

SOUTH AFRICA / JUDGMENT

Eagle Canyon Homeowners Association v Blakes Maphanga Incorporated (2013/02686) [2016] ZAGPJHC 282 (24 May 2016)

[2016] ZAGPJHC 282

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Weiner

CASE / FILE NUMBER

2013/02686

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: 2013/02686

Reportable:	No
	Of
	interest to other judges: No
	Revised.
	In the
matter between:	EAGLE
	CANYON
	HOMEOWNERS
	ASSOCIATION Plaintiff
	and
	BLAKES
	MAPHANGA
	INCORPORATED Defendant

JUDGMENT

WEINER, J:

INTRODUCTION

1. The defendant applied at the commencement of the trial for an order in terms of Rule 33(4):-

“The question whether the plaintiff is entitled to impose fines or penalties on a homeowner for failure to comply with a condition in the title deed that a main dwelling be completed on the property within 21 months from the date of the registration of the first transfer of the property from the seller, shall be dealt with under Rule 33(4).”

2. The plaintiff agreed with the defendant in this regard. Accordingly, an order was made that the above question be dealt with in terms of Rule 33(4).

BACKGROUND

3. This matter deals with a condition in title deed number T046599/2008 in respect of Erf 1176 Honeydew Manor Extension 24 Township (“the 2008 title deed”). The 2008 title deed contained a number of conditions in Part B. These conditions were imposed by Eagle Canyon Golf Estate (Pty) Ltd in favour of the present plaintiff. Paragraph (d) of Part B in the 2008 title deed reads as follows:-

“(d). The owner of the erf of any successors in title is obliged to complete a main dwelling on the property within 21 (twenty one) months from the date of registration of the first transfer of the property from the Seller. Conditions to be waived by the Home Owners Association in writing when completed.”

4. It is common cause that the period of 21 months was amended to read 24 months. It is further common cause that there was no sanction provided if the obligation to complete the main dwelling within the requisite time was not complied with.
5. The plaintiff’s case in the main action is a damages claim against the defendant.
6. The claim deals inter alia, with the effect of the substitution of the word “first” in the title deed condition referred to above with the word “this”, when Deed of transfer number T4360/2010 was registered on the 17th February 2010. The defendant, in registering the transfer, substituted the word “first” with the word “this”. The new owner, the Bellamo Trust contends that, as a result thereof, it effectively acquired a period of 24 months (calculated from the 17th February 2010) to comply with the obligation to complete the main dwelling.
7. The dispute arises because the 24 months would have initially run from the date of “first” transfer of the property. When the word “first” was substituted with the word “this”, in the 2010 title deed, this resulted in a further period being afforded to the Bellamo Trust. The plaintiff claimed that the defendant was not entitled to substitute the word “this” for the word “first” and as a result it has suffered damages. These allegations arise because the

plaintiff can no longer claim the penalties if the owner does not complete the building within 24 months from the “first” transfer date.

8. The defendant’s case is that plaintiff does not have the power to impose a penalty for the failure to comply with the obligation.

PARTICULARS OF CLAIM

9. The plaintiff pleaded that:-

“1. At an Annual General Meeting (“AGM”) of the plaintiff held on 30 August 2005, it was resolved that the trustees/board of the Plaintiff implement the penalty clause in respect of the commencement of construction and completion of construction as from 1 November 2005;

2. At a meeting held on 15 November 2005, it was resolved that penalty levies of R5 000,00 per month would be implemented 24 months from date of first registration of transfer of the immovable property from Eagle Canyon Golf Estate (Pty) Ltd (the developer);
3. At an AGM (of members of the plaintiff) held on 24 April 2006, it was duly resolved that the time limits for completion of construction, as set out in the title deeds, would be extended by three months to a period of 24 months from the date of first registration of transfer from Eagle Canyon Golf Estate (Pty) Ltd (the developer)”.
10. Accordingly, the plaintiff contends that the title condition was extended to 24 months and the amount of the building penalty of R5 000,00 per month was determined by the members of the plaintiff in a general meeting.

POWER TO IMPOSE PENALTY

11. The defendant contends that there is no allegation in the particulars of claim, as amplified by the further particulars, that the plaintiff has the power or authority to impose penalties and fines for the failure to erect a dwelling within the requisite time.
12. It is common cause that in terms of the articles of association of the plaintiff (“the Articles”) and the builders’ code of conduct (“the Builder’s Code”), the plaintiff has authority to perform certain acts and/or impose certain levies, in other instances which are set out in the Articles and Builders’ Code. However, the particular act of imposing the penalty is not contained in either the Articles or the Builder’s Code.
13. The defendant contends that the relationship between a company and its members is contractual. The Memorandum and Articles under the Companies Act 61 of 1973 and the Memorandum of Incorporation (“MOI”) (under the Companies Act 71 of 2008) “have contractual force between the company and its members”[1]. The company derives its powers from its Articles and MOI. The defendant further contends that, if these powers are not contained in the Articles and Memorandum this cannot be imposed by way of a resolution by the plaintiff.

14. The plaintiff sought to rely on some of the Articles, which make provision for the trustees to impose certain levies upon members, for the plaintiff's power to impose the penalty for failure to comply with the obligation to complete the dwelling timeously. It is common cause that none of these refer specifically to the penalty sought to be imposed. They referred, *inter alia*, to

- 14.1. Clause 4.1 of the Articles which provides that:

"the trustees may from time to time impose levies upon the Members for the purpose of meeting all the expenses which the Association has incurred, or to which the trustees reasonably anticipate the Association will be put in the attainment of its objects or the pursuit of its business and without derogating from the generality hereof, with specific reference to the maintenance of the communal internal services".

- 14.2. Clause 4.3 provides:

"Any amount due by a Member by way of levy, interest or fines shall be a debt due by him to the Association... Member... or his or her successor".

- 14.3. These levies, interest and fines may be imposed for various events set out in clause 4.1, but not for the failure to build within a specified time. There is no mention of penalty levies.

- 14.4. Clause 4.8 of the articles provides:

"The Association may in, general meeting, itself make any rules which the Trustees may make and may, in general meeting, vary or modify the rules made by it or the trustees from time to time".

- 14.5. Clause 5.1 of the articles which provides that the trustees may, from time to time, make rules or regulations in regard to the matters set out in clauses 5.1.1 to 5.1.9. (the obligation to build timeously, is not one of these matters);

- 14.6. Clause 5.1.8 provides that rules or regulations can be made in respect of:

"the furtherance and promotion of any of the objects of the association and/or for the better management of the affairs of the association and/or the advancement of the interests of members and/or residents in the township".

- 14.7. Clause 5.2.3 of the Articles which provides:

"The Trustees may impose a system of fines... The amounts of such fines shall be reviewed and confirmed at each Annual General Meeting of the Association".

15. The plaintiff contends that clause 5.2.3, read with clause 5.1.8, together, are sufficient to create the power to impose the penalty levy which it did.

16. Clause 10 of the Builders Code provides that:

"10.4. The building committee shall be entitled to impose fines against the owner for any contravention of these rules..."

17. The defendant contends that none of these grant to the plaintiff the power to impose penalties or fines for the failure to build within the specified time.
18. In a response to a request for further particulars, the plaintiff admitted that they do not rely upon the Articles and/or the Builders Code for the power to impose the penalty. The plaintiff states that it enforced the condition as holder of a personal servitude (real right in condition (B)(d)) and imposed the building penalty at the AGM, as pleaded in paragraph 10 of the plaintiffs particulars of claim.
19. The defendant contends that without such authority being provided for in the Articles and/or the builder's code, no such power can be exercised. In this regard, it relies on *Kenrock Homeowners Association v Allsop*[2] in which the Court concluded:

"As Ms Wharton argued on behalf of the respondents, the appellant derives all its powers from its constitution and if that instrument does not prescribe such a power, the association cannot exercise such power

- [27] Clause 11 of its constitution does not bestow upon the appellant power to impose a recurring penalty levy on a homeowner in breach of his or her obligations...Clause 8 thereof, which deals with the imposition of levies and special levies, similarly makes no provision for the imposition of a levy such as that which the appellant purported to impose upon the respondents.
- [28] In our view, in the absence of a clear provision in the constitution empowering the appellant to impose a penalty levy in appropriate circumstances, it does not possess the power to do so".[3]

20. The plaintiff attempts to distinguish this case on the basis that it is related to the powers of the Trustees and not to the powers of the Members in general meeting. However, the power to impose certain penalties and fines are dealt with specifically in the Articles. There does not appear to be any reason to afford the members powers which the Trustees would be precluded from exercising. *Kenrock* holds that if the imposition of a penalty for a specific circumstance is not dealt with expressly in the Articles, the trustees cannot resolve to impose such penalty. The position must apply equally to the Members at an AGM. This view is borne out by the provisions of clause 4.8 set out above.

CONCLUSION

21. Accordingly, the question before the court in terms of Rule 33(4) must be decided in favour of the defendant. The following order is made:
 1. The plaintiff is not entitled to impose fines or penalties on a homeowner for failure to comply with a condition in the title deed, that a main dwelling be completed on the property within 24 months from the date of the registration of the first transfer of the property from the seller.

2. The plaintiff is to pay the costs.

S WEINER

JUDGE OF THE HIGH COURT OF
SOUTH AFRICA (GLD)

Appearances

For the Plaintiff: Advocate D Fisher SC

Instructed by: Marais Stephens Attorneys

For the Defendant: Advocate G Kairinos

Instructed by: Blakes Maphanga Inc.

Date of hearing: 24 May 2016

Date of Argument: 24 May 2016

Date of Judgment: 12 August 2016

- [1] Section 65(2) of the 1973 Companies Act, see also *Dennegeur Estate Huiseienaarsvereniging v Zonnekus Mansion* (EDMS) BPK (2024/2011) [2014] ZAWCHC 70 (8 May 2014)
- [2] *Kenrock Homeowners Association v Allsop and Another* (A224/2011) [2012] ZAWCHC 31 (28 March 2012)
- [3] *Supra* fn 3 paragraph 26 - 28

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Prepared on 11 October 2026 · Esheria