

SOUTH AFRICA / JUDGMENT

Walker and Another v Cilantro Residential Estate Homeowners Association (A3067/16) [2016] ZAGPJHC 299 (9 November 2016)

[2016] ZAGPJHC 299**COURT**

South Gauteng High Court, Johannesburg

BEFORE

R M Keightley, Malungana

CASE / FILE NUMBER

A3067/16

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO: A3067/16****9/11/2016****Reportable:**

No

Of

interest to other judges: No

Revised.

In

the matter between:

NIGEL

JOHN

WALKER First

Appellant

DEANNE

WALKER Second

Appellant

and

CILANTRO

RESIDENTIAL ESTATE

HOMEOWNERS

ASSOCIATION Respondent

JUDGMENT

KEIGHTLEY, J:

INTRODUCTION

- [1] This is an appeal against a decision of the Magistrate's Court, Roodepoort. The court a quo upheld the respondent's claim and dismissed the appellant's counterclaim. The appellant appeals against both decisions.
- [2] The respondent is the Cilantro Residential Estate Homeowner's Association ("Cilantro"). It is, as its name describes, a homeowner's association for a residential estate and, to this end, is registered as a non-profit entity. It is governed by registered articles of association, and by governing rules adopted and/or amended from time to time.
- [3] The appellants, Mr and Mrs Walker ("the Walkers") were members of Cilantro from May 2005 until December 2013. They automatically became members when they became the registered owners of an immovable property in the estate. Their membership terminated after they sold the property and the transfer was registered to the new owners in December 2013.

THE CLAIM, COUNTERCLAIM AND GROUNDS OF APPEAL

- [4] Cilantro was the plaintiff in the court a quo, and the Walkers the defendants. Cilantro's claim, as amended, was for payment of an amount of R150 223. 63 made up as follows:
 - [4.1] R105 960. 00 by way of penalties up to 8 November 2013, and
 - [4.2] R44 263. 63 on the Walkers' levy account up to 31 December 2013.
- [5] It is common cause that there were two components to the penalties. One of these was a late payment penalty. The second component was a building penalty. It was imposed because the Walkers failed to comply with the following obligation registered against their Title Deed:

"The transferee undertakes to commence with the erection of a dwelling and outbuildings on the erf in accordance with the architectural theme of (Cilantro), to the reasonable satisfaction of Inverhyde Properites, within 8 calender months from the date of transfer ... and to complete such improvements within 12 months from commencement, failing which Inverhyde Properites shall be entitled (but not obliged) to claim that the erf be re-transferred to Inverhyde Properites at the cost of the owner in time against payment of 80% of the original purchase price"

- [6] To avoid confusion it should be noted that Inverhyde Properites' rights were subsequently ceded to Cilantro. The Walkers conceded that they did not commence and complete the requisite development of the property within the required time limits. In fact, the developments were still outstanding at the time that they sold and transferred the property to the subsequent owners.
- [7] The issue of imposing penalties for owners who had failed to comply with their development obligations was discussed at various AGM's over the period that the Walkers were owners. Decisions were taken at these AGM's regarding the amount and timing of the building penalties. It was on this basis that Cilantro calculated the amount they contended the Walkers owed by way of building penalties. The late payment penalties were also dealt with at AGM's.
- [8] The Walkers disputed their indebtedness as regards the building penalties. They pleaded that these had not been validly imposed in that Cilantro had:
- [8.1] failed to act within its powers as contained in the articles of association;
 - [8.2] failed to register the governance rules and its architectural guidelines;
 - [8.3] failed to ratify any decision in respect of the penalties at its annual general meetings ("AGMs");
 - [8.4] failed to act in accordance with the Walkers' Title Deed;
 - [8.5] imposed penalties in contravention of the objects of a non-profit company;
 - [8.6] failed to show or allege any damages suffered as a result of the Walkers' failure to finalise the construction of their house; and
 - [8.7] failed to follow the procedures as specified in the articles of association, the governance rules and the architectural guidelines.
- [9] The Walkers also disputed their indebtedness as regards the late payment penalties, although they conceded that they had not paid their levy accounts on time.
- [10] Under cross-examination Mr Walker explained the basis for their defences to the claim arising from the penalties. The Walkers' main contention was that for certain periods there were less than five directors appointed to the board of Cilantro. The articles of association required that there be "not less than five" directors. Accordingly, so the argument went, all actions of the board, including its imposition of the penalties against the Walkers, were rendered invalid as a result of this defect.
- [11] The remainder of their defences to the penalties in essence were that:
- [11.1] There was no evidence that any of the decisions taken at the AGM's over the years regarding the imposition of penalties were proposed, seconded and ratified as required in the governance rules.

[11.2] The conditions registered in the Walkers' Title Deed limited Cilantro to one remedy only in the event of breach, viz. the repossession of the property against payment of a pre-determined amount. Cilantro was not entitled to impose penalties if the Walkers did not comply with their obligations.

[11.3] Cilantro could only claim monetary compensation against the Walkers if it was able to prove a claim for damages, which it had not done.

[11.4] Cilantro had failed to register the governance rules, and the architectural guidelines. For this reason it could not rely on them to impose penalties against the Walkers.

[11.5] The imposition of penalties was a profit-making act, and thus was contrary to the objectives of a non-profit enterprise.

[12] As regards the claim based on the levy account, it is common cause that this amount is based on legal costs debited to the Walkers' account arising out of non-payment over a period of time. The Walkers disputed that Cilantro was entitled to debit their levy account with these costs on the basis that: "the account was in dispute and (Cilantro) was only entitled to taxed or agreed costs once a claim has been proven" (emphasis added).

[13] The Walkers also instituted a counterclaim for the following relief:

[13.1] A statement and debatement of account in respect of an amount of R11

259. 56 that the Walkers had paid for purposes of obtaining a clearance certificate when they sold their property. The Walkers claimed that an amount of R5 000 included in the invoice for "unforeseen costs, legal fees etc" was not due.

[13.2] A refund of an amount of R1 500 that the Walkers had paid to Cilantro as a pavement deposit. The Walkers claimed that they were entitled to this refund as they had not caused any damage or otherwise breached their obligations covered by the deposit.

[14] The court a quo heard evidence from two witnesses for Cilantro. The first, Ms Mclean, was the managing agent for Cilantro. She was employed by the board to execute the day-to-day management of the Cilantro estate under direction from the board. Ms Mclean gave evidence on the articles of association, the governing rules, the architectural guidelines, the composition of the board at various times and the decisions taken at the AGM's. Her evidence was supported by a range of documentation, including minutes of the AGM's and of board meetings.

[15] The second witness for Cilantro was Ms Whitlow, who was employed to act as Cilantro's bookkeeper. In her evidence she took the court through the statements of account that had been rendered to the Walkers over the relevant period, and explained how the amounts claimed by Cilantro were calculated.

[16] Mr Walker was the only witness for the defendants. In his evidence he disputed the Walkers' indebtedness for the amounts claimed on the bases set out above.

- [17] The court a quo rejected the Walkers' defences to Cilantro's claim and dismissed the Walkers' counterclaim.
- [18] In the main the Walkers' grounds of appeal mirror the defences raised a quo. Essentially they contend that the court a quo erred in rejecting their defences and their counterclaim for the same reasons advanced by them at the trial. In addition, the Walkers introduce an alternative ground of appeal, viz. that the court a quo erred in: "Not taking cognisance of the Conventional Penalties Act or relevant case law on the issue of building penalties".

CILANTRO'S ARTICLES OF ASSOCIATION

- [19] In order to determine whether the Walkers' appeal has merit, it is necessary to have reference to various provisions in Cilantro's articles of association, and in their title deed. I should add that the court a quo undertook the same exercise in its

judgment.

- [20] Clause D1 of the title deed provides that:

"Every owner of the erf ... shall become ... a member of the Homeowners Association and be subject to its Memorandum and Articles of Association." (emphasis added)

- [21] Clause 7.1 of the articles of association provides that:

"The directors may from time to time impose levies upon the members for the purposes of meeting all the expenses which the Association has incurred, or to which the directors reasonably anticipate the Association will be put, in the attainment of its objects of the pursuit of its business."

- [22] Clause 7.8 provides that:

"Any amount due by a member by way of levy and interest shall be a debt due by him to the Association. ..."

- [23] In terms of clause 8.1:

"Subject to any restriction imposed or direction given at a general meeting of the Association, the directors may from time to time make rules" (emphasis added)

This expressly includes the power to establish architectural guidelines.

- [24] Clause 8.2.3 is of particular significance. It provides that:

"For the enforcement of any of the rules made by the directors in terms hereof and for the payment of any debt due to the Association, the directors may ... impose a system of fines or other penalties. The amounts of such fines shall be reviewed and confirmed at each Annual General Meeting of the Association" (emphasis added)

- [25] Clause 8.3 deals with legal costs. It provides that:

“In the event of the directors instituting any legal proceedings against any member or resident within the association area for the

enforcement of any of the rights of the Association in terms hereof, the Association shall be entitled to recover, on demand, all legal costs so incurred from the member ... calculated as between attorney and client.”

[26] It is not only the directors that have the power to make rules under the articles of association. Clause 8.8 provides that:

“The Association may in general meeting itself make any rules which the directors may make and may in general meeting vary or modify any rules made by it or by the directors from time to time.”

[27] Clause 9.1 provides for the number of directors:

“There shall be a board of directors of the Association which shall consist of not less than 5 (five) and not more than 9 (nine)”

Board members are elected at the AGM each year, in terms of clause 10. In addition, clause 17 provides for the power to co-opt directors.

[28] As far as the procedure for meetings of the AGM is concerned, clause 29 provides for a quorum of 25% of all members eligible to vote. Clause 39 provides that:

“Every resolution and every amended resolution proposed for adoption by a general meeting shall be seconded at the meeting and, if not so seconded, shall be deemed not to have been proposed.”

[29] Clause 41 is important. It provides as follows:

“Unless any member present in person or by proxy at a general meeting shall, before the closure of the meeting, have objected to any declaration made by the chairman of the meeting as to the result of any voting at the meeting, whether by show of hands or otherwise, or to the propriety or validity of the procedure at such meeting, such declaration by the chairman shall be deemed to be a true and correct statement of the voting, and the meeting shall in all respects be deemed to have been properly and validly constituted and conducted. Any entry in the minutes to the effect that any motion has been carried or lost, with or without a record of the number of votes recorded in favour of or against such motion, shall be conclusive evidence of the votes so recorded.”

BACKGROUND TO PENALTY LEVIES

[30] The inaugural governing rules of Cilantro provided that:

“A double levy will be raised, should development of a stand not commence as indicated in the architectural guidelines.”

It is common cause that Mr Walker was a director of Cilantro at this time. He made no objection to the rule regarding building penalties. It should also be recorded that at this time the number of directors was seven, i.e. a number in excess of the minimum required under the articles of association.

[31] Despite the adoption of the building penalty rule, a grace period was extended during which the rule was not applied. The issue of building penalties was dealt with at a number of AGM's subsequently. The minutes reflect the following in this regard:

[31.1] In 2007, it was recorded that:

"Penalty levies will now be implemented on empty stands where construction has not commenced by 1st January 2008. Once construction has commenced the owners will go back to normal levies for a period of nine months. If they have not completed their house in this period they will go back onto penalty levies. The committee will decide when a house is complete."

[31.2] In 2009 it was recorded that:

"The only item received under general was the amendments to the Governance Rules of the Estate. Sam Mclean of Effective Estate Management gave an overview of the changes as per the attached Annexure C. The Amendments were accepted without any objections."

[31.3] Annexure C recorded that:

"Building penalties for vacant stands and for owners who fail to complete dwellings in the specified time period is double levy amount (sic) of whatever the levy is at that point in time."

[31.4] The 2010 minutes record:

"Th(e) point was put forward to the floor to raise the building penalty of vacant and incomplete houses to a penalty of R3 000 a month effective as of 01 March 2011. There were 28 votes in favour of the motion and 1 opposing vote."

[32] As far as the late payment penalty is concerned, the Walkers discovered a document headed "Cilantro Levy Payment Policy". It provided, in relevant part that:

"1. Any stand that has monies owing on the 8th of every month will have their tags de-activated. Re-activation will only occur once the account is up-to-day."

2. Any stand that has any amount in arrears on the 8th of the month will also be billed a late payment penalty as follows:

30 days in arrears R100. 00

60 days in arrears R200. 00

90 days in arrears R300. 00

120+ days in arrears R400.00

3. All Legal fees will be for the offender's account. ... ”

[33] Ms Mclean testified that police was adopted by the directors. This evidence was uncontested.

[34] Mr Walker conceded that the Walkers were in arrears on their monthly levies continuously during the relevant period. The evidence of their payment history indicates that they made levy payments erratically, and not on time. In his evidence, Mr Walker conceded that: “every time the summonses were issued, there were amounts outstanding.” It is also common cause that as a result of him being in arrears, he and Mrs Walker lost their right to access the estate by way of their access tags. This meant that they had to dial themselves into the estate. This resulted in “click-on charges” being added to their levy account.

BACKGROUND TO DIRECTORS

[35] As far as the numbers of directors is concerned, the minutes reflect the following:

[35.1] In 2005, there were seven directors appointed to the board, including Mr Walker.

[35.2] In 2007, there were five directors.

[35.3] In 2009, there were four directors appointed “with no objection raised.”

[35.4] In 2010, there were four directors appointed, with the minutes noting that Ms Louw would be co-opted with effect from the next board meeting as a fifth member.

[36] It is common cause that Mr Walker was a director (either elected or co-opted) for a substantial portion of the time that he was a member of the association. He conceded that he had never raised any objections under clause 41 of the articles of the association at any of the AGM's as regards the process in terms of which resolutions were put forward, voted on and adopted. On his own evidence, he never raised any objection at any relevant time regarding the constitution of the board and the number of directors appointed. Mr Walker's concerns and his contentions regarding the validity of the actions of the board, and of the decisions adopted at the AGM's appear to have only come to the fore after Cilantro instituted legal proceedings against

him and Mrs Walker for recovery of the amounts due to the association.

WERE THE PENALTIES INVALID DUE TO THE NUMBER OF DIRECTORS APPOINTED?

[37] Against this background, can it be said that the court a quo erred in dismissing the Walkers' contention that the imposition by the board of the penalties was invalid in light of the fact that at certain times there were less than the requisite five directors in office? In my view it did not so err.

[38] Much of Mr Walker's evidence and the submissions made on his behalf on this point focused on his reliance on records from CIPRO indicating that fewer directors were registered than reflected in the minutes. However, the minutes of the AGM's and the record of directors

appointed in those minutes stood uncontested at the trial. Furthermore, the undisputed evidence from Ms Mclean, was that the company records at CIPRO did not always accurately reflect the number of directors actually appointed. Ms McClean explained that registration at CIPRO did not always take place timeously as directors delayed in providing their details to the association. Whatever the reasons for the discrepancy may have been, Cilantro established that reliance could not be placed on the CIPRO records tendered as evidence by Mr Walker.

[39] It is also significant that the articles of association do not require registration of the directors with CIPRO to be a pre-condition of membership of the board. While the Companies Act[1] requires companies to keep a register of directors, failure to comply with this requirement renders the company guilty of an offence.

The law does not render the actions of directors who are not timeously entered into the register invalid. Nor does it render

invalid the acts of a board constituted of less than the minimum number required under the articles of association. In this

regard, the court a quo correctly pointed out in its judgment, section 214 of that Act expressly provides that:

“The acts of a director of a company shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.”

[40] In addition, as the court a quo also correctly noted, section 20(1) of the new Companies Act, [2] which is also applicable to certain periods relevant to the claim, provides that:

“If a company’s Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of that company, as contemplated in section 19(1)(b)(ii)-

(a) no action of the company is void by reason only that-

(i) the action was prohibited by that limitation, restriction or qualification ...; and

(b) in any legal proceeding, ...

(ii) no person may rely on such limitation, restriction or qualification to assert that an action contemplated in paragraph (a) is void.”

[41] I am satisfied that on the evidence presented Cilantro established that at all relevant times there were at least four directors appointed at the AGM’s. This was above the statutory minimum of one. It was also above the quorum required for a decision by the board under the articles of association. In fact, it was only for very limited periods that the number of directors was less than five. Cilantro also established that where the number was less than that of the minimum required under the articles, this was accepted and endorsed by the AGM. Ms McClean testified to this in her evidence in chief, and

it was not placed in dispute under cross-examination.

[42] As I have already indicated, Mr Walker never raised any objection to the situation regarding the number of directors at the AGM's. The evidence also established that:

[42.1] He was a member of the board at a time when there were only four directors appointed. He raised no objection to this at that time. Under cross-examination he confirmed that he had not raised with his co-directors what he subsequently raised as a defence to Cilantro's claim, viz. that they could not act lawfully because they were improperly constituted.

[42.2] In fact, he conceded under cross-examination that he had signed the Governance Rules as one of only four directors, thus signaling his approval of the Rules. At this time the Rules included a provision imposing double levies on members who had not commenced development timeously.

[42.3] When questioned about this under cross-examination, Mr Walker replied that: "At that point in time I was not aware that the five (directors) was a criteria."

[42.4] As further illustration of the same point, I refer to the following interchange that took place between counsel for Cilantro and Mr Walker under cross-examination as regards clause 41 of the articles of association:

"(Counsel) -To sum up briefly, any irregularity that there may have been at the meeting, AGM, if there is no objection as per this clause, then whatever is said there is correct. Do you agree with that? – (Mr Walker) – Yes.

"(Counsel)

- *Alright. So if you afterwards come and say no, no, no, but I dispute the constitution of the directors, if it is a standing point on the agenda, if it is not disputed there then whatever the directors did is accepted. Do you agree with that? – (Mr Walker) - That is fine, yes."*

[43] In all of these circumstances, it seems to me that there is no substance in the Walkers' complaint. It was raised ex post facto as a means of attempting to establish some technical, rather than a substantive basis upon which to avoid their obligations to Cilantro. In my view, the court a quo correctly rejected their defence in this regard.

WERE THE PENALTIES INVALID DUE TO PROCEDURAL IRREGULARITIES?

[44] For similar reasons, I am of the view that there is no substance in the Walker's contention that the decisions taken at the AGM's to impose building penalties, and late payment penalties at the rates determined from time to time were invalid for want of compliance with the relevant procedures. It is so that the minutes do not always specifically record who proposed and who seconded the motions leading to the decisions adopted. However, on Mr Walker's own admission, he never raised any objection to the procedure adopted at any of the meetings when decisions about penalties were taken. Furthermore, he conceded in cross-examination that when penalties were discussed at directors' meetings at the times

when he was a director, he did not take issue with his fellow directors on the issue. He testified that his only form of protest was to not pay the penalties.

[45] In these circumstances, clause 41 plainly applies. In the absence of an objection prior to the close of the AGM's, the decisions regarding building penalties and late payment penalties are deemed to have been properly taken by the general meeting. As I have indicated already with reference to the excerpt from the transcript, above, Mr Walker conceded this.

[46] He also conceded that:

[46.1]he paid his levies late, and that late payment of levies was a material issue for Cilantro;

[46.2]the Walkers' property did not comply with the Architectural Guidelines and that they had not finished developing their property at the time that the building penalties applied;

[46.3]they did not comply with their Title Deed condition regarding their obligation to develop their property in the required time period; and

[46.4]this was a material issue for Cilantro.

[47] In an email to the Walkers' attorney sent after summons was issued against them Mr Walker wrote as follows:

"... Our woes stem from a second property that we own in a development called 'Cilantro Residential Estate' in honeydew manor (sic). ...Unfortunately with the happenings of the last 2 and a half years, we have not been able to finish the house and it has not become quite a burden to us. The big problem that we are currently sitting with is the home owners (sic) association are penalising us for not completing the property. In principle I understand the concept of a penalty levy is too (sic) primarily keep land speculators at bay and thus ensure a speedy

completion of the developments within the estate. I have however not been paying this penalty levy for a couple of reasons.

· The most obvious reason is that my current cash flow does not permit me. Due to the current economic crisis some of my contracts have been cut and my income experienced a noticeable dip last year. ..." (emphasis added)

Mr Walker goes on to list a number of other reasons for his non-payment. They include a number of the defences he ultimately raised at the trial.

[48] What this evidence demonstrates is that the Walkers' refusal to pay the penalties was driven by their own personal circumstances and personal objections to being made to pay for their failure to comply with obligations they had undertaken to meet as members of Cilantro. Only after summons was issued did Mr Walker raise the technical objections he relied on later in defending Cilantro's action against him. However, the Walkers were bound by the Rules regardless of whether they held any personal objections to them. They, like everyone else in the estate, were obliged to develop within the stipulated time period, and to pay their levies on time. They knew that, as with any other member, their failure to do so would

attract penalties. Their belated attempt to impugn the penalty rules adopted and applied over the years cannot absolve them of their obligation.

- [49] I find that their contention that the penalties were invalidly imposed for want of proper procedures was correctly dismissed by the court a quo.

WERE THE PENALTIES INVALID DUE TO THEIR RECURRING NATURE?

- [50] In the heads of argument filed on behalf of the Walkers in support of their appeal, and in oral argument before us, counsel for the Walkers sought to raise a new defence in relation to the question of whether Cilantro had validly imposed the penalties. This was not included in the grounds of appeal identified in the notice of appeal. It was not identified as a defence in the Walkers' plea, and it was not specifically traversed in evidence, save for in indirect terms.
- [51] The Walkers submit that they are entitled to raise the argument now as it is based on a legal point. More specifically, they refer to the case of *Kenrock Homeowners Association v Allsop* (unreported decision of the Western Cape High Court, Case No.: A224/2011, 28 March 2012). In that case the court held that in terms of the homeowners association's constitution, it did not have the power to impose a recurring penalty for a breach of a member's obligations (at para 27). The Walkers contend that the same argument applies in the present case and that for this reason we should find that the penalties (which were recurring in nature) were invalidly imposed.
- [52] I will assume, without deciding the issue, that the Walkers are entitled to raise this point at this late stage. In my view, the *Kenrock* case is distinguishable from this case in important respects. In that case the clause in question gave the association the power to impose "a fine". The court expressly noted that it did not give it the power to impose a penalty levy, which implied a recurring penalty. It was on this basis that the court reached the conclusion that it did.
- [53] Cilantro's articles of association are different. They give the directors and/or the association itself at the AGM the power to: "impose a system of fines or other penalties". In my view this is a wider, and more flexible power that applicable in the *Kenrock* case. The evidence in the present case establishes that the penalties in respect of non-development were adopted at the AGM's

over the years. Mr Walker himself signed off on Governance Rules that imposed the penalty. The system that Cilantro

adopted was to link the penalty to the rate of levies payable, and to make it a recurring penalty. Cilantro had the power to choose the system it regarded as most suitable to serve the purpose of putting pressure on non-compliant members to comply with their obligations. The evidence established that non-compliance with the development obligation was an ongoing issue, over an extended period of time. It was of material concern to Cilantro, and hence an issue of concern for the Cilantro community in general. In the circumstances, unlike in the *Kenrock* case, in my

view Cilantro acted within its powers in imposing this system of penalties. For this reason, the defence has no merit.

TITLE DEED DEFENCE

[54] What of the Walkers' defence to the effect that Cilantro had only one remedy under the title deed, viz. to claim re-registration of their property, and that it had no power to impose building penalties for failure to comply? Once again, in my view, there is no merit in this defence. The court a quo correctly found that the title deed creates an entitlement to re-registration and no more. As I recorded earlier, the title deed also bound the Walkers to become members of Cilantro and rendered them subject to Cilantro's articles of association. Mr Walker conceded that he and his wife were bound by them. As indicated above, under these articles the board and directors had the power to impose penalties on members for non-compliance. Plainly, therefore, the title deed did not prohibit Cilantro from adopting measures other than restitution of the property concerned in circumstances where owners, like the Walkers, failed to comply with their development obligations. The court a quo correctly dismissed this defence.

NON-PROFIT DEFENCE

[55] There is no merit in my view in the Walkers' contention that the penalties were contrary to the objects of a non-profit company. The evidence on behalf of Cilantro was that the monies raised from penalties were used to further the objects of the association by paying for facilities and costs not met by ordinary or special levies. The Walkers' complaint that Cilantro failed to put up specific evidence to show direct links between penalty revenues and actual projects that they funded is not persuasive. There is nothing to suggest that Cilantro acted outside of its mandate to act in the general interests of its community of members in the way in which it utilized its finances. Evidence was presented that the financial statements were presented at each AGM and adopted. Against this background, the fact that Cilantro imposed penalties, as it was entitled to, which had the effect of increasing its revenue stream quite plainly does not render it a profit-making enterprise in conflict with its registration status.

CLAIM BASED ON LEGAL COSTS

[56] I now turn to the court a quo's rejection of the Walkers' defences to Cilantro's claim arising from the amounts added to their levies account based on legal costs incurred in Cilantro pursuing its claims against them.

[57] I have recorded the terms of clause 8.3 of the articles of association above. It provides that where Cilantro institutes legal proceedings against a member to enforce its rights, Cilantro is: "entitled to recover, on demand, all legal costs so incurred from the member ..., calculated as between attorney and own client."

- [58] The Walkers contend that this provision must be interpreted to mean that Cilantro is only entitled to payment of taxed legal costs after the litigation is completed, and only in the event that Cilantro is successful in the legal action. On the Walkers' interpretation, all clause 8.3 does is to set the scale of costs the costs to which Cilantro would be entitled under the general principles applicable to costs in legal proceedings.
- [59] However, this is not what the articles of association say. The articles entitle Cilantro to claim payment of legal costs "on demand". This is different to linking the right to claim costs only in the event of the court awarding costs on the conclusion of legal proceedings. By including the phrase "on demand", it was clearly intended that Cilantro could claim legal costs as and when they were incurred. As a non-profit entity financially dependent on levies for its income stream, it would otherwise be difficult for Cilantro to cover the ongoing costs of litigation. In instituting proceedings against a member, Cilantro acts in the interests of the remaining members. In this context, the interpretation of the costs provision in clause 8.3 favoured by Cilantro makes sense.
- [60] There are further considerations that support Cilantro's position. Ms Mclean was referred in her evidence in chief to clause 7.9.1 of the articles of association. It reads as follows:
- [60.1] "In calculating the levy payable by any member, the directors shall as far as reasonably practical:
- 7.9.1 assign those costs arising directly out of the erf itself to the member owning such erf; ... "
- Ms Mclean testified that Cilantro does not budget for legal costs relating to taking action against members. The practice is to include any legal costs incurred in the relevant member's levy account. This is because these costs arise directly out of the erf in question and are thus payable as a levy by the member concerned. She testified that the same practice was adopted with the Walkers, and that the legal costs were charged to their levy account in terms of the articles of association.
- [61] Under cross-examination, Ms Mclean was asked how Cilantro dealt with circumstances where a member objected to legal costs being added to their levy account. She replied that the costs remain on the account, until such time as a court order directs otherwise. If the court makes an order that has the effect of reversing or amending the payment by (or levying of) costs by a member, then Cilantro makes the necessary reversal or adjustment.
- [62] Ms Mclean's evidence in this regard was not placed in dispute. In fact, under cross-examination Mr Walker accepted that the practice was to hand over non-paying members to attorneys. He was asked:
- "So if you do no pay on time then you will incur legal cost (sic) because it will be handed over. You agree with that? (Mr Walker replied) – Yes." (emphasis added)*

- [63] On this evidence it is clear that clauses 7.9.1 and 8.3 of the articles of association have consistently been implemented on the basis that a defaulting member will have the associated legal costs of litigation added to their levy account as they are incurred. Mr Walker himself accepted that this was so.
- [64] As far as the claimed amount itself is concerned, in their heads of argument on appeal the Walkers submit that no evidence was led as to the legal costs incurred. However, Ms Whitlow gave evidence on all the monthly statements rendered to the Walkers. These included the amounts allocated to legal costs. She testified that each of these amounts was based on an invoice received from the attorneys acting on behalf of Cilantro in the litigation against the Walkers. A full reconciliation was annexed to the particulars of claim and Ms Whitlow addressed this in her evidence. Her evidence in this regard and the contents of the statements that included legal costs were not disputed in cross-examination.
- [65] From the evidence it seems to me that Cilantro did nothing untoward in adding the legal costs associated with the litigation against the Walkers onto their levy account. I am satisfied that they were entitled to do so under clause 8.3 of the articles of association. The Walkers' position remains protected in the event that it should subsequently be determined that they are not liable for the legal costs as levied against their account. This is for two reasons:
- [65.1] They remain entitled to have the final bill of costs in the present litigation taxed. On the undisputed evidence of Ms Mclean, it is the practice in such circumstances to adjust or reverse any legal costs that were levied in accordance with the determination on taxation.
- [65.2] In Cilantro's plea to the Walkers' counterclaim, it tenders "any amount that may have been due after applying set-off".
- [66] Thus, the Walkers' submission that Cilantro's interpretation of clause 8.3 is prejudicial to their interests is unfounded. Cilantro's interpretation, together with the practice in terms of which it implements its rights under clause 8.3, do not exclude the Walkers' entitlement to an adjustment of legal costs levied should circumstances require this after the costs have been taxed. However, Cilantro had the right under clause 8.3 to levy costs against the Walkers' account at the time that they were incurred.
- [67] For these reasons, I find that the court a quo did not err in rejecting the Walkers' defence against the claim based on the legal costs levied against their account.
- [68] It follows that none of the main grounds of appeal warrant the setting aside of the decision reached by the court a quo as regards Cilantro's claim.

CONVENTIONAL PENALTIES ACT

- [69] That brings me to the alternative ground of appeal, the alleged failure by the court a quo to have regard to the Conventional Penalties Act 15 of 1962 ("the CPA").

- [70] I have already referred to the fact that the Walkers did not raise this as a defence in their plea. At best, their attorney made the point in her heads of argument and argued the point before the court a quo. The court a quo made no finding in this regard. To the extent that it may be an issue properly before this court (and I will assume, without making a specific finding, that it is), my view is that it has no merit.
- [71] Section 3 of the CPA permits a court hearing a claim involving a penalty to reduce the penalty to a more equitable level if it appears to the court that the penalty claimed “is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated”. In determining the prejudice, the court is required to take into consideration not only the creditor’s proprietary interest, “but every other rightful interest which may be affected by the act or omission in question”. In relation to this latter proviso, it was held in *Murcia Lands CC v Erinvale Country Estate Home Owners Association*[3] it was held that the court was entitled to take into account the prejudice to the homeowners association’s right to enforce the terms of the association for the common good.
- [72] In *Western Bank Ltd v Meyer; De Waal; Swart & Another*,[4] it was held that:
- “ ... a Court will not reduce the penalty unless it is clear or plain to the Court that the penalty is ‘out of proportion to the prejudice suffered’. The words ‘out of proportion’ have also been interpreted. It seems that by the use of these words it was intended that the penalty is markedly, not infinitesimally, beyond the prejudice suffered, and that the excess is such that it would be unfair to the debtor not to reduce the penalty. It is a matter left entirely to the Court which, so it seems to us, should only interfere if, bearing in mind that an object of a penalty clause is to compel the debtor to implement his obligations under the contract by providing harsh consequences should he default, it nevertheless is of the opinion that the penalty is unduly severe to an extent that it offends against one’s sense of justice and equity”.*
- [73] It is common cause that the Walkers’ ongoing delay in developing their property in accordance with their obligation was a cause of concern for Cilantro. It goes without saying that it prejudiced the underlying rights of other owners, represented through Cilantro, to enjoyment of a fully developed estate. The late payment penalties were imposed in lieu of interest that Cilantro was entitled to impose under the articles of association. This was undisputed at the trial. Late payment of levies quite obviously has a detrimental impact on the ability of Cilantro to carry out its obligations to its members.
- [74] Ms Mclean gave evidence on how the building penalty compared with those imposed by other estates in the area. She testified that it fell well below those estates and was fair in comparison. This evidence was not disputed in cross-examination. In addition, the Walkers led no evidence to rebut the evidence for Cilantro in this regard, or to provide any other basis upon which the trial court could competently conclude that the penalties imposed by Cilantro were clearly and plainly out of proportion to the prejudice to Cilantro and the other members it represented. On the test laid down in the *Western Bank* case, above, that threshold was simply not met at trial.

[75] It follows that the alternative ground of appeal falls to be dismissed.

COUNTERCLAIM

[76] The first part of the Walkers' counterclaim is for a statement and debatement of account. It relates to payments made by them to Cilantro in order to obtain a clearance certificate for purposes of transferring the property to the new owners.

[77] Mr Walker explained his counterclaim under cross-examination. From this it is apparent that he took issue with a statement from Cilantro rendered for the purpose of the clearance certificate, which included an amount of R5 000 for "unforeseen costs, fines, legal fees etcetera". Mr Walker did not dispute that this was a "sundries type of provision", but he disputed that he was indebted to pay it. On this basis, he sought a proper statement as regards the clearance amount that was due, and a debatement thereof.

[78] Cilantro pleaded that it had provided a full reconciliation of the Walkers' account to the court, and that the Walkers had been given the opportunity to cross-examine its witnesses as regards the reconciliation. It accordingly disputed that the Walkers were entitled to the relief they sought.

[79] The court a quo found that as regards "the amounts not due to the plaintiff", that were alleged to be repayable to the Walkers, no evidence had been submitted as to these amounts. Further, the court found that it had accepted the amounts claimed by Cilantro.

[80] On appeal the Walkers contend that the court a quo misunderstood the nature of this part of their counterclaim as being a claim for an amount of money, rather than a claim for statement and debatement of account. The reasons for the court a quo's dismissal of this counterclaim are not very clear. The important issue on appeal, however, is whether the counterclaim was correctly dismissed, not whether the reasons for the dismissal were correct.

[81] In a claim for statement and debatement of account a party must establish that there was a failure to render an account (in circumstances where there was an obligation to do so), or a failure to render a complete and proper account.[5] The Walkers did not make it very clear what the basis was for their claim, either in their pleading or in Mr Walker's evidence. However, given that it is undisputed that Cilantro rendered statements of account to the Walkers, including one for the payments disputed under the counterclaim, it would seem to be based on an implied incomplete or improper rendering of an account.

[82] As I have indicated, from Mr Walker's evidence under cross-examination (when Cilantro's counsel was attempting to understand the nature of and basis for the counterclaim) his complaint was directed at the "sundries type provision" included in the account from Cilantro. It is difficult to understand how Cilantro could be expected to render a more detailed account for an amount that is by nature based on generalised costs to Cilantro. A provision of this nature is not unusual in cases where, as here, a party is requested to issue a clearance certificate. This of necessity requires any number of relatively small tasks and

relatively small costs that would be difficult, or not cost effective, to itemise, cost and charge for individually. Thus, a general provision is included in the account for “sundries” of this nature. It seems to me that that there is nothing incomplete or improper in an account item of this nature to warrant an order for a statement and debatement of account.

[83] For these reasons I concluded that the court a quo did not err in dismissing the first of the counterclaims.

[84] As regards the second part of the counterclaim, viz. the claim for a refund of the pavement deposit, the court a quo also acted correctly in dismissing this claim. Clause 49 of the articles of association, and clause 7.2.9 of the Architectural

Guidelines are clear in laying down that the pavement deposit is only refundable once the development is complete. Mr Walker conceded that an owner is entitled to only claim a refund once the building is completed, and Cilantro has determined that no damage has been done warranting a deduction from the deposit. He conceded further that he never completed the development during the time that he was owner. If the new owners completed the development, it stands to reason that the pavement refund is an issue between them (as owners at the time the development is complete) and Cilantro, not between Cilantro and the Walkers.

[85] Thus, the court a quo did not err in dismissing the second counterclaim and the appeal in this regard cannot succeed.

CONCLUSION

[86] There being no merit in any of the grounds of appeal, it falls to be dismissed. The articles of association permit Cilantro to recover costs on an attorney and client scale. An order in these terms must follow.

[87] I make the following order:

The appellant’s appeal is dismissed with costs on an attorney and client scale.

R M KEIGHTLEY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

MALUNGANA AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date Heard:

17 October 2016

Date of Judgment: November 2016

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[1] Act 61 of 1977

[2] Act 71 of 2008

[3] [2004] 4 All SA 656 (C) at [25]

[4] 1973

(4) SA 697 (TPD) at 699G

[5] Doyle v Fleet Motors PE (Pty) Ltd 1971 (3) SA 760 (A); Nusca v Nusca 1995 (4) SA 813 (T)

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