IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case number: 3979/2016

In the matter between:

GOLDEX 16 (PTY) LTD Applicant

and

THE BODY CORPORATE OF WATERFORD
GOLF & RIVER ESTATE SS 139/2006 1st Respondent

MOGWELE TRADING 291 (PTY) LTD t/a
CORAL PROPERTY MANAGEMENT SOLUTIONS 2nd Respondent

HEARD ON: 29 JUNE 2017

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 13 OCTOBER 2017

I INTRODUCTION

[1] The original owner and developer of immovable property situated in the district of Parys, Free State Province on the one hand and the Body Corporate established in respect of the sectional title scheme registered with the Registrar of Deeds on such immovable property and the managing agent of the Body Corporate on the other hand, are at loggerheads. The correct interpretation of certain sections of the Sectional Titles Act, 95 of 1986 ("the Sectional Titles Act") and the Sectional Titles Schemes Management Act, 8 of 2011 ("the Management Act") with specific reference to the obligation of a holder/owner of a Registered Real Right of Extension to pay levies to the Body Corporate *in casu* is paramount to the main dispute. In addition to a statutory obligation to pay levies, the Body Corporate relies on an agreement between it and the developer. Other issues must be resolved as well as will appear soon.

II THE PARTIES

[2] Applicant is Goldex 16 (Pty) Ltd, ("Goldex") a private company with registered address in Johannesburg, it being the original owner of immovable property described as Subdivision 9 (of 4) of the farm Luciana 214, Free State Province, measuring 23, 0869 hectares. It is the developer of the Waterford Sectional Title Scheme ("the Scheme") which Scheme is operated on the aforesaid immovable property and *inter alia* also still the registered owner of a Real Right of Extension in the Scheme in

respect of 18 vacant stands clearly demarcated on the Certificate of Real Right of Extension issued to it. Adv GF Porteous appeared before me on behalf of Goldex, duly instructed by Jordaan and Wolberg Attorneys, c/o Rossouws Attorneys, Bloemfontein.

[3] First respondent is the Body Corporate of Waterford Golf and River Estate ("the Body Corporate"), duly established in terms of s 36(1) of the Sectional Titles Act.

[4] Second respondent is Mogwele Trading 291 (Pty) Ltd, t/a Coral Property Management Solutions ("the Managing Agent").

[5] The Body Corporate and the Managing Agent were represented by Adv P Strathern SC, instructed by Brian Kahn Inc, c/o Claud Reid Inc, Bloemfontein.

III THE RELIEF CLAIMED

[6] I have to adjudicate a main application by Goldex as well as a counter-application by the Body Corporate. In order to put the reader in the picture, I deem it necessary to quote the relief sought fully. It needs to be pointed out that Goldex initially relied on s 37(1)(bA) of the Sectional Titles Act for the declaratory relief sought, but eventually, and after having been alerted thereto by the Body Corporate in its answering affidavit, requested an amendment in order to rely on s 3(1)(d) of the Management Act which Act came into operation on 7 October 2016. There was no

objection to the amendment and all relevant issues have been canvassed fully. The amendment is granted accordingly.

[7] In the amended notice of motion Goldex seeks the following relief:

"1. declaring that no levies or other amounts whatsoever are due and payable by the Applicant to the First Respondent in respect of Real Rights of Extension Nos [the numbers are not repeated] in Waterford Golf and River Estate SS 139/2006 ("the Scheme"), save and except for such amounts as envisaged in section 3(1)(d) of the Sectional Title Schemes Management Act 8 of 2011 ("the STSMA") which the First Respondent has necessarily expended in respect of the actual part or parts of the common property of the Scheme reserved in terms of the abovementioned Real Rights of Extension and which the First Respondent may, from time to time, seek to recover from the Applicant in terms of section 3(1)(d) of the STSMA;

2. ordering and directing the First Respondent to furnish to the Applicant within 10 (ten) days of this order, the following detailed statements;

2.1 in respect of each of Real Right of Extension No's [again not repeated] statements reflecting only such amounts as may be due and payable by the Applicant to the First Respondent by virtue of the provisions of section 3(1)(d) of the STSMA;

2.2 in respect of Real Right of Extension No RR82 in the Scheme, a statement reflecting only such amounts as may be due and payable by the Applicant to the First Respondent by virtue of the provisions of section 3(1)(d) of the STSMA and of section 25(5A)(b) of the Sectional Titles Act 95 of 1986 as amended ("the STA") read with section 37(1)(b) of the STSMA (sic) ;

3. ordering and directing the First Respondent, upon receipt of written request from Knowles Husain Lindsay Inc or such other conveyancers as the Applicant may direct and against payment by the Applicant of the amounts reflected as due in the relevant statement of account furnished in terms of paragraph 1 above, to furnish a certificate as envisaged in section 15B(3)(a)(i)(aa) and/or section 25(4A)(a) of the STA in respect of any such Real Right of Extension certifying that all monies due to the First Respondent by the Applicant have been paid;

4. ordering and directing the First Respondent to furnish, on the last day of the month following the month during which this order is granted and on the last day of every month thereafter, a further detailed statement of account as described in paragraph 1 above, in respect of each Real Right of Extension which remains registered in the name of the Applicant;

5. ordering and directing the First Respondent, upon receipt of written request from Knowles Husain Lindsay Inc or such other conveyancers as the Applicant may direct and against payment by the Applicant of the amounts reflected as due in the most recent statement of account issued in terms of paragraph 1 or 3 above, to furnish a certificate as envisaged in section 15B(3)(a)(i)(aa) and/or section 25(4A)(a) of the STA in respect of any such Real Right of Extension certifying that all monies due to the First Respondent by the Applicant have been paid;

6. ordering, directing and authorising the Sheriff of the above Honourable Court in the event that the First Respondent fails to comply with any of the orders contained in paragraphs 1 to 4 above, and at the request of Knowles Husain Lindsay Inc or such other conveyancers as the Applicant may direct and against payment by the Applicant of the amounts reflected as due in the most recent statement of account issued in terms of paragraphs 1 to 3 above, to furnish on the First Respondent's behalf, a certificate as envisaged in section 15B(3)(a)(i)(aa) and/or section 25(4A)(a) of the STA in respect of any such Real

Right of Extension certifying that all monies due to the First Respondent by the Applicant have been paid;

7. …….

8. ordering and directing such of the Respondents who oppose this application to pay the costs hereof, jointly and severally, the one to pay the other to be absolved."

[8] The following relief is sought by first respondent in the counter-application:

"1. Ordering and directing the applicant within thirty days of the date of granting of an order herein, to sign all necessary documents, make all necessary applications and in general do all things necessary so as to bring about and cause the registration of praedial servitudes in favour of the applicant, over the buildings, and/or services which are situated on adjacent agricultural land which is owned by the applicant and held by it under deed of transport T7589/2004 and which consist of the following:

1.1 The estate manager's house;

1.2 The 'pump house' which houses the water reticulation system which supplies potable water to the scheme and the individual units;

1.3 The water purification plant and water storage tanks;

1.4 The sewerage works of the scheme;

1.5 All other necessary services and accessories which are required for the security and running of the scheme;

1.6 The eighth and ninth 'holes' of the 'Classic Par 3 nine hole Golf Course';

1.7 Paths and means of access to the boathouses.

2. Directing the applicant to transfer to the first respondent, Units 1 and 2 of the scheme known as The Body Corporate of Waterford Golf & River Estate, with scheme registration number SS139/2006, which are presently held and owned by the applicant and which consist of
   2.1 A gate house; and
   2.2 Ablution facilities.

3. Granting judgment against the applicant in favour of the respondent for
   3.1 Payment of the sum of R2 474 652.69;
   3.2 interest thereon at 10.5% *per annum a tempore morae* to date of final payment.

4. Ordering the applicant to pay the first respondent's costs of the counter application on the scale as between attorney and client, including the costs occasion by the employment of senior counsel.

5. Granting the first respondent further and alternative relief."

IV SUMMARY OF THE DISPUTES BETWEEN THE PARTIES

[9] The main issue to be considered is whether Goldex as the owner of a Real Right of Extension in the Scheme is statutory obliged to contribute to the Body Corporate's levy fund in accordance with the provisions of the Sectional Titles Act and the Management Act. In addition, and if it is found that Goldex has no such statutory obligation towards the Body Corporate, the further matter to be considered is whether Goldex is in any event entitled to a declaratory order, or whether it is contractually

bound to settle the levies, special levies and penalties claimed by the Body Corporate.

[10] The other issues, *i.e* the Body Corporate's right to claim transfer of Units 1 and 2 in the Scheme and registration of certain praedial servitudes, as well as its monetary claim in respect of levies allegedly due and payable by Goldex, will also be considered in due course.

[11] The parties have different views on the main issue (as is the case in respect of the others matters). It is for this court to decide in respect of the main issue whether Goldex in its capacity as owner of a registered Real Right of Extension in the Scheme is liable for payment of levies charged by the Body Corporate. Goldex denies liability, save in respect of limited obligations as contained in s 3(1)(d) of the Management Act, whilst the Body Corporate insists that Goldex is statutory liable for levies charged against it as if it was an owner in the Scheme and member of the Body Corporate, alternatively and/or in addition, in that it bound itself contractually to pay levies as if it were the owner of sections in the Scheme and member of the Body Corporate as defined in the two Acts.

[12] Before I proceed to deal with certain principles applicable to sectional title schemes, it is necessary to emphasise that Goldex decided to develop the property in a totally different manner than the accustomed way of developing sectional title schemes, *i.e.* either to develop the scheme as a whole, or in phases. Goldex had in mind to establish a golf and river estate providing for 48

residential units to be built alongside a mashie golf course and with access to the river for boating activities. Initially it merely erected two buildings, to wit a gate house and ablution facilities, being units 1 and 2 on the sectional plan registered in 2006. Thereafter the sectional plan was amended and/or extended insofar as provision was made for the reservation of Goldex as developer's right to extend in terms of s 25 of the Sectional Titles Act. A Certificate of Real Right of Extension in favour of Goldex in respect of 48 separate real rights of extension on separate demarcated areas of the common property was registered. The idea was to sell the various real rights of extension (loosely referred to as vacant stands) set out in its Certificate of Real Right of Extension to individual purchasers who would then for their own account erect houses on the particular demarcated areas. Therefore, instead of Goldex building 48 houses in the Scheme at its costs and then sell and transfer the sections to individual purchasers, it decided to sell "vacant stands" set out in the Certificate of Real Right of Extension in terms of s 25 of the Sectional Title Act to individuals, and by doing so, shifting the financial risk to the purchasers.

[13] The downturn in the local economy following the worldwide financial crisis in 2008 was probably not expected and furthermore, it was probably not anticipated that purchasers of real rights of extension would find it much more difficult to obtain finance than purchasers of completed houses. Consequently, by the time Goldex brought its application, it was still the registered owner of a Real Right of Extension in respect of 18 vacant stands as set out in its Certificate of Real Right of

Extension for which it could not find buyers, although a period of nine years has lapsed since opening of the sectional title register.

[14] The manner in which Goldex decided to develop ensured that it as the owner of the Real Right of Extension, or any of its subsequent purchasers, did not obtain ownership of a portion of the common property in respect of which a Real Right of Extension was reserved. A person/entity only acquires ownership as defined in the relevant two Acts upon the exercise of a Real Right of Extension through the construction of a dwelling on the demarcated area of the common property for which the real right was reserved and the subsequent registration of an amendment of the sectional plan together with the inclusion of the unit in the sectional title register of the Scheme. At this stage the former holder/owner of the Real Right of Extension becomes an owner for purposes of the two Acts insofar as he/she/it acquires an undivided share in the common property in accordance with the participation quota allocated to the newly created section.

V SECTIONAL TITLE OWNERSHIP IN PERSPECTIVE

[15] Sectional title ownership is still relatively new in South Africa. In 1973 new concepts in respect of fragmented ownership of immovable property were introduced in this country when the Sectional Titles Act, 66 of 1971 was put into operation. This Act

was repealed by the present Sectional Titles Act, 95 of 1986, but the conceptual framework for sectional titles was maintained.

[16] According to GJ Pienaar, *Sectional Titles and other fragmented property schemes*, 2010 ed at 58 the conceptual framework for sectional titles includes:

1. the possibility of dividing a building into sections which sections can be the objects of individual ownership (s 2(a) & (b);
2. the creation of the concept “common property”, which common property is being held in undivided bound common ownership shares by all owners of sections (ss 2(a), 2(c) and 16(1));
3. the creation of a new form of immovable property, a sectional title unit, comprising a section of the building and an undivided share in the common property (s 1 - “unit”) and s 3(4);
4. the creation of a new form of ownership, namely individual ownership of a section combined with the undivided bound common ownership share in the common property (s 2(b) and (c);
5. the participation quota of each sectional owner, which determines *inter alia* the extent of the undivided share of such owner in the common property (s 1- “participation quota”);
6. the body corporate of the sectional title scheme of which all the sectional title owners are members (s 36(1)).

[17] A sectional title unit is regarded as immovable property, it being defined as a section together with its undivided share in common property apportioned to that section in accordance with the quota of the section. The unit is a composite immovable thing and an independent legal object. See *inter alia* s 3(4) of the Sectional Titles Act. A unit has two components, namely a section of the building(s) – *e.g* a flat or office in a building or a loose-standing building forming part of the sectional title scheme - and an undivided share in the common property in accordance with the participation quota.

[18] It is possible to develop a sectional title scheme in phases by extension of the scheme which may be exercised by the developer (or its successor in title) or by the body corporate. Extension of the section title scheme is provided for in s 25 of the Sectional Titles Act. There is good reason to allow for extensions of a sectional title scheme in that the initial capital outlay of the developer can be kept at an affordable level. In doing so, cash flow problems can be minimized by using the profit of the initial phase to develop further phases. A developer and owner of land may for example decide to initially build only ten town houses as part of the initial phase or phase 1, although the land provides for sufficient space to build another ten town houses. Instead of the developer being forced to build twenty town houses simultaneously at huge capital expense, it could develop phase 1 first, sell the ten town houses and use the profit to continue with construction of the next ten town houses in the second phase. The Sectional Titles Act provides for sufficient safeguards to protect the rights of the owners of sections in

phase 1, but it is not required to deal with these aspects further for purposes of this judgment.

VI AUTHORITIES REGARDING INTERPRETATION OF LEGISLATION AND OTHER DOCUMENTS

[19] In an oft-quoted judgment Wallis JA summarised the current state of our law regarding the interpretation of documents, including contracts, as follows in *Natal Joint Municipal and Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

Thus, the matter must be approached holistically and context and language must be considered together with neither predominating over the other. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at paras [10]-[12].

[20] In *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA) Lewis JA stated the following in a unanimous judgment at para [11]:

> "It is settled law that the contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract …. It is also clear that the position must be given a commercially sensible meaning …"

In *Novartis v Maphil* [2015] ZASCA 111, 3 September 2015, the same learned judge of appeal stated the following at para [28]:

> "[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paras 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing." (emphasis added)

VII GOLDEX' STATUTORY OBLIGATION TO PAY LEVIES

[21] Bearing in mind the authorities in respect of the interpretation of statutes, I shall now consider the relevant provisions of the two Acts and the arguments of counsel in order to arrive at my conclusion in respect of this aspect of the case. Counsel could not refer me to any authorities directly in point and I was also unsuccessful in this regard. I remind the reader that I have already referred to some aspects of sectional title ownership *supra* and shall not necessarily repeat any thereof. It should also be mentioned that I do not intend to refer to s 37 of the Sectional Titles Act which was initially amended and thereafter repealed on 7 October 2016. My focus will be (as was the case with counsel) on the new Act, the Management Act and in particular s 3 thereof, read with other provisions in both Acts.

[22] Section 2(1) of the Management Act stipulates that bodies corporate are created as follows:

> "(1) With effect from the date on which any person other than the developer becomes the owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such other person are members, and any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate." (emphasis added)

[23] Any doubt about the status of a developer has been put to bed by s 2(2) of the Management Act which reads as follows:

> "(2) The developer ceases to be a member of the body corporate when he or she ceases to have a share in the common property as contemplated in s 34(2) of the Sectional Titles Act." (emphasis added)

[24] Section 34(2) of the Sectional Titles Act reads as follows:

> "(2) When the ownership in every section is held by any person or persons other than the developer, the developer shall, subject to the provisions of section 25(1) cease to have a share or interest in the common property." (emphasis added)

The language that the legislature adopted is clear and unequivocal: a developer ceases to be a member of the body corporate when it ceases to own any section in the scheme and any share in the common property. This occurs when it has transferred all the units in the scheme. As mentioned *supra*, a unit comprises a section together with its undivided share in the common property apportioned to that section in accordance with the participation quota of the section.

[25] It is necessary to understand the concept of "participation quota" and for that reason I quote from s 32(1) of the Sectional Titles Act:

> "Subject to the provisions of section 48, in the case of a scheme for residential purposes only as defined in any applicable operative town planning scheme, statutory plan or conditions subject to which a

development was approved in terms of any law the participation quota of a section shall be a percentage expressed to four decimal places, and arrived at by dividing the floor area, correct to the nearest square metre, of the section by the floor area, correct to the nearest square metre, of all the sections in the building/buildings comprised in this scheme." (emphasis added)

[26] Section 11(1) of the Management Act reads as follows:

> "(1) Subject to subsection (2) the quota of a section must determine -
>
> **a.** the value of the vote of the **owner** of the section in any case where the vote is to be reckoned in value;
>
> **b.** the undivided share in the common property of the **owner** of the section;
>
> **c.** subject to section 3(1)(b), the proportion in which the **owner** of the section must make contributions for the purpose of section 3(1)(a) or may in terms of section 14(1) be held liable for the payment of a judgment debt of the body corporate of which he or she is a member." (emphasis added)

It is important to acknowledge that membership in a body corporate provides members with rights: to vote; but also obligations: to pay levies. The participation quota plays a role in each case. A simple example may enlighten the reader. If a sectional title scheme consists of ten sections which are exactly the same size – 100 square metres – the participation quota percentage of each section is 10.0000 and the aggregate of all quotas is 100.0000. Refer also to annexure FA2 for the calculations in respect of units 1 and 2 *in casu.* In my example the owner of each section will have equal voting power and each

will have to contribute equally to the levy fund of their body corporate. There is no room to claim anything else from a person who does not own a section, save for the provision in s 3(1)(d) of the Management Act. Also, a non-owner does not have any voting rights.

[27] Section 3(1)(a) - (f) of the Management Act reads as follows, paraphrased to some extent:

"3 Functions of bodies corporate

(1) A body corporate must perform the functions entrusted to it by or under this Act or the rules, and such functions include –

(a) to establish and maintain an administrative fund which is reasonably sufficient to cover the estimated annual operating costs –

(i)……

(ii)……

(iii)…..

(iv)…….

(b) To establish and maintain a reserve fund in such amounts as are reasonably sufficient to cover the cost of future maintenance and repair of common property……

(c) To require the **owners**, whenever necessary, to make contributions to such funds: Provided that the body corporate must require the **owners of sections** entitled to the right to the exclusive use of a part or parts of the common property, …., to make such additional contribution to the funds as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts, including the provision of electricity and water, unless in terms of the rules the **owners concerned** are responsible for such costs,;

> **(d)** To require from a **developer** who is **entitled to extend the scheme** in terms of a right reserved in section 25(1) of the Sectional Titles Act, to make such reasonable additional contribution to the funds as may be necessary to defray the cost of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution of electricity and water and other expenses and costs in respect of and attributable to the relevant part or parts;
>
> **(e)** To determine the amounts to be raised for the purposes of paragraphs (a), (b) and (c);
>
> **(f)** To raise the amounts so determined by levying contributions on the **owners** in proportion to the quotas of their respective sections;" (emphasis added)

[28] Mr Strathern submitted that the word "additional" indicates that the contribution contemplated in s 3(1)(d) of the Management Act is in addition to or supplementary to an already existing contribution payable by Goldex *in casu*, or for the argument, any other developer in similar circumstances. So interpreted, a sensible grammatical interpretation will be achieved. I do not agree. In my view the contribution to be made by the owner of a Real Right of Extension to the levy fund is merely in addition to the contributions to be made by the owners of sections. As stated *supra,* the owner of a Real Right of Extension is not the owner of a section in the sectional titles scheme and the full amounts envisaged in s 3(1)(a) and (b) are to be covered by the owners of sections in accordance with the participation quotas of the respective sections.

[29] Mr Strathern also submitted that Goldex' argument that it is liable only for the actual costs related to the undeveloped stands is irrational and incapable of reconciliation with the way in which schemes and developments come into being and in which subsequent purchasers of Real Rights of Extension become owners or subsequent developers. As mentioned above, the *modus operandi* adopted by Goldex in respect of this Scheme is the exception rather than the rule. Instead of what developers normally do, Goldex chose not to prepare a sectional plan for 48 sections, to construct 48 houses and thereafter sell the sections to individual purchasers. In the strange scenario in casu, each purchaser of a Real Right of Extension becomes a developer in the sense that he/she/it is expected to construct his/her/its own house on the demarcated area of the common property, whereafter amendments to the sectional plan are endorsed providing for the new sections. This is apparent from the sectional plan, Annexure FA3 to the founding affidavit, and the various endorsements thereto. Only sections 1 and 2 (the gate house and ablution facilities) appear on the original sectional plan, but the plan has been amended over time to include several other sections. I accept that the sectional title register was also extended to include the further sections and exclusive use areas set out in the endorsements referred to and that the relevant Certificates of Registered Sectional Title have been issued in order to comply with s 25(11) and (12) of the Sectional Titles Act.

[30] I am in agreement with Mr Porteous' able argument. Clearly the development *in casu* is an exception and not the norm and something the legislature never considered when the Acts were drafted. If s 34 of the Sectional Titles Act is read with s 25 of that Act and s 3(1) of the Management Act, and bearing in mind the context within which the Acts were promulgated and the purpose of the legislation, I am satisfied that the legislature did not foresee or cater for the exception with which we are confronted *in casu.* The owner of a Real Right of Extension in terms of s 25 or its successor in title can never be regarded as an owner of a section. Therefore the full amount required for the funds established in terms of s 3(1)(a) and (b) of the Management Act needs to be contributed by the owners of sections and no one else. I also agree with Mr Porteous that in terms of s 3(1)(d) the Body Corporate is only entitled to recover from Goldex actual amounts expended on the actual part of the common property reserved in terms of the Real Right of Extension. If the legislature intended anyone other than the owners of sections to contribute to the funds established in terms of s 3(1)(a) and (b), it would have stated so in clear and unequivocal terms. On a plain reading of s 3(1), in the context of s 32(1) of the Sectional Title Act which I quoted *supra* as well as other provisions, the owners of sections are liable for the costs contemplated in s 3(1)(a) and (b) and the developer (and owner of a Real Right of Extension in terms of s 25) and its successors in title, are liable "to make such reasonable additional contribution to the funds as may be necessary to defray the cost of rates and taxes, insurance and maintenance of the part or parts of the common property affected by the reservation, including a contribution to the provision of electricity and water and other expenses and costs in respect of

and attributable to the relevant part or parts." (s 3(1)(d) - emphasis added)

[31] It is important to consider the use of the words "owners" in s 3(1)(c) and s 3(1)(f) on the one hand and "developer who is entitled to extend the scheme" in s 3(1)(d) on the other hand. The distinction makes it abundantly clear that Goldex' situation as developer entitled to extend the scheme cannot be equated to that of owners of sections. The clear and unambiguous language of the legislature suggests that the developer cannot be held responsible for levies payable as provided for in s 3(1)(a) and (b), but only for such reasonable additional contributions mentioned in s 3(1)(d).

[32] I agree with Mr Porteous that a Real Right of Extension is a *sui generis* limited statutory right. It is deemed to be a right to immovable property which may be mortgaged and transferred by registration of a notarial deed of cession in respect of the whole, a portion or a share in such right. In the case of cession of a portion, the portion must be identified to the satisfaction of the Surveyor General. Refer to s 25(4) of the Sectional Titles Act. There can be no doubt that this is what occurred *in casu*. I refer to annexure FA5 of the founding affidavit. Neither Goldex as owner of the Real Right of Extension, nor any subsequent purchaser of a portion of such right becomes owner of the portion of the common property in respect of which such right was reserved and ownership of a section will only be obtained upon completion of the dwelling to be constructed. Only hereafter will levies become payable to the Body Corporate as provided for in s 25(5A)(a) and (b) of the Sectional Titles Act which I quote:

"(5A) (a) If the right reserved in terms of subsection (1) is exercised, the developer or his or her successor in title shall immediately after completion of the relevant unit apply for the registration of the relevant plan of extension and the inclusion of such unit in the relevant sectional title register;

(b) If the developer or his or her successor in title fails to take such steps and fails to register the relevant plan of extension within 90 days of completion for occupation of the unit, the developer or his or her successor in title shall be liable to the body corporate for the amounts payable in terms of section 3(1)(b) of the Sectional Titles Schemes Management Act as if the unit has been included in the relevant sectional title register on the date of completion. (emphasis added)

This may strengthen the argument that no levies are payable by Goldex as the developer until such time as dwellings have been constructed in the exercise of the Real Right of Extension. I must note that the reference in s 25(5A)(b) is to s 3(1)(b) (the reserve fund) only and not to s 3(1)(a) (the administrative fund which is the general fund utilised by bodies corporate to pay running expenses.) Whether this is an oversight or not, is not clear. In my view the subsection as it presently reads cannot be used to support the Body Corporate's submissions in the light of all other aspects raised herein. Mr Strathern's argument contained in paragraph 29.1 of his heads of argument (which he amended during oral argument) that both the Sectional Titles Act and the Management Act "recognise that a developer is the owner of a section shown on a Sectional Title Scheme diagram until sold" is rejected. He could not refer me to any particular section(s) in either Act in support of this submission.

[33] It is necessary to consider the following further issues as well, bearing in mind the authorities referred to. The Body Corporate was established when the Judin Children's Trust became the registered owner of a unit. I refer to s 36(1) of the Sectional Titles Act. This could only occur after exercising its Real Right of Extension and the construction of a dwelling on the appropriate demarcated area, whereafter the sectional plan was duly amended and the sectional title register amended to include the particular unit. Refer to s 25(5A)(a) of the Sectional Titles Act. From then on the Judin Children's Trust became liable for the payment of levies in terms of s 3(1)(a) and (b) of the Management Act.

[34] Goldex knew that the Scheme would collapse if it did not pay any levies or if no provision was made for the purchasers of Real Rights of Extension to pay levies. In fact, nobody would be interested in becoming involved in the Scheme. Therefore and insofar as Goldex had a significant interest in the success of the Scheme, it provided in its deeds of sale with purchasers of Real Rights of Extension that they shall pay levies as if they were the owners of sections.

[35] Goldex' deponent, Mr Hulme stated that it made *ex gratia* payments to the Body Corporate to ensure that it operated successfully. No doubt, Goldex was fully aware of the fact that it could not be expected of the Judin Children's Trust to settle the huge monthly bill of a high maintenance development such as the

Waterford Scheme, consisting of a mashie golf course, river frontage lawns and jetties to name a few facilities, although it is precisely Goldex' argument that the Judin Children's Trust became legally responsible for virtually all the expenses. Obviously this liability decreased as new owners came on the scene. It is apparent from the first budget prepared on behalf of the Body Corporate (when the Judin Children's Trust was the only owner) that it budgeted for annual expenses of R1 698 800.00. Goldex' argument that it made *ex gratia* payments to ensure the smooth running of the Scheme and that it never contracted to pay levies to the Body Corporate will be considered *infra*, bearing in mind all relevant facts, including the minutes of the various meetings placed before the court.

[36] Mr Strathern submitted that a further unjust consequence is the fact that Goldex as developer can, on its version, enjoy all the benefits of the Scheme at no or limited costs whilst being subsidised by the owners and members of the Body Corporate. This, he submitted, the legislature could never have intended. He relied upon the following judgments, to wit *Heritage Hill Home Owners' Association v Heritage Hill Devco* (Pty) Ltd 2013 (3) SA 447 (GNP), (*"Heritage"*) a judgment by Kollapen J, and Heritage Hill Devco (Pty) Ltd v *Heritage Hill Home Owners' Association* 2016 (2) SA 387 (GP), a judgment by the full bench on appeal from the judgment of Kollapen J, as well as *Body Corporate of Fish Eagle v Group Twelve Investments (Pty) Ltd* 2003 (5) SA 414 (W) (*"Fish Eagle"*).

[37] I am of the view that the decisions are clearly distinguishable. *Heritage Hill* had to do with a developer of a township who refused to pay levies to the homeowners' association on the ground that it was not the owner of any individual erven within the township, but only of an undivided remainder. The Deeds Registries Act, 47 of 1937 applied, defining an "erf" as "every piece of land registered as an erf … and includes any defined portion, not intended to be a public place, of a piece of land laid out as a township." In *Heritage* the farmland was converted into a township and all erven were depicted on a general plan in order for the township to be proclaimed. The individual unsold erven belonging to the developer had an identity similar and comparable to erven already sold and transferred. The homeowners' association was formed to create a structure for the benefit of all owners of land in the township, all of whom automatically became members of the association on account of their ownership. The articles of association specified that levies were payable by property owners and not only homeowners. All members could participate in decision-making processes. The developer was clearly the registered owner of the unsold erven within the context of the particular articles of association. As indicated, Goldex is not an owner of any sections in the Scheme, bearing in mind *inter alia* the provisions of s 34(2) of the Sectional Titles Act.

[38] *Fish Eagle* is equally distinguishable. The court found that no member of a body corporate is entitled to dispute liability for the payment of levies on the ground that he/she thinks the levies to

be excessive. I have shown that Goldex is not a member of the Body Corporate.

[39] In conclusion, in respect of this part of the enquiry, I find that Goldex in its capacity as the owner of a Real Right of Extension in the Scheme is not an owner for purposes of the Sectional Titles Act and the Management Act and therefore not statutory liable for payment of levies as claimed by the Body Corporate. The only possible liability would be for such contributions specifically stipulated in s 3(1)(d), but that is not what the Body Corporate claims from Goldex. However, this conclusion does not mean that Goldex is entitled to the relief claimed. I considered whether it would be possible to take into consideration equity and fairness in interpreting the sections of the two Acts in order to prevent inequitable and unfair consequences. I am reminded by the *dictum* of Wallis JA in *Endumeni at paragraph [26]:* *"An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration."*

I cannot see how I could possibly read into any sections of the two Acts words and/or excise words from sections in order to reconcile the legislation with the approach of the Body Corporate. It is the legislature's task to draft legislation.

[40] The next issue to consider is Goldex' possible liability based on contract: its contractual undertakings to pay levies to the Body Corporate in respect of all so-called vacant stands, the particular areas of the common property earmarked for development. I

refer to annexure FA5 of the founding affidavit, to wit the amendment of the sectional plan to provide for real rights of extension.

VIII THE BODY CORPORATE'S RELIANCE ON A CONTRACTUAL UNDERTAKING TO PAY LEVIES

[41] The main application by Goldex, being the applicant seeking a declaratory order and thus final relief, must be adjudicated on the basis of the principles set out in *Plascon-Evans Paints.* The Body Corporate denies that Goldex made *ex gratia* payments towards the fund established by the Body Corporate for the running of the Scheme or that some payments were made under protest as alleged. An order can only be granted on the second leg of the enquiry into the main application if the facts stated by the Body Corporate together with the admitted facts in Goldex' affidavits justify such order. Obviously, if no real, genuine and *bona fide* dispute has been raised, or if the Body Corporate's allegations or denials are far-fetched or untenable, the court may be justified in rejecting them if it is otherwise satisfied with the inherent credibility of Goldex' version.

[42] The Body Corporate is of the view that Goldex is contractually bound to pay levies in respect of the vacant stands mentioned in its Certificate of Real Rights of Extension of which it is still the holder on the basis as if it was the owner of sections in terms of

the Sectional Titles Act. Goldex, on the other hand, is of the view that no levies or other amounts are due and payable to the Body Corporate in respect of its Real Right of Extension with specific reference to 19 demarcated and numbered areas on the common property.

[43] On Mr Hulme of Goldex' version it has paid an aggregate amount in excess of R4.4m to the Body Corporate between 14 June 2007 and February 2016, which contributions the Body Corporate submits was for nothing else than levies raised and which Goldex contractually agreed to pay. Goldex now claims that many payments were made *ex gratia* and in some instances payments were made under protest. I could not find any indication prior to the filing of the founding application that payments were made *ex gratia.* This was raised for the first time in the founding affidavit.

[44] The Body Corporate attached numerous minutes and deeds of sale to the answering affidavit. It is not my intention to discuss and/or refer to each of these documents. However, I shall mention some and quote from them when I believe it is necessary to do so. Goldex entered into at least three deeds of sale with different purchasers for the cession of Real Rights of Extension prior to the registration of the Scheme on 29 June 2006 in terms of s 11 of the Sectional Titles Act.

[45] On 14 June 2007 the Body Corporate was established in that the Judin Children's Trust, the first purchaser of a Real Right of

Extension, had its dwelling registered as a section – section 3 – in the Scheme.

[46] On 23 August 2007 the Body Corporate held its first special general meeting. Messrs Hulme and Sneech represented Goldex at the meeting. It was agreed in paragraph 12.2 of the minutes that as from 16 June 2007 the Body Corporate would be responsible for maintenance and equipment. I quote the following *verbatim* from paragraph 13.3:

> "It was agreed that levies will commence at R2000 per month until 31 December 2007 then will be increased to R2500 per month until the next AGM which should be in August 2008. Payment of the base levies will be monthly in advance by debit or stop order to alleviate body corporate cashflow collection problems. Interest on outstanding levies will be levied at prime plus 2 percentage points. The developer will pay his share of the levies in respect of actual costs incurred of the unsold 48 stands prorata."

The copy of the minutes presented to the court has not been signed by the trustees. However Goldex's Mr Hulme at no stage objected to copies being placed before me and also did not deny the correctness of these minutes or any of the other placed before the court. The 2007/2008 budget accompanied the notice of the meeting. Levy income, excluding special levies was budgeted to be R1 959 600 (the total income to be R2 318 100) and the expenses were budgeted to be R1 698 800.

[47] In the light of the budget which was duly approved, the Judin Children's Trust would become liable for levies of about R2m for

the year, if Goldex' viewpoint is accepted and also bearing in mind the legislation considered *supra.* I accept that it was ever intended that levies would be payable in respect of units 1 and 2. Clearly, Messrs Hulme and Sneech on behalf of the developer, Goldex, did not believe that it could be expected of the first sectional title owner to pay all expenses of the Body Corporate. It is therefore no surprise that Goldex agreed to pay pro rata in respect of all of the unsold 48 stands. The use of the term "pro rata" can mean nothing else than that Goldex accepted an obligation in respect of each vacant unsold stand measured against the entire costs of the Scheme. The agreed levy is directly in line and reconcilable with the amounts payable by Goldex' purchasers, in particular Mr Cowley referred to in the next paragraph. It is highly probable that the proposed levy of R2 000 per month, to be increased during the 2007/2008 financial year to R2 500, was arrived at by dividing the total expenses by 48, and consequently, it is accepted that it was agreed that a levy was to be paid in respect of each vacant stand or section.

[48] In the deeds of sale entered into between Goldex and various purchasers, provision was made for payment of levies. It escapes any logic that Goldex would be insisting on such payments to be made to the Body Corporate if it had no statutory or contractual obligation towards the Body Corporate. The deed of sale with Mr GA Cowley, which was concluded on 2 February 2005 and long before the opening of the sectional title register, provides as follows and I quote from paragraph 7.1.1:

> "the purchaser shall be obliged to make payment of the levies attributable to the real right of extension…..The share of expenses to be levied against the purchaser in terms hereof shall be equal to that levied against the owners or purchasers of all the other proposed portions of the real right of extension…. It is anticipated that the proposed levy will be between R2500 – R3000 per month including maintenance and building insurance."

[49] Even if Goldex was not statutory obliged to pay levies, nothing prevented it to agree to the payment of levies and also contracting with its purchasers to ensure that they pay levies. The Scheme's very existence was in danger if nobody was prepared to accept liability. Obviously, the entity that would have suffered the most if the Scheme failed was Goldex. It must have spent a small fortune to develop the Scheme. I reiterate that Goldex must have known that the Scheme would collapse unless it provided financial assistance in the form of levies to ensure that the Body Corporate's books balance.

[50] At a meeting of trustees held on 9 December 2010 attended by Messrs Hulme and Sneech on behalf of Goldex it was recorded that Goldex was in arrears. If read in context, it could only mean that its levies were in arrears.

[51] On 5 October 2012, nearly two years later, Mr Hulme on behalf of Goldex for the first time queried the correct calculation of levies, although Goldex acknowledged its obligation to pay levies. Mr Hulme stated during the meeting that "he was not happy with what he

had to pay over the past five years." However Goldex accepted that levies be increased from R2500 to R3200 for vacant stands and from R2 500 to R3600 for completed units.

[52] At the AGM of 24 March 2015 it was agreed by majority vote that Goldex would be charged 50% of the agreed levy on all Goldex and owner vacant stands. This agreement followed upon a memorandum circulated by Mr Hulme to owners earlier. Goldex did not object *ex facie* the minutes of this meeting to the above or the further agreement to charge Goldex with 50% of the special levy to be raised, *i.e.* R6 800 per vacant stand.

[53] I am satisfied that the golden thread that emerges from the minutes of meetings is that Goldex agreed to pay levies on the same basis as other subsequent owners/developers of vacant stands over which they held Real Rights of Extension.

IX THE BODY CORPORATE'S ENTITLEMENT TO THE REGISTRATION OF SERVITUDES AND TRANSFERS OF UNITS 1 & 2 IN THE SCHEME

[54] It is Goldex' case that the counter-application is a clear attempt to obfuscate the determination of its application and that it was in any event entirely unnecessary. I do not agree with this submission, particularly with reference to the registration of servitudes and transfer of units 1 and 2. There is no reason why

this should not have been done some time ago and I am of the view that Goldex has been dragging its feet all along. Although there was no demand in this regard earlier, Goldex knew what its obligations towards the Body Corporate and its members were and still are. I accept Mr Porteous' submission that there is no controversy about the registration of servitudes and transfers and that it is apparent from the correspondence between the attorneys that processes have been embarked upon to see to this. Fact of the matter is that counsel has no authority to oversee the processes.

[55] Notwithstanding my observations in the previous paragraph, it must be recorded that the Body Corporate failed to serve the counter-application on the Registrar of Deeds as is required by s 97(1) of the Deeds Registries Act, 47 of 1937. It might be possible to grant an order for transfer of units 1 and 2 without any complications, although Goldex indicated that it might rather opt for cancellation of registration of the units in its name, instead of transferring same to the Body Corporate. The issue has not been canvassed fully and I do not have the advantage of a report by the Registrar of Deeds. However, I am satisfied that it can do no harm to order Goldex to transfer the units to the Body Corporate. It has no objection thereto in principle. The *causa* of the transfer and whether or not consideration is required have not been recorded. I shall leave that to the parties and trust that they will find common ground.

[56] There are more serious aspects that must be considered in order to decide whether relief should be granted pertaining to the

registration of servitudes. This was never considered by any of the parties or counsel during their argument. No doubt, the deeds of sale presented to the court all reflect an undertaking by Goldex to register reciprocal praedial servitudes over the land on which the Scheme is operated as well as Goldex' adjacent land. Although it is clear that praedial servitudes are to be registered, much will have to be negotiated in order to obtain sufficient clarity regarding the terms of the servitudes. I do not intend to elaborate further, but mention just one aspect: the parties must obviously agree about the precise area to be provided for the two holes (holes eight and nine) of the golf course. The holes have been laid out, but I do not know where the borders of the servitude should be and if this was ever agreed upon. The matter is none the less important and I trust that the parties can come to an agreement in respect of the terms of the servitudes. I am not in a position to direct Goldex, with the dearth of information available, to "cause the registration of praedial servitudes in favour of applicant (sic), over the buildings, and/or services which are situated on adjacent agricultural land" as prayed for in the counter-application. I would have expected the Body Corporate to present me with draft notarial deeds of servitude, for these to be referred to the Registrar of Deeds for a report and an opportunity being given to Goldex to consider the drafts. This did not happen. The notice of motion is too vague to issue a meaningful order. In my view a proper case has not been made out for such relief.

X THE BODY CORPORATE'S CLAIM FOR THE PAYMENT OF LEVIES

[57] There is doubt about the correctness of the *quantum* of the Body Corporate's claim. I do not accept Mr Porteous' submission that the claim is illiquid as it is not capable of easy proof. Items might have been claimed that the Body Corporate is not entitled to, but that does not mean, in principle, that levies due and payable cannot be ascertained with relative ease. I have been told during argument that supporting documents consist of about 1 800 pages, but even so, the statements forming part of the record appear to be clear and concise.

[58] Mr Strathern, whilst appreciating some difficulty faced by the Body Corporate to prove the claim, suggested that this aspect be referred to trial, that the counter-application shall stand as a simple summons and that further filing of pleadings be allowed to take place in terms of the uniform Rules of Court. Contrary thereto, Mr Porteous submitted that the whole counter-claim shall be dismissed with costs.

[59] I believe that, instead of dismissing the counter-claim *in toto* as required by Goldex, the matter should be referred to trial. In doing so, the interests of justice will be served better. The parties need to get clarity as soon as possible. The Body Corporate is not claiming anything for itself, but actually for and on behalf of its

members. The Scheme finds it difficult to survive and suffers from financial constraints. An appropriate order will be made.

XI CONCLUSION

[60] Applicant is not entitled to a declaratory order as sought. Although it is not liable as owner of a Real Right of Extension reserved in terms of s 25(1) of the Sectional Titles Act for the payment to the first respondent of any amounts other than those recoverable in terms of s 3(1)(d) of the Management Act, it has bound itself contractually to settle levies charged from time to time by the Body Corporate in respect of all vacant premises, *i.e.* the areas of the common property demarcated for future construction of houses, such levies to be calculated and payable on a pro rata basis with owners of other sections.

[61] Prayer 1 of the counter-claim pertaining to the registration of servitudes cannot succeed, although I am of the view that prayer 2 – the transfer of units 1 and 2 - may be granted. The monetary claim – prayer 3 – shall be referred for trial.

[62] Mr Strathern sought costs on an attorney and client scale. Most of the time was spent during argument to show that Goldex was statutory liable for payment of the levies claimed. I found in favour of Goldex in this regard. Although I am satisfied that Goldex contractually bound itself to settle the levies charged by

the Body Corporate, I am not prepared to find that the application was brought on unreasonable grounds and/or that any other reason exists as to why a punitive costs order should be made. The voluminous answering affidavit with annexures consists of nearly 450 pages, far in excess of fifty percent of the whole application. In the process the Body Corporate unnecessary attached several deeds of sale and minutes, whilst it could have made use of extracts from these documents.

[63] The costs of the counter-application shall be reserved for adjudication at the hearing. The Body Corporate obtained limited success so far and if the attorneys were willing to communicate with each other in more meaningful terms, it might not have been necessary to apply for an order to transfer the two units. Goldex never denied liability to transfer the units to the Body Corporate.

XII ORDERS

[64] The following orders are made:

1. The main application of applicant (Goldex) is dismissed with costs.
2. Prayer 1 of the counter-claim is dismissed.
3. Applicant is directed to forthwith transfer to the first respondent (the Body Corporate of Waterford Golf and River Estate) units 1 and 2, consisting of the gate house and ablution facilities

respectively, in the Waterford Golf and River Estate, Scheme registration number SS139/2006.

4. First respondent's monetary claim against applicant is referred to trial, the counter-application to stand as simple summons and further pleadings to be exchanged in terms of the Uniform Rules of Court.

5. The costs of the counter-claim are reserved for adjudication at the trial.

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JP DAFFUE, J

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