

SOUTH AFRICA / JUDGMENT

Kenrock Homeowners Association v Allsop and Another (A224/2011) [2012] ZAWCHC 31 (28 March 2012) [2012] ZAWCHC 31

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek, Henney

CASE / FILE NUMBER

A224/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. A224/2011

In the matter between:

KENROCK HOMEOWNERS ASSOCIATION

.....Appellant

And

HAROLD ALLSOP1st
Respondent

AUDREY JOYCE ALLSOP2nd Respondent

Coram: BOZALEK J et HENNEY J

Judgment:

BOZALEK J et HENNEY J

Heard: 9 MARCH 2012

Delivered: 28 MARCH 2012

For the Appellant: Adv RJ Howie

As instructed by: Randall Titus and Associates

(ref: Mr R Titus)

For the Respondents: AdvB Wharton

As Instructed by: Dunster and Associates

(ref: Ms B Blender)

Republic of South Africa IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN) CASE No: A224/2011 In the matter between: KENROCK HOMEOWNERS ASSOCIATIONAppellant And HAROLD ALLSOP1st Respondent AUDREY JOYCE ALLSOP2nd Respondent JUDGMENT: 28 MARCH 2012 BOZALEK, J AND HENNEY, J: INTRODUCTION

- [1] The respondents are the registered owners of a house located in Kenrock Country Estate in Hout Bay. The appellant is the Homeowner s Association of Kenrock Country Estate. Like all other homeowners, upon acquiring their property the respondents automatically became members of the association.
- [2] The appellant has a constitution which binds all members. All the appellant's powers and authority are derived from the constitution. The constitution with all its rules and regulations constitutes an agreement into which the members enter into upon becoming members.

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A224/2011

In the matter between:

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JUDGMENT: 28 MARCH 2012

BOZALEK, J AND HENNEY, J: INTRODUCTION

- [1] The respondents are the registered owners of a house located in Kenrock Country Estate in Hout Bay. The appellant is the Homeowner s Association of Kenrock Country Estate. Like all other homeowners, upon acquiring their property the respondents automatically became members of the association.

- [2] The appellant has a constitution which binds all members. All the appellant's powers and authority are derived from the constitution. The constitution with all its rules and regulations constitutes an agreement into which the members enter into upon becoming members.
- [3] The appellant issued summons against the respondents for certain "penalty /ew'es" which it imposed on the respondents. According to its amended particulars of claim, the appellant was entitled to impose these penalty levies in terms of clause 11.2.3 of the constitution for the enforcement of breaches of its rules or the constitution. That sub-clause provides that the appellant may impose a "fine" upon a member for a breach of the rules or the constitution which shall be a debt due to the appellant and shall be payable as part of the members monthly levy account. Pursuant to these provisions, the appellant purported to impose penalty levies upon the respondents totalling R57 868,21. The respondents refused to pay the bulk of these penalty levies, hence this action.
- [4] In their plea the respondents denied any liability for the amounts claimed save for admitting that they were indebted to the appellant in the amount of R4 660,00 which they paid into court. They further denied that clause 11.2.3 or any other provision of the constitution makes provision for the imposition of penalty levies and as such averred that the appellant's particulars of claim disclosed no cause of action. Unfortunately this point was not independently pursued as an exception since this may well have short-circuited the proceedings. In the alternative, the respondents pleaded that the appellant in effect consented to their one breach of the appellant's rules and thus could not claim, or was estopped from claiming, any penalty levy arising therefrom. For the purposes of this judgment it is not necessary to deal with the respondent's alternative plea.
- [5] The magistrate granted absolution from the instance at the close of the appellant's case on the basis that it had made out no case for the respondents to answer. More particularly, in interpreting clause 11.2.3 of the appellant's constitution the magistrate found that a fine or penalty levy could not have been lawfully imposed since the appellant had failed, in terms of clause 11.2.2, to first take action to remedy the alleged breach/es of which the respondents were guilty before imposing such a penalty levy or fine.
- [6] The appellant appeals against the order of absolution, its sole argument being that the magistrate erred in interpreting clause 11.2 as requiring the appellant to first invoke the steps envisaged in sub-clause 11.2.2 before it could impose a fine in terms of sub-clause 11.2.3.
- [7] FACTS

The evidence led by the appellant regarding the alleged breach/es by the respondents was confusing and in certain respects contradictory. The situation was not helped by the fact that the appellant did not set out these alleged breaches at all in its particulars of claim and further particulars thereof were not sought by the respondents.

[8] According to the appellant's complaint as elicited during the evidence, the respondents constructed or erected certain structures in contravention of clause

12 of the constitution in breach of the governing architectural design manual, in particular, the complaint/s related to the erection of balustrades, a garage door and a roof in breach of the design manual and, further, that the window frames of the respondent's house were painted the incorrect colour. It would appear, however, that ultimately the appellant relied for the imposition of the penalty levies on the breaches involving the balustrades and possibly also the roof. Upon closer analysis, furthermore, the respondents' alleged failure to complete the construction of their dwelling timeously appears also to have led to the imposition of penalty levies.

[9] The respondents were requested to rectify this last mentioned breach by means of a letter from the estate manager dated 15 February

2005. Under the heading: "Obligation to Complete Construction", this letter referred the respondents to clause 14.1 of the Agreement of Sale under which they were compelled to commence with the erection of their dwelling within 2 years of registration of transfer which dwelling had to be completed within 12 months from such date of commencement. The Agreement of Sale was the contract in terms whereof the respondents purchased their erf in the housing estate. The respondents were further referred to clause 14.2 of the Agreement which apparently provided that the trustees could impose a sanction and/or penalties on owners who failed to commence or complete construction of a dwelling within the time limits prescribed.

[10] In the same letter it was stated that according to the records of the estate manager the respondents had exceeded their allowable 12 month period of construction and therefore, as from 1 March 2005, a penalty levy would be billed, being an additional R1 850,00 per month, equivalent (and additional) to the usual monthly homeowner levy.

[11] Amidst the confusing and contradictory evidence of its witnesses, at best for the appellant the amounts additional to the respondent's normal levy which it sought to recover as penalty levies were either those envisaged to in the letter of demand dated 15 February 2005, referred to earlier, or a letter from the appellant's erstwhile attorneys to the respondents dated 19 May 2005. The latter letter refers to the respondent's roof structure and balustrades as being a contravention of the design manual and thus unacceptable.

[12] Schedule "B" to the particulars of claim sets out the "penalty levies" and "interest" levied upon the respondents by the appellant. The total claimed reflects a penalty levy equivalent to the standard levy for the three months between July and September 2005, then for the 18 months between March 2006 and August 2007 and culminating in a penalty levy, in September 2007, double that of the standard levy.

[13] THE PARTIES CASES AND THE ISSUES

The appellant's case rests on the assumption that it is entitled to impose the penalty levies in terms of clause 11.2.3 of the constitution. Mr Howie, who appeared for the appellant in this court, argued that the magistrate had misdirected himself in finding that the invocation of clause 11.2.2 was a prerequisite to imposing a fine in terms of clause 11.2.3. According to his interpretation of clause 11, the trustees, on behalf of the appellant, had a discretion after giving notice in terms of clause 11.2.1, to either invoke the provisions of clause 11.2.2 or 11.2.3 or both.

[14] On behalf of the respondents Ms Wharton contended that in terms of clause 8 of its constitution the appellant was only entitled to impose levies and special levies as provided for in clause 8 of the constitution and that it had no power to impose a penalty levy as it had nevertheless purported to do pursuant to its power to impose a fine in terms of clause 11.2.3. She argued furthermore that in any event the magistrate was correct in holding that clause 11.2.3 only empowers the appellant to impose a fine after it had taken remedial action in terms of clause 11.2.2.

[15] Clause 11.2 reads as follows:

"11.2 For the enforcement of any rules or any of the provisions of this constitution generally the trustees or the manager may:

11.2.1. give notice to the member concerned to remedy any breach within such period as they may determine;

11.2.2. take or cause to be taken such action as they deem fit to remedy the breach of which the member concerned may be guilty and debit the cost thereof, which shall be a debt due to the Association, to his levy account, and which shall be payable as part of his levy on the first day of the following month, and

11.2.3. impose a fine on the member concerned which amount shall be a debt due to the Association, it shall be debited to his levy account and shall be payable as part of his levy on the first day of the following month."

(Own underlining)

[16] Two principal points thus arise for decision: whether the constitution permits the appellant to impose penalty levies and the correct interpretation of clause 11.2, more particularly whether the steps in clause 11.2.2 and 11.2.3 are sequential or optional.

[17] Mr Howie contended that the appeal should be decided solely on the issue of whether the magistrate correctly interpreted clause 11 since this was the basis upon which the magistrate granted absolution. He argued that this court must confine itself to this point and could not have regard to any other issue, more particularly whether the constitution permitted the appellant to impose penalty levies.

[18] If this were the case, however, it would mean that this court on appeal is bound by the trial court's characterization of the critical issue/issues notwithstanding that on the pleadings and the evidence there are other grounds upon which the court should

or could have made the order appealed against.

[19] The real question in these circumstances is whether it is open to the respondents to argue, in support of the magistrate's order or judgment, on the basis of a ground other than that relied upon by the magistrate in his judgment. In casu this boils down to the question of whether the respondents are precluded from arguing on appeal that the appellant failed to make out a prima facie case that it had the power in terms of its constitution to levy the amounts which it claims from the respondents.

[20] A similar situation arose in *Sentrale Kunsmis Korp. V N.K.P. Kunsmisverspreiders* 1970

(3) SA (AD) where at page 395 A - 396 F the court stated as follows:

"Before us the parties joined issue first and foremost on (b), i.e., whether the Court a quo correctly decided that the respondent could rely, and rely successfully, on the common law stipulatio alteri. Indeed, the appellant in noting its appeal purported in express terms to confine this appeal to that particular aspect, and in argument its counsel contended that, in the absence of a cross-appeal in (a), the respondent could not reopen that issue before us. That approach by the appellant was, I think, untenable. Its appeal was, as it had to be, against the substantive order made by the Court a quo upholding the respondent's appeal and granting the relief it claimed; on such an appeal each party thereupon became entitled respectively to attack or support that order on any relevant ground; the appellant could not by its form of notice of appeal or otherwise confine the appeal, or the argument on appeal to some particular part of the reasoning in the judgment of the Court a quo; hence it was open to the respondent to maintain before us that the order was correct on the ground that s71 had been duly complied with; and, although the Court a quo had rejected that ground in its reasoning, the respondent could nevertheless rely upon it without lodging any cross-appeal, for it was not thereby seeking any variation of the above order. (See *Municipal Council of Bulawayo v Bulawayo Waterworks Co. Ltd.*, 1915 (AD) 611 at pp. 625, 631-2; *Western Johannesburg Rent Board And Another v Ursula Mansions (Pty) Ltd.*, 1948 (3) SA 353 (AD) at p. 355).

[21] The point of whether the appellant was entitled to levy penalty levies was expressly pleaded by the respondents in their plea and was pursued by counsel in one of the heads of argument filed on their behalf on appeal. The point was also dealt with in evidence. In these circumstances the fact that the magistrate did not deal with this issue in his judgment, and

thus that the appellant did not refer thereto in its notice of appeal, does not serve to remove the point as one which this court can consider and, if needs be, determine the appeal on the basis thereof.

- [22] We disagree therefore with Mr Howie's submission that upon appeal this court is confined only to the issue of the interpretation of clause 11 and more particularly whether clause 11.2.3 can only be utilised once the appellant has invoked the provisions of clause 11.2.2 this being the basis upon which the magistrate granted absolution. In our view, furthermore, the primary issue before us is whether the appellant possessed the power to impose penalty levies; absent this power it is irrelevant whether it followed the correct sequence of steps in terms of clause 11.2. Regrettably, based upon his insistence that this court could not consider this issue since it fell outside of the ratio of the magistrate's judgment, Mr Howie chose not to make any substantive submissions on the question of whether the appellant had exceeded its powers in imposing penalty levies.

[23] ANALYSIS

In *Gordon Lloyd Page & Associates v Rivera and Another* 2001

(1) SA 88 at 92

para [2] Harms JA (as he then was) held:

"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976

(4) SA 403 (A) at 409G - H in these terms:

'... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2)1958(4) SA 307 (T).) This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van derSchuyff* 1972

(1) SA 26(A) at 37G - 38A; *Schmidt Bewysreg* 4th ed at 91 - 2)."

- [24] As best as can be determined the appellant purported to levy a penalty levy equivalent to, and in one month double that of, the existing standard levy for a period of three months for a breach of the Agreement of Sale and then for 19 months for breaches of its rules or the constitution itself. The penalty levy referred to in the February 2005 letter i.e. for the first period, is expressly predicated upon the respondents' alleged breach of the Agreement of Sale, in particular clause 14 thereof, which document was, however, neither relied upon nor put up by the appellant.

- [25] In regard to the second run of penalty levies, those imposed between March 2006 and September 2007, one can only assume that these were, as pleaded by the appellant, imposed pursuant to its powers in terms of clause 11.2.3 of its constitution. That clause, however, only grants the appellant the power to impose "a fine"-and not a penalty levy - which fine "shall be debited to (the homeowners) levy account and shall be payable as part of his levy".
- [26] 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. In this regard she relied on LAWSA: Associations Vol 1(2nd edition) at paragraph 620 where the following is stated:
- "The constitution of an association together with all rules or regulations collectively constitute the agreement which is entered into by its members. This agreement is the crucial factor in the existence of an association. It not only determines the nature and scope of the association's existence and activities but also, where necessary, prescribes and demarcates the powers of, inter alia, the executive committee, secretary and general meeting, expresses and regulates the rights of members and provides for certain procedural aspects."
- [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. When regard is had to the language which the appellant used and uses - "a penalty levy", the amount of the penalty levy (equivalent to the standard levy) and its recurring nature, this is clearly what the appellant purported to do. The Concise Oxford Dictionary defines a fine as a sum of money exacted as a penalty by a court of law or other authority. In its ordinary usage a fine does not connote a recurring penalty. Nor is a power on the part of the appellant to impose a recurring penalty levy to be found elsewhere in its constitution. 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. It follows that the appellant misconstrued its authority to impose a penalty levy and may even have confused it with a provision authorising the imposition of a sanction or penalty in terms of clause 14.2 of the Kenrock Agreement of Sale. Whatever the case, it acted outside of its powers in purporting to impose a penalty levy under the guise of imposing a fine in terms of clause 11.2.3. Ultimately, having regard to the evidence as a whole the appellant failed to make out a prima facie case that it possessed the power to impose any penalty levy upon the respondents.
- [29] For these reasons it is unnecessary to consider the question of the correct interpretation of clause 11, more particularly whether the steps involved in sub-clauses 11.2.2 and 11.2.3 are sequential or optional.
- [30] In the result the appeal is dismissed with costs.

BOZALEK, J

Judge of the High Court

HENNEY, J

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