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

Case No: 2024/2011

In the matter between:

DENNEGEUR ESTATE HUISEIENAARSVERENIGING Applicant

and

ZONNEKUS MANSION (EDMS) BPK Respondent

JUDGMENT: 8 MAY 2014

PILLAY AJ:

INTRODUCTION

1. This is an application for the Respondent's provisional liquidation.

2. The matter has a long history with proceedings having been instituted in February 2011.

THE PAPERS FILED OF RECORD

3. The application was instituted on the basis that the Respondent (which owns certain property at Dennegeur Estate) is indebted to the Applicant (which is the

Dennegeur Estate Homeowner's Association) in an amount of R 103 708.90.[1] The debt was initially alleged to include an amount for arrear levies, penalty levies and legal fees, which indebtedness was alleged to be due, owing and payable.

4. In its answering affidavit, the Respondent avers inter alia as follows:

> "6. The actual monthly levy in respect of which Applicant purports to hold Respondent liable was R 456.00 from March 2008 and R 513.00 per month from September 2008 to the present. The monthly levy was paid by Respondent up to and including October 2008.
>
> 7. In September 2008 a charge of R 6 928.35 for rubble removal was raised against Respondent. Respondent was not prepared to pay this amount.
>
> 8. In June 2009 Applicant introduced a penalty levy of R 2 565.00. Interest, administration fees and other costs were also levied against Respondent. Respondent was not prepared to pay these amount (sic) and disputes its liability to do so.
>
> 9. In March 2009, Applicant, as Plaintiff, purported to cause summons to be issued out of the Somerset West Magistrates' Court against Respondent, as Defendant, in respect of the selfsame cause of action on which it relies for its alleged claim against Respondent in this application (the amount of the claim was then less). ...
>
> 10. Respondent, as Defendant, instructed attorneys to defend the aforesaid action ("the action") and a plea was served and filed in June 2009 in which Respondent set out its defence. ...
>
> 11. As appears from the Plea, Respondent does not accept that Applicant exists and requires Applicant to <u>prove all technical and procedural aspects relating to the charges levied against Respondent</u>.
>
> 12. Without admitting liability for the standard normal levy, Respondent was prepared on numerous occasions to pay same in settlement of the action and Applicant's alleged claim. Respondent has however always disputed the liability of all the charges levied.

[1] At the time that this matter was heard, the quantum of the claim had increased to R 416 406.83.

> 13. Applicant has not withdrawn the other action.
>
> 14. I deny that Applicant is <u>entitled to levy the charges</u> which have been levied by it, especially those over and above the standard levy. There are various factors in this regard:
>
> 14.1 Respondent disputes Applicant's existence.
>
> 14.2 Respondent never agreed to any Homeowner's Association Constitution or Development Control Parameters (as all homeowners were requested to do in writing).
>
> 14.3 Respondent disputes Applicant's authority to impose any of the charges sought to be imposed by it.
>
> 14.4 <u>Respondent disputes any resolution in respect of the charges made against it</u>.
>
> 14.5 <u>Respondent disputes the amount of the penalty levy</u>. This would have to be determined. The amount is therefore not liquidated.
>
> 15. Even were it to be entitled to levy further charges over and above the standard levy, these further charges would be a penalty which is not a liquidated amount and would have been subject to dispute by Respondent.
>
> 16. Applicant's alleged claim was being dealt with in the action. I am advised that a trial is the proper forum for the determination thereof and that liquidation applications are not the correct forum for the resolution of the dispute which exists between the parties herein. This will be dealt with further in legal argument to the extent necessary."
>
> (Own Emphasis)

5. In addition, the Respondent provided some indication of the value of its immovable property, asserted that its movable assets are readily realisable "in an amount way in excess of Applicant's claim" and referred to the *quantum* of its long term liabilities.

6. In its Replying Affidavit, the Applicant stated inter alia as follows:

> "8. In June 2009 word 'n sogenaamde "penalty levy" gehef van R 2 565.00. Hierdie heffing is ingestel weens die feit that die Respondent weens wanbetaling en ander problem wat dit skep, a groot administratiewe las op die Applikant plaas. In terme van die Applicant se konstitutsie is dit geregtig om hierdie heffing in te stel. Weereens is die enigste verweer wat die Respondent hierteen opwerp dat dit nie bereid was om die bedrag te betaal nie.
>
> 9. Die primere verweer wat die Respondent opwerp, word vervat in paragrawe 11 tot 14 me Cameron se verklaring. Die grondslag van hierdie verweer is dat die Respondent nie aanwaar dat die Applikant bestaan nie. Geen feitelike en/of regsbasis word verskaf vir hierdie bewering nie end sky dit bloot 'n gefingeerde en uit die lug gegrypte bewering te wees."

7. The replying affidavit was filed on 19 May 2011. On 2 December 2011, the Respondent filed a further affidavit. According to the further affidavit, the Respondent paid "under protest" the normal levy and the rubble removal portions of the Applicant's claim "in order to remove them from the arena of dispute"; this notwithstanding, it persists in disputing its liability to pay these amounts. The further affidavit also states that the Respondent has made available cash funds in an amount of R 79 000.00, which is the *quantum* of the balance of the claim.

8. On 3 February 2014 (two Court days before the hearing of this matter), the Applicant filed a supplementary affidavit. The following aspects of that affidavit warrant reference:

    8.1. A printout of the Applicant's detailed ledger for the period 1 March 2013 to 28 February 2014 was attached which reflected the Respondent's indebtedness to the Applicant in respect of various levies, penalty charges and fees levied against it by the Applicant in the performance of its responsibilities in terms of section 2 of its Constitution in an amount of R 416 406.83.

8.2. A copy of the Applicant's Constitution was attached in confirmation of its existence and locus standi.

8.3. It was contended that the institution of these proceedings was authorised by the Applicant's Executive Committee and had the support of its members. Certain minutes of the Applicant's annual general meetings were attached in this regard.

8.4. A copy of the Respondent's title deed to Erf 13421 Somerset West was attached.

9. When this matter came before me on 6 February 2014, I granted an Order in terms whereof the Respondent was afforded an opportunity to answer to the Applicant's further affidavit. Both parties were also afforded the opportunity to file supplementary heads of argument.

10. Pursuant to my Order of 6 February 2014, the Respondent filed a further affidavit on 24 February 2014. In its further affidavit, the Respondent contended as follows:

10.1. The print out of the Applicant's detailed ledger constitutes hearsay evidence in that it was prepared by an entity styled Micsam Management and is presented in the absence of a confirmatory affidavit by the person responsible for its preparation. To this extent, the Respondent seeks to have the print out (as well as the supporting averment in the affidavit) struck out.

10.2. In the alternative, it is alleged that the print out is any event "nonsensical and ultimately of no use to this Honourable Court as a basis for establishing the Respondent's alleged indebtedness" towards the Applicant. In this regard it is averred that the print out commences with an opening balance as at 1 March 2013 in an amount of R 312 604.666 without any indication of the manner in which this balance had been arrived at. Furthermore, it is contended that the legal fees reflected in the print out are not chargeable to the Respondent's account.

10.3. The print out does not indicate on which basis the interest component of the amount claimed from the Respondent has been calculated, specifically in respect of the base amount and the interest rate employed.

10.4. The Applicant's "true case" on its version is that the Respondent's alleged indebtedness in respect of "ordinary monthly levies payable" over the book year in question, in the sum of R 6 600.00, which is slightly more than 1.5% of the total amount of R 416 406.83. In this regard the Respondent contends that it is eminently able to make payment of these levies and in fact did pay these levies in full. In amplification, it is further contended that the Respondent made payments totalling R 6 550.00 over the period in question which is just

R 50 short of the “normal levies” claimed from the Respondent in that period. These payments were discontinued by the Respondent since September 2013.

10.5. Despite clause 10 of the Constitution, the Applicant has failed to present any documentary or other evidence as proof that the correct procedure was employed in the imposition of levies.

THE ISSUES IN DISPUTE

11. In the course of the affidavits that have been filed by both parties the issues have narrowed substantially in that:

11.1. The Respondent no longer disputes Applicant’s existence.

11.2. The Respondent no longer contends that it had never agreed to any Homeowner’s Association Constitution or Development Control Parameters (as all homeowners were requested to do in writing). It accepts that it is bound by the following condition in the title deed: “Subject further to the following condition contained in the Constitution of the Dennegeur Home Owner’s Association, imposed in Deed of Transfer T 102878/2002 by the Helderberg Municipality in terms of section 29 of Ordinance 15 of 1985 upon approval of the subdivision of Erf 13351 Somerset West, namely – ‘The within property may not be sold or transferred without the prior written consent of the DENNEGEUR HOME OWNER’S ASSOCIATION, of which the Transferee shall become a member, which consent shall not be unreasonably withheld." Furthermore, a document entitled "Requirements for Consent to Transfer" signed on behalf of the Respondent on 9 February 2007 states as follows: "That a copy of the house rules/constitution has been received from the previous owner. By signing this document the purchaser and his spouse acknowledges that they read the conduct rules / constitution, understands it and agrees to become a member of the body corporate / association and abide by the conduct rules and the Sectional Title Act or the constitution of the association and any regulation and rules made by the trustees / committee."

11.3. The Respondent no longer disputes Applicant's authority to impose any of the charges sought to be imposed by it. As is apparent from the provisions of the constitution quoted elsewhere in this judgment, the Applicant is indeed authorised to impose charges in respect of ordinary levies as well as penalty levies.

12. The remaining issues in dispute are accordingly whether the alleged debt is genuinely disputed on reasonable grounds on the basis of the Respondent's contentions:

12.1. That it disputes any resolution in respect of the charges made against it.

12.2. That the Applicant has not proved all technical and procedural aspects relating to the charges levied against Respondent.

13. In addition, I am called upon to determine the outcome of the application to strike out.

THE APPLICATION TO STRIKE OUT

14. As stated in its application to strike out, the Respondent seeks to strike out:

14.1. Paragraph 4 of the Applicant's further affidavit (on the basis that it is alleged to constitute inadmissible hearsay evidence) which states as follows:

> "4. As regards the extent of the Respondent's current indebtedness to the Applicant, I hereto annex a printout of the Applicant's detailed ledger for the period 1 March 2013 to 28 February 2014, marked annexure "AL1". As can be seen from Annexure "AL1", the Respondent's indebtedness to the Applicant in respect of various levies, penalties, charges and fees levied against it by the Applicant in the performance of its responsibilities in terms of Section 2 of its Constitution, currently amounts to R 416 406.83. I respectfully confirm that the aforesaid amount is due and payable by the Respondent to the Applicant. I further respectfully point out that the component of this aggregate sum of R 416 406.83 which relates to the ordinary monthly levies payable (as opposed to penalties and the like) amounts to R 14 300."

14.2. Annexure AL 1 which is the detailed ledger allegedly reflects the Respondent's indebtedness to the Applicant also on the basis that it is alleged to constitute inadmissible hearsay evidence.

14.3. Paragraphs 10 and 11 of the supplementary affidavit and AL5 on the ground that it constitutes matter of a privileged nature.

15. Subsequent to the application to strike out having been brought, a further supplementary affidavit was filed on behalf of the Applicant. The Deponent to that affidavit is one Ms Jackson who identifies herself as a businesswoman and director of the company Micsam Management, the managing agent of the Applicant. She further states as follows: "I have read the supplementary affidavit by Andre Loedolff and confirm the correctness thereof together with the correctness of the annexures prepared by Micsam, which was prepared by me and/or under my supervision." The Respondent took issue with the formulation of this averment and contended that it did not adequately address the question of hearsay.

16. Notwithstanding the supplementary affidavit having been filed at a late stage of the proceedings, I am of the view that it is in the interests of justice that it be admitted. Indeed, the Respondent could not point to any prejudice that it would suffer as a result thereof.

17. I am of the view that the supplementary affidavit of Ms Jackson does indeed address the complaint of hearsay evidence in relation to AL1 and paragraph 4 of the further affidavit. I am guided by the following in this regard:

    17.1. First, the fact that the documents in question were prepared by the Deponent and/or under her supervision is, in my view sufficient to respond to the allegation of hearsay.

17.2. Second and in any event, it is clear from the papers filed of record that the statements of account for the Homeowner's Association have consistently been prepared by Micsam Management.

17.3. Third, the Circular to all Owners on the Estate regarding the Construction Levy was authored by Ms Jackson in her capacity as managing agent.

17.4. Fourth, the AGM minutes of 20 October 2011 which referred to outstanding levies as well as the liquidation application of the Respondent, reflect that Ms Jackson was in attendance. The minutes of a Committee meeting held on 20 October 2011 also reflect Ms Jackson as having been in attendance as do the minutes of the AGM of 7 December 2006 at which a resolution was adopted regarding the amendment of clause 2.7 of the Constitution. Ms Jackson was also in attendance at a committee meeting and an AGM on 26 July 2011.

18. Indeed, Ms Jackson appears to have been intimately involved in the matters concerning the Association. I accordingly do not have a difficulty in respect of the formulation of what she confirms in her supplementary affidavit and conclude for reasons aforestated that the application to strike out paragraph 4 of the supplementary affidavit and AL1 must fail.

19. As regards the striking out of the privileged matter, it has long been recognised that statements expressly or impliedly made without prejudice in the course of bona fide negotiations for the settlement of a dispute cannot be disclosed in

evidence without the consent of both parties. Such exclusion is based upon the tacit consent of the parties and the public policy of allowing people to try to settle their disputes without the fear that what they have said will be held against them if the negotiations should break down.[2] I am of the view that paragraphs 10 and 11 of the supplementary affidavit (as well as AL5) do indeed constitute privileged matter. The application to strike out in this regard must therefore succeed.

<u>THE LAW</u>

20. Section 344 of the Companies Act No. 61 of 1973 regulates the circumstances in which a company may be wound up by Court. One such instance is if the company is unable to pay its debts as described in section 345.[3]

21. Section 345 provides as follows:

> "345 When company deemed unable to pay its debts
>
> (1) A company or body corporate shall be deemed to be unable to pay its debts if-
>
> (a) a creditor, by cession or otherwise, to whom the company is indebted in a sum not less than one hundred rand then due-
>
> (i) has served on the company, by leaving the same at its registered office, a demand requiring the company to pay the sum so due; or
>
> (ii) in the case of any body corporate not incorporated under this Act, has served such demand by leaving it at its main office or delivering it to the secretary or some director, manager or principal officer of such body corporate or in such other manner as the Court may direct,

[2] Waste-Tech (Pty) Ltd v Van Zyl & Glanville NNO 2000 (2) SA 400 (SE)At 406. See too: Naidoo v Marine and Trade Insurance Company Ltd 1978 (3) SA 666 (A) at 677B-C; Milward v Glaser 1950(3) SA 547 (W) at 554.

[3] Section 344(f) of the Companies Act.

and the company or body corporate has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) any process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned by the sheriff or the messenger with an endorsement that he has not found sufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy such process; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

(2) In determining for the purpose of subsection (1) whether a company is unable to pay its debts, the Court shall also take into account the contingent and prospective liabilities of the company."

22. I am of the view that in terms of Schedule 5 (9) of the Companies Act No. 71 of 2008, the previous Companies Act will continue to apply in respect of the present application. In this regard in **Scania Finance Southern Africa (Pty) Ltd v Thomi-Gee Road Carriers CC and Another Case** 2013 (2) SA 439 (FB) the Court held:

> "[21] I therefore hold that an applicant may, in terms of s 9 of sch 5 of the 2008 Act, approach the court for the liquidation of a respondent company (or close corporation) on the ground of its inability to pay its debts in terms of s 344(f), and that s 345 (and s 69 of the Close Corporations Act) is still a deeming provision. Such an applicant need not prove that the respondent company is insolvent in order to rely on ch XIV of the previous Act."

23. The applicable legal principles in respect of applications of this nature are well established:

23.1. In **Van Zyl NO v Look Good Clothing CC** 1996 (3) SA 523 (SE) at 530B-E it was held:

> "In order to obtain a provisional order of liquidation an applicant is required to establish a prima facie case. <u>Where, as in the present matter, the application is opposed, the necessary prima facie case is established only when the applicant is able to show that on a consideration of all the affidavits placed before the Court a case for liquidation has been established on a balance of probabilities</u>. Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A) at 978D-E, 979B-C and E-F.
>
> Where, however, the respondent shows on a balance of probabilities that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the application will be refused. In Kalil's case supra at 980C-D Corbett JA, as he then was, has the following to say in this regard:
>
>> 'Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on bona fide and reasonable grounds, the Court will refuse a winding-up order. The onus on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on bona fide and reasonable grounds.'"
>
> (Own emphasis)

23.2. In **Helderberg Laboratories CC v Sola Technologies (Pty) Ltd** 2008 (2) SA 627 (C)[4] this Court held:

> "[20] Before turning to the relevant facts in this regard, it is necessary to consider the principles applicable in deciding, on the return day of a provisional winding-up order, whether the provisional order should be confirmed or discharged. In particular, it is necessary to consider the relevant principles in circumstances where a respondent disputes the existence of the alleged debt upon which an applicant relies. <u>In an application for the grant of a provisional winding-up order, a mere prima facie case has to be established by the applicant, while a final order will only be granted if the applicant satisfies the court on a balance of probabilities that the provisional order should be confirmed</u>. Where an applicant, as in the instant case, relies on s 346(1)(b) of the Companies Act, it has to satisfy the court that it is a creditor within the meaning of the said subsection. It follows that, on the return day of a provisional winding-up order, the onus is on the applicant to prove on a balance of probabilities that it has the necessary locus standi as

[4] See too: Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another 2011 (2) SA 266 (SCA) para 16; Hülse-Reutter v HEG Consulting Enterprises (Pty) Ltd (Lane & Fey NNO Intervening) 1998 (2) SA 208 (C) at 219E.

a creditor. See Henochsberg on the Companies Act vol 1 at 728 - 30 and the authorities there cited.

[21] If, however, a respondent opposes an application for its liquidation on the basis of a dispute as to the existence of the alleged debt, a difference in approach is called for. If the alleged debt is genuinely disputed on reasonable grounds, the attitude of our courts is that it would be wrong to allow such dispute to be resolved by utilising the machinery designed for winding-up proceedings, rather than ordinary litigation. In this event the court ought to refuse the granting of a winding-up order, whether it be a provisional or final order which is sought by the applicant. See Kalil v Decotex (Pty) Ltd and Another I 1988 (1) SA 943 (A); Wolhuter Steel (Welkom) (Pty) Ltd v Jatu Construction (Pty) Ltd (In Provisional Liquidation) 1983 (3) SA 815 (O); H\)lse-Reutter and Another v Heg Consulting Enterprises (Pty) Ltd (Lane and Fey NNO Intervening) 1998 (2) SA 208 (C); and Payslip Investment Holdings CC v Y2K Tec Ltd 2001 (4) SA 781 (C).

[22] In the event of a respondent disputing its alleged indebtedness in liquidation proceedings, it is often said that the respondent has the 'onus' of satisfying the court that the alleged debt is disputed on bona fide and reasonable grounds. In my view the use of the word 'onus', in these circumstances may lead to confusion, as the overall onus, to prove on a balance of probabilities that it is a creditor of the respondent within the meaning of s 346(1)(b) of the Companies Act, remains on the applicant. In Commonwealth Shippers Ltd v Mayland Properties (Pty) Ltd (United Dress Fabrics (Pty) Ltd and Another Intervening) 1978 (1) SA 70 (D) at 72D - E, Milne J said the following:

> Perhaps it may be said that if there is prima facie a valid claim by the applicant so as to make it a creditor within the meaning of sec. 346(1)(b), then it is for the respondent to disturb that prima facie situation by showing a dispute on bona fide and reasonable grounds. Overall, however, it seems to me that the position must be that, in order to establish that the applicant has locus standi to bring the application, it must show, on a balance of probabilities, that it is a creditor (where of course that is the ground relied upon to establish its locus standi).

[23] I am in respectful agreement with the aforesaid dictum of Milne J, which has been approved by the Appellate Division in Kalil v Decotex (Pty) Ltd and Another (supra) at 980E. It therefore appears to me that it would be preferable to refer to this duty, of a respondent to show that the alleged debt is disputed on bona fide and reasonable grounds, as an evidential

burden and not an onus. Be that as it may, it should be borne in mind, as explained by Thring J in the H\)lse-Reutter case (supra) at 219F - G, that a respondent merely has to satisfy the court that the grounds which are advanced for its disputing the debt are not unreasonable. The learned judge further emphasised that it is not necessary for the respondent to adduce on affidavit, or otherwise, the actual evidence on which it would rely at a trial. It is sufficient if the respondent bona fide alleges facts which, if proved at a trial, would constitute a good defence to the claim made against it."

(Own emphasis)

23.3. The approach in dealing with factual disputes in winding-up applications differs from applications in general. In **Payslip Investment Holdings CC v Y2K Tec Ltd** 2001 (4) SA 781 (C) at 783G – I, it was held:

> "Guidelines as to how factual disputes should be approached in an application such as the present were laid down by the Appellate Division in Kalil v Decotex (Pty) Ltd and Another 1988 (1) SA 943 (A). According to these guidelines a distinction is to be drawn between disputes regarding the respondent's liability to the applicant and other disputes. Regarding the latter, the test is whether the balance of probabilities favours the applicant's version on the papers. If so, a provisional order will usually be granted. If not, the application will either be refused or the dispute referred for oral evidence, depending on, inter alia, the strength of the respondent's case and the prospects of viva voce evidence tipping the scales in favour of the applicant. With reference to disputes regarding the respondent's indebtedness, the test is whether it appeared on the papers that the applicant's claim is disputed by respondent on reasonable and bona fide grounds. In this event it is not sufficient that applicant has made out a case on the probabilities. The stated exception regarding disputes about an applicant's claim thus cuts across the approach to factual disputes in general."

<u>THE BASIS ON WHICH THE APPLICANT ENTITLED TO LEVY CHARGES</u>

24. The Applicant is a homeowner's association established in terms of section 29 of the Land Use Planning Ordinance No. 15 of 1985 ("LUPO"). Section 29(1) and (2) provides as follows:

> "29 Home owners' association
>
> (1) Either the Administrator or the council concerned, as the case may be, may impose conditions under section 42 as to the granting of an application for subdivision in terms of section 25(1), in relation to the compulsory establishment by the applicant for subdivision of a home owners' association.
>
> (2) A home owners' association coming into being by virtue of the provisions of subsection (1)-
>
> (a) shall be a body corporate;
> (b) shall have a constitution which-
> (i) has as its object the control over and the maintenance of buildings, services and amenities arising from the subdivision concerned;
> (ii) provides for the implementation of the provisions of paragraph (c), and
> (iii) has been approved by the council concerned in order to ensure that the provisions of subparagraphs (i) and (ii) are being complied with, and
> (c) shall have as its members the owners of land units arising from the subdivision concerned, who shall be jointly liable for expenditure incurred in connection with the association."

25. It is common cause that the Applicant has adopted a Constitution pursuant to section 29 of LUPO. The following provisions of the Applicant's Constitution warrant reference:

> "**4. OBJECTS OF THE ASSOCIATION**
> The objects of the Association:
> ....
> 4.3 That the Association, through its said Committee, shall have the power to do such acts as are necessary and reasonably required to give effect to the provisions of the Constitution.

5. MEMBERS

5.1 The Association shall be organised without capital and membership thereof shall be evidenced by registered ownership in the Deeds Registry in Cape Town of one or more erven in the Private Area. Upon registration of ownership, membership of the Association shall be automatic and members shall be obliged to comply with the provisions of this Constitution. No person shall be entitled to cease to be a member of the Association while remaining the registered owner of an erf in the Private Area.

....

5.3. Membership shall be transferred by the registration of a Deed of Transfer in the Deed's Registry at Cape Town, passing transfer of one or more erven in the Private Area to the new member.

5.4. Every member shall pay an annual levy/subscription to the Association, the amount of which shall be determined by EXCOM in terms of Clause 10 hereof. The subscription so determined shall apply equally to erven and shall be payable in respect of each erf owned by a member.

....

6. COMMITTEE

6.1. The powers of the Association other than those to be exercised by the members in General Meeting, shall be exercised by the Executive Committee (EXCOM).

...

7.4. MEETINGS AND PROCEDURES THEREAT

7.4.1 EXCOM members may give notice convening meetings, meeting together for the dispatch of business, adjourn or otherwise regulate their meetings as they think fit. It shall not be necessary to give notice of a meeting of any EXCOM member currently absent from the Republic of South Africa.

7.4.2 An EXCOM member may at any time convene a meeting of EXCOM by giving to the other EXCOM members no less than TEN (10) days written notice of a meeting proposed by him, which notice shall specify the reason for calling such a meeting, provided that in case of urgency shorter notice may be given within reason and according to circumstances.

7.4.3 THREE (3) EXCOM members shall form a quorum where EXCOM consists of either FIVE (5) or EIGHT (8) members. If at any meeting a quorum is not present within THIRTY (30) minutes of the appointed time of the meeting, such meetings shall stand adjourned to the next business day at the same time.

7.4.4 If the number of EXCOM members falls below the number necessary to form a quorum, the remaining members may constitute a quorum, but only for the purpose of convening a General Meeting of members.

7.4.6 All matters at any meeting of EXCOM shall be determined by a majority or (sic) those present and voting.

7.4.7 EXCOM members may from to time appoint a person to be Secretary of the Association, to fulfil the normal functions of a Secretary and, inter alia, to attend all meetings and keep Minutes thereof.

7.5. POWERS OF EXCOM

The Management and administration of the Association shall vest in EXCOM which may exercise all such powers of the Association and also on behalf of the Association, all such acts as may be exercised by the Association itself and which are not, by its Constitution, required to be exercised or executed by the Association in a General Meeting. Without in any way limiting the generality of the aforegoing, such powers shall include but not be limited to the following:

7.5.1 The determination of what constitutes an appropriate standard for community living and the maintenance of properties in the Private Area and ensuring house rules if need be;

7.5.2 The performance of such acts as are necessary to accomplish the objects expressed or implied herein;

7.5.3 The investment and re-investment of monies of the association which are not immediately required, in such a manner as may be determined from time to time;

....

7.5.7 To institute proceedings in the name of the Association, to defend actions in the name of the Association and to appoint legal representatives for this purpose; in particular and without derogating from the generality of the aforegoing, the power to sue shall include the right to sue members for the payment of subscriptions in arrears an(sic)/or for the carrying out of their obligations in terms of the Constitution;

7.5.8 The levying of a subscription payable by the members are provided in Clause 5 and 10 hereof and subject to the said Clauses, the determination from time to time and as frequently as they may, at their sole and absolute discretion, consider necessary or expedient, of the amount of the subscription to be paid to the Association by its members.

....

8. MEETINGS

8.1 Annual General Meetings shall be held once every year at such time and place as may be determined by EXCOM, but so that no more than FIFTEEN (15) months shall be allowed to elapse between any TWO (2) such successive meetings. The business to be done at the Annual General Meeting shall include:

8.1.1 the receipt of a report on the affairs of the Association;
8.1.2 the election of members to EXCOM;
8.1.3 the adoption of the Balance Sheet account;
8.1.4 the consideration of any Resolutions concerning the affairs of the Association of which due notice has been given;
8.1.5 any other business.

....

10. ANNUAL SUBSCRIPTIONS

10.1 The Association, through EXCOM, shall be entitled to levy an annual subscription to, defray and provide for all the costs for which the Association may become responsible in order to give effect to its objects in terms of this constitution. Such subscriptions may be fixed and collected annual in advance.

....

14. RULES AND REGULATIONS AND AMENDMENTS TO THE CONSTITUTION

14.1 Any amendment or addition to the Constitution, with the exception of “Annexure C”, may be effected by a Resolution passed by a 50 PERCENT majority at a General Meeting, after written notice thereof setting out such amendment or addition in full, has been given in the notice calling the meeting. Any amendment to “Annexure C” may only be effected through the above stipulation as well as the consent of the Municipality.”

26. Annexure C, which forms part of the Applicant's Constitution provides as follows in clause 2.7:

> "2.7 Construction of all dwellings must be completed by 31st December 2008. Failure to complete construction within such period will result in a penalty being imposed which will be payable over and above the normal levy."

27. Based on the above mentioned provisions, I am of the view that the Applicant is indeed entitled to impose both an ordinary levy and a penalty levy. It derives the power to do so from its Constitution.

28. As regards notification of the penalty levy in a Circular dated 20 February 2007, the following is stated:

> "We have been instructed by the Committee to advise that at the Special General Meeting held on 7th December 2006 the Resolution pertaining to the Building Deadline being 31st December 2008 was passed without amendment.
>
> The Constitution has been amended to reflect the above and therefore the existing Clause 2.7 of the Development Control Parameters, which forms part of the Constitution, falls away. Due to this clause falling away no further monthly construction penalties have been charged with effect from 1st January 2007. Any penalties imposed upon owners prior to this date are still applicable and must be paid in full.
>
> Should dwellings not be completed by 1st January 2009, a construction penalty levy will be imposed which will be payable over and above the normal levy, the amount of this penalty is still to be determined.
>
> It is incumbent on present owners to advise potential buyers of erven of this clause."

IS THE CLAIM DISPUTED ON BONA FIDE AND REASONABLE GROUNDS?

29. The Respondent submits that the Applicant has failed to place evidence before this Court to show that the prescribed formalities and internal procedures were

followed in the imposition of levies charged by the Applicant against the Respondent. Reliance is placed on the following specific averments in this regard:

29.1. In its Plea to the Magistrates' Court proceedings (attached to its answering affidavit), the Respondent specifically pleaded (albeit in the context of a special plea dealing with jurisdiction):

> "(a) In order for Plaintiff to succeed with this action they are required to prove the valid constitution and registration of the homeowners association in question, which would not have taken place wholly within the jurisdiction of this Honourable Court.
>
> (b) In order for the Plaintiff to succeed with this action they are required to prove that all decisions pertaining to constitution of the management committee; ordinary and special levies etc. were taken after the necessary democratic process was followed, which, of necessity, includes proof that Defendant and other effected (sic) home owners were duly notified in each instance. This would not have happened wholly within the jurisdiction of this Honourable Court."

29.2. Furthermore, in its answering affidavit (as already referred to) the Respondent has averred:

> "As appears from the Plea, Respondent does not accept that Applicant exists and requires Applicant to prove all technical and procedural aspects relating to the charges levied against Respondent.
>
> .....
>
> Respondent disputes any resolution in respect of the charges made against it."

30. The Respondent's defence with regard to compliance with prescribed formalities and internal procedures has not been clearly expressed. One would

have expected the defence to have been formulated with reference to specific instances in which procedural requirements have not been complied with and furthermore the precise basis on which resolutions have been disputed. Unfortunately, this has not been the case and, is in my view partly attributable to the manner in which this matter has evolved and more particularly that the Association's Constitution was attached to the papers only <u>after</u> the replying affidavit had been filed.

31. Despite the fact that the Respondent's defence with regard to compliance with prescribed formalities and internal procedures has not been clearly expressed, the Applicant appears to have understood the complaint regarding non compliance with prescribed formalities and internal procedures in that in its supplementary affidavit it averred:

> "7. For the sake of completeness I also hereto annex the minutes of the Applicant's Annual General Meetings for 2006 and 2012 years marked annexures "AL3c" and "AL3d" respectively. <u>Even a cursory perusal of the attached minutes reveals that all of the levies, penalties and related costs and imposts which the Applicant claims to be owed by the Respondent have been duly authorised by its members and raised by the Applicant</u>."
>
> (Own Emphasis)

32. Despite the fact that the Respondent's defence regarding non compliance with formalities and internal procedures has not been articulated with absolute clarity, it is, in my view, apparent that it entails a dispute as to: (a) whether there was a resolution in respect of the penalty charges levied; and (b) if so, whether the procedural requirements for a valid resolution were complied with. The supplementary affidavit filed by the Applicant (referred to above) contents itself

with a statement that is ultimately not borne out by the source documents relied upon.

33. As is apparent from the case-law referred to above the threshold that the Respondent has to satisfy in matters such as these is a relatively low one. In my view, the Respondent's reliance on the prescribed formalities and internal procedures satisfies the threshold that it "merely has to satisfy the court that the grounds which are advanced for its disputing the debt are not unreasonable.... [and] that it is not necessary for the respondent to adduce on affidavit, or otherwise, the actual evidence on which it would rely at a trial. It is sufficient if the respondent bona fide alleges facts which, if proved at a trial, would constitute a good defence to the claim made against it." In other words, should this matter proceed to trial the Respondent may contend that the debt is not due, owing and payable because the procedural requirements of the Homeowner's Association have not been complied with. By way of example (and as amplified in argument), the Respondent may contend that: (a) there was no quorum when the decision to impose the charges was taken; and/or (b) no resolutions were adopted by the EXCOM and therefore no valid decisions were taken. This, in my view, constitutes a genuine dispute on reasonable grounds, particularly given that the "attached minutes" referred to by the Applicant do <u>not</u> show that all of the levies, penalties and related costs (in the amounts charged) have been duly authorised by the Applicant's members. Indeed, the AGM minutes of 7 December 2006 merely refers to the constitutional amendment in respect of clause 2.7.

34. Furthermore, the minutes of the Association's AGM dated 19 September 2013 state inter alia as follows:

> "4. ADOPTION OF THE AUDITED ANNUAL FINANCIAL STATEMENTS
>
> A question was raised as to whether there will be a shortfall due to the penalties being ceased for a year. The Chairman said that, as per his report, in order to assist owners who currently are struggling to sell their plots because of the penalty levies imposed on them; and taking the economic climate into consideration, it was through to cease the penalties for a year. It will give those owner (only 4 plots are left) the opportunity to sell their plots.
>
> The idea is not to penalise the owners but to get the Estate completed; the raising of penalty levies was successful to date and this assisted in achieving good finances, but now the last few plots are struggling to sell and with the ceasing of the penalty levies it could help to get these 4 plots sold and build (sic) on hopefully as soon as possible. Owners will be given a 12 month period to draw up plans and complete the building – this will assist prospective buyers. The Chairman advised that at the next annual general meeting the owners can decide to re-instate the penalty levies. ...."
>
> (Own Emphasis)

35. It is apparent from the documentation that even if the charges were validly and competently imposed in terms of the Constitution, due to a constitutional amendment penalty levies were not charged from 1st January 2007 until 1st January 2009. Furthermore, it appears from the minutes of the Association's AGM dated 19 September 2013 that at some stage penalty levies had been ceased for a year. These issues, in my view, have a bearing on the calculation of the charges that the Applicant has imposed on the Respondent which falls to be properly ventilated at a trial, particularly given that in these proceedings the Respondent has disputed the amount of the penalty levy.

36. Finally, I was asked in argument on behalf of the Applicant to identify the “debt” in question as being the building of the house in light of the obligation in the constitution that the construction of all dwellings must have been stipulated by a specific date. It was further contended that it was this debt that the Respondent was unable to pay. Whatever the merits of such an argument may be, these proceedings were instituted on the basis that the Applicant was the creditor of the Respondent in respect of a particular sum of money as identified in a statement of account attached to the founding affidavit. In light thereof, I am of the view that it is not competent at this stage for the Applicant to seek to identify the debt as being the construction of the house.

CONCLUSION

37. In the result, I make the following Order:

“The application is dismissed with costs.”

K PILLAY

Acting Judge of the High Court