despite Geo Buro being a professional geotechnical body and the letter summarizing findings by Dolmatec and the Council of Geoscience (CGS).

[20] Despite the above Mr Einkamerer, goes on to make a very telling concession under cross-examination when he admitted that only "approximately 10% of the property is buildable". This was a direct contradiction by himself to the effect that the western portion of the stand was generally developable. The concession was a confirmation that even the allegedly "developable" portion was severely limited.

[21] It is common cause that the NHBRC, a statutory body with regulatory oversight had declined the development application for the standby letter dated 26 July 2018. Mr Kameroner's response to that letter is that it was "not correct" without any substantiation. In my view, reliance on the evidence of an expert such as Mr Einkamerer, as the court a quo did was, to say the least, a misdirection with the capability of simply rejecting objectively reliable evidence without being able to support or substantiate such rejection.

[22] In the circumstances I find that the court a quo erred in accepting Mr Einkamerer's evidence as determinative or persuasive as his conclusions were unsupported by critical documentary and expert sources.

Condonation for late prosecution of the appeal

[23] The respondent has argued for the dismissal of the appeal on the basis of the appellants having failed to comply with Uniform Rules 50(4) and 50(7) of the Uniform Rules of Court.

[24] The appellants have not denied their non-compliance with the Uniform Rules but have sought the condonation for failing to timeously provide the record of the proceedings as required by the rules.

[25] The court has a discretion in considering application by condonation. In *United Plant Hire (Pty) v Hills*³ the following was said:

"It is well settled that, in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a question of fairness to both sides"

[26] Without going into the details of the appellants' explanation for the delay it can be summarized as follows: The only reason proffered by the appellants' attorney is that she "mistakenly believed that the record of the matter was not necessary for the appeal and assumed that the [respondent] would supply it. As a result, [she] had to wait for the record, which caused the delay in the appeal process".

[27] This is one of those cases where the ineptitude and remissness of the attorney is relied upon for the application for condonation. The explanation in this case leaves much to be desired. It is absolutely astounding that a practicing attorney can proffer such a lame excuse. It is however trite that in such cases condonation will only be granted if prospects of success are strong. *Saloojee and Another NNO v Minister of Community Development*⁴, *De Kuszaba-Dabrowski v Steel NO*⁵;

[28] I have considered the relevant authorities and the merits of this appeal. In *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*⁶ the Constitutional Court held that:

³ *United Plant Hire (Pty) v Hills* 1976 (1) SA 717.

⁴ 1965 (2) SA 135 (A) at 141H.

⁵ 1966 (2) SA 277 (RA) at 280E.

⁶ *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*

"This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success".

[29] Three factors have tipped the scales in favour of my decision to grant the condonation application and all of them are referred to in the Unitas decision quoted above. They are the importance of the issue raised in this appeal, the interests of justice and the prospects of success.

Conclusion

[30] In light of the above I have come to the conclusion that the court a quo misdirected itself in its finding in favour of the respondent. It committed the said misdirection in its application of clause 7 of the respondents rules by failing to consider that the erf in question was not objectively buildable.

[31] The court a quo ought to have applied the principles enunciated in Endumeni to Clause 7 read with Clause 8. Further, the court a quo ought to have adopted a restrictive approach to interpretation of a penal provision as illustrated in the Democratic Alliance matter.

[32] The court a quo erred in reaching the conclusion that "The fact that the defendants wanted to embark on a large development does not do away with the fact that a reasonable portion of the immovable property was developable"

This conclusion was reached despite the common cause evidence that only ten percent of the property was buildable. The conclusion by the court a quo was at odds not only with the evidence but also with the Endumeni interpretative approach.

[33] The court a quo also failed to take cognisance of the fact that the evidence overwhelmingly demonstrated that construction was impossible due to unresolved dolomitic hazards and outstanding regulatory approvals, a fact conceded by both the respondent's own expert and estate manager.

[34] In the result, I propose that the following order be made

35.1. The appeal is upheld and the respondent is ordered to pay the costs of the appeal.

35.2. The application for condonation of the late prosecution of the appeal is granted.

35.3. The order of the court a quo is set aside and substituted with the following

35.4. The application is dismissed with costs.


SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA


ETTIAN RAUBENHEIMER
ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 28 October 2025

Date of judgment: 10 February 2026

Appearance

behalf of the Applicants

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