

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

Case number: 9387/2022

In the matter between:

**CHAPMAN'S BAY ESTATE HOMEOWNERS'
ASSOCIATION**

Applicant

and

**WILLEM ADRIAAN LÖTTER
COMMUNITY SCHEMES OMBUD SERVICE
MNINAWA BANGILIZWE**

First respondent
Second respondent
Third respondent

JUDGMENT DELIVERED ON 24 FEBRUARY 2023

VAN ZYL AJ:

Introduction

1. Khalil Gibran was of the view that "*between what is said and not meant, and what is meant and not said, most of love is lost*". This case admittedly has nothing to do with love, but what has been "meant and not said" lies at the core of the dispute.
2. The matter involves an appeal, alternatively, an application to review and set aside, paragraphs 1.4.1 and 7.1 of an adjudication order dated 5 May 2022 made by the third respondent as adjudicator under the Community Schemes Ombud Service Act 9 of 2011 ("the Act").
3. The applicant is a body corporate established under section 29(1) of the now-repealed Land Use Planning Ordinance 15 of 1985 for the Chapman's Bay

Estate residential development situated in Noordhoek. The applicant is a “community scheme” as defined in section 1 of the Act, namely “.... any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings, including but not limited to a sectional titles development scheme, a share block company, a home or property owner's association, however constituted, established to administer a property development, ...;

4. The first respondent is a homeowner in the Estate. He is thus automatically a member of the applicant, and is bound by its constitution (see *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and others* 2019 (4) SA 471 (SCA) at para [19]: “When the respondents chose to purchase property within the estate and become members of the Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature.”).
5. The Community Schemes Ombud Service, which is a juristic person established in terms of section 3 of the Act, is cited as the second respondent. The core functions of the Service include, in terms of section 4 of the Act, the promotion of good governance of community schemes and the provisions of a dispute resolution service under the auspices of the Act.
6. The third respondent is the adjudicator to whom an application had been made by the first respondent in terms of section 38, read with section 48, of Act, for relief concerning its complaint about the payment of certain penalty fees to which I shall refer in detail below.
7. The second and third respondents took no part in the proceedings in this Court. I therefore infer that they abide the judgment. The first respondent also did not oppose the application, but was present at the hearing and, at the invitation of the Court, stated his views.
8. This Court's jurisdiction to determine the matter under the Act is confirmed by the provisions of section 57(1) of the Act, which provide for a statutory appeal

as follows: “An applicant, the association or any affected person who is dissatisfied by an adjudicator’s order, may appeal to the High Court, but only on a question of law”.

9. The application was, in the alternative, brought as an application for the judicial review of the adjudicator’s decision pursuant to the provisions of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). This practice has been endorsed in this Division: in *Kingshaven Homeowners’ Association v Botha and others* [2020] ZAWCHC 92 (4 September 2020) the Court held as follows at para [25] (and with reference to *Manor Body Corporate v Pillay and Others* [2020] ZAGPJHC 190 (6 March 2020)):

“The notion that such cases will arise quite commonly is not far-fetched because the right of appeal in terms of s 57 is not exclusive of the right of an aggrieved party also to impugn the adjudicator’s decision on review grounds that might not involve ‘questions of law’ within the meaning of that term in s 57. A party might be well advised in many cases to adopt a double-barrelled approach because of the difficulty not infrequently encountered in defining whether or not a particular complaint entails only ‘a question of law’ within the meaning of that term in the statute, which might itself be a matter in contention.”
[Emphasis added.]

10. A record of the proceedings before the third respondent was delivered, as contemplated in Rule 53 of the Uniform Rules of Court.
11. The present matter is perhaps better dealt with as a statutory appeal under section 57 of the Act rather than strictly as an application for judicial review under PAJA (although the review references are not irrelevant). The reason for this is that it appears to me that the determination of the dispute turns mainly on a question of interpretation, which is a question of law (see *KPMG Chartered Accountants v Securefin Ltd* 2009 (4) SA 399 (SCA) at para [39]) as stipulated in section 57 of the Act. In *Trustees for the Time Being of the Avenues Body Corporate v Shmaryahu and Another* 2018 (4) SA 566 (WCC) the Court pointed out that:

*“[25] The appeal is not one for which provision is made in terms of the rules of court, and no procedure has been prescribed for it in terms of the Act or the regulations made thereunder. It is well recognised that the word ‘appeal’ is capable of carrying various and quite differing connotations. One therefore has to look at the language and context of the statutory provision in terms of which a right of appeal is bestowed in a given case to ascertain the juridical character of the remedy afforded thereby. An appeal in terms of s 57 is not a ‘civil appeal’ within the meaning of the [Superior Courts Act 10 of 2013](#). What may be sought in terms of s 57 is an order from this court setting aside a decision by a statutory functionary on the narrow ground that it was founded on an error of law. The relief available in terms of s 57 is closely analogous to that which might be sought on judicial review. The appeal is accordingly one that is most comfortably niched within the third category of appeals identified in *Tikly v Johannes* 1963 (2) SA 588 (T), at 590-591.” [Emphasis added.]*

12. The third category of appeals as identified in *Tikly v Johannes* is “a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly” (at 590H-591A).
13. I proceed to discuss the issues against this background.

The penalty levy clause in the applicant’s constitution

14. Clause 9.10 of the applicant’s constitution stipulates:

“Penalty levies as determined by the Trustees Committee are payable to the Association if a dwelling on the property is not completed within 3 (three) years from date of transfer of the property from the Developer on the basis that construction of the dwelling should commence within 2 (two) years from date of transfer of the property into the name of the Purchaser, and completed within 1 (one) year from date of commencement of such construction process, which

shall be undertaken on a continuous basis, unless an extended time period is approved by the Design Review Committee due to the complexity of the dwelling.”

15. The amount of the penalty levy, which is imposed in addition to any regular levies, doubles from the fifth year after transfer of the property from the developer.
16. The applicant contends that clause 9.10 falls to be interpreted as follows: The period within which construction of a dwelling is required to commence and be completed in terms of the clause is calculated from the date of first transfer of the property from the Developer. It is not calculated from the date on which a subsequent owner such as the first respondent takes transfer. It may accordingly transpire, as it did in the present case, that a subsequent owner is held liable for the payment of penalty levies from the date of transfer if, at the time the property is acquired, the time periods in clause 9.10 have already expired and the construction of a dwelling on the property has not yet commenced or been completed.
17. The purpose of a provision such as clause 9.10, which is often to be found in the constitutions for residential developments in community schemes, is to serve as an incentive to owners to start and complete building works as soon as possible. Building works inherently cause prejudice to the homeowners' association and the owners of the Estate (whose interests the homeowners' association represents) as a result of the nuisance (such as noise and dust) caused by such works, the security risk it presents and the potential for damage to common property (for example, because of the use of heavy vehicles). It also affects the attractiveness and hence the market value of properties in the Estate since prospective buyers do not want to live next to or near a building site for an indefinite period. The homeowners' association and its members thus have an interest in building works within the Estate being completed within a reasonable time – in the present matter, in the time stipulated in clause 9.10.

18. The applicant submits that the purpose of clauses such as clause 9.10 will be undermined if the period stipulated therein commenced afresh every time a property is transferred to a new owner. In such a case, owners would be eager to on-sell their properties every time the date of the payment of penalty levies drew near. This would defeat the objective of the clause, namely to encourage the completion of construction works in the Estate as soon as possible.
19. In the circumstances, it is for the purchaser of a property that is subject to a penalty levy to negotiate a reduced purchase price.

The first respondent's complaint

20. The first respondent purchased a vacant property in the Estate and took transfer on 29 January 2021. The property had, originally, first been transferred from the developer of the Estate on 17 August 2017. Neither the first purchaser nor any of the successive purchasers (except for the first respondent) commenced with construction on the property.
21. It is common cause that the first respondent was made aware by the applicant of the implications of clause 9.10 of the constitution (as interpreted and applied by the applicant) prior to purchasing his property in the Estate. (The first respondent mentioned, at the hearing of the matter (admittedly not on affidavit) that the seller refused to agree to a reduced purchase price.) He acknowledged that he would be bound by the terms of the constitution, by signing a copy thereof.
22. It is further common cause that the first respondent started with the development of his property shortly after the transfer thereof to him, and it has since been completed. The first respondent was, nevertheless, charged penalty levies in the amount of R58 905,00 because the first owner of the property (having taken transfer from the developer) had failed to develop the property within three years of transfer.
23. It is important to point out that the first respondent was not required to pay any

levies “inherited” from the previous owner of his property. Those levies had been paid up. The levies required from the first respondent were imposed afresh on the basis of the applicant’s interpretation of the provisions of clause 9.10.

24. In any event, fourteen months after taking transfer the first respondent made application to the second respondent for, amongst other relief, an order that the applicant *“be stopped from enforcing penalty levies on new owners who have made every effort to develop their property expeditiously”*.
25. The crux of the first respondent’s complaint was that subsequent owners should not be forced to pay penalty levies under clause 9.10 of the constitution where such subsequent owner is not to blame for the fact that the time period stipulated in the clause has not been complied with. The principal issues in his complaint were:
 - 25.1. That clause 9.10 was unreasonable or unenforceable in imposing penalty levies on owners of undeveloped properties irrespective of when such an owner acquired the property.
 - 25.2. Alternatively, that clause 9.10 should be interpreted to mean that the relevant period to construct a dwelling starts to run (or recommences) from the date when a new owner takes transfer of the property. In other words, each new owner should be afforded the full period stipulated in clause 9.10 to construct a dwelling on the property before penalty levies are imposed.
26. The applicant levies the following criticism against the first respondent’s complaint:
 - 26.1. A provision in the constitution of a homeowners' association which imposes penalties on an owner where building works have not commenced or have not been completed within a stipulated period of

time is not *per se* so unreasonable or against public policy to be rendered unenforceable as a matter of law (with reference to the principles stated in *Beadica 231 CC and others v Trustees, Oregon Trust and others* 2020 (5) SA 247 (CC) at para [35], albeit in another context).

- 26.2. I have no issue with these principles, or with the purpose of penalty provisions like clause 9.10 in the context of estates such as the one in the present matter. One must, however, be careful to have proper regard to the words in which these types of provisions are couched. They are not all identical, and each case must therefore be determined on the basis of the particular provision in question. (A case in point is *Walker and another v Cilantro Residential Estate Homeowners Association* [2016] ZAGPJHC 299 (9 November 2016), where the imposition of penalties was upheld, but on the basis of penalty clauses reading differently from clause 9.10.)
- 26.3. The applicant argues that there are no circumstances in this case that render its application unreasonable or against public policy. Again, the submission is correct as a broad principle, but – as is clear from the discussion below – the provision should be scrutinised to see if it may in fact be applied in the manner for which the applicant contends.
- 26.4. Insofar as the first respondent contends that, on a proper interpretation of clause 9.10, new owners are not liable for penalty levies in circumstances where the three-year period stipulated in clause 9.10 had expired (in full or in part) before such new owner acquired the relevant property, this also cannot be sustained. Clause 9.10 is clear and there is no justification for the interpretation advanced by the first respondent.
27. On 5 May 2022 the third respondent issued his adjudication order. In paragraphs 1.4.1 and 7.1 thereof, the adjudicator ordered “*that the contribution levied on new owners, in reference to inheriting penalty levies from previous*

owners is unreasonable and [the applicant] is ordered, with immediate effect, to desist from transferring penalty levies from previous owners to new owners.”

28. The proper interpretation of clause 9.10 is clearly central to the determination of the parties’ dispute. I turn to that issue before addressing the third respondent’s adjudication award.

The proper interpretation of clause 9.10

29. The oft-quoted dictum in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] represents the current state of the South African law regarding the interpretation of documents:

“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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.” [Emphasis added.]

30. In *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) the Court elaborated as follows at paras [25] to [26]:

“[25] ... It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself’.

[26] None of this would require repetition but for the fact that the judgment of the high court failed to make its point of departure the relevant provisions of the subscription agreement. Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.”
[Emphasis added.]

31. The text – viewed in context – therefore remains the starting point in the interpretation of a contract. For ease of reference, I quote clause 9.10 again:

“Penalty levies as determined by the Trustees Committee are payable to the Association if a dwelling on the property is not completed within 3 (three) years from date of transfer of the property from the Developer on the basis that construction of the dwelling should commence within 2 (two) years from date of transfer of the property into the name of the Purchaser, and completed within 1 (one) year from date of commencement of such construction process, which shall be undertaken on a continuous basis, unless an extended time period is approved by the Design Review Committee due to the complexity of the dwelling.” [Emphasis added.]

32. What is immediately apparent from a plain reading of the clause is that the

three-year period within which a dwelling is to be completed is expressly linked to the date of transfer of the property from the developer. Similarly, the obligation to commence construction within two years means that the construction must start within two years from the date of transfer from the developer. There is no indication in the text of the clause that, once the three-year period has lapsed, penalty levies will continue to be imposed notwithstanding the fact that the property has been transferred to a subsequent owner.

33. Subsequent owners do not take transfer from the developer, and there is thus nothing in the clause that entitles the applicant to continue to impose penalty levies on them. Those owners are, in any event, incapable ever of complying with the obligation placed on the first owner, namely to develop the property within three years of the date of transfer from the developer, if they only took transfer of the property more than three years after it was first transferred from the developer.
34. What the applicant is effectively seeking is the “reading-in” (a concept used in the interpretation of legislation so as to render it constitutionally compliant: see *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs* 2000 (6) SA 1 (CC)) of words in the clause so as to make provision for the imposition of levies on subsequent owners for as long as the property remains undeveloped, in other words, to serve the purpose that the applicant had in mind in including clause 9.10 in the constitution. This approach ignores the express link in the clause between transfer of the property from the developer and the development of the property thereafter. It is also impermissible on the authority of *Endumeni* and *Capitec Bank*. This Court may not make a contract for the parties.
35. In any event, insofar as clause 9.10 involves the imposition of penalties, it should be strictly interpreted (see *Auto Protection Insurance Co Ltd v Hanmerstrudwick* 1964 (1) SA 349 (A) at 354D).
36. Clause 9.10 should not be viewed in isolation, but must be considered in the

context of the constitution as a whole: *Government of the Republic of South Africa v York Timbers Ltd (2)* [2001] 2 All SA 75 (SCA) at para [5]). In what follows, I refer to relevant clauses which assist in the proper interpretation of clause 9.10.

37. Clause 7.5 of the constitution provides that the rights and obligations of a member shall not be transferable. This appears to be contradictory to the provisions of clause 9.10 as interpreted by the applicant, although it could be argued, in favour of the applicant, that the obligation to pay penalty levies is not transferred from one owner to the next, as the penalty levies are imposed afresh on each succeeding purchaser. The answer to that argument, in my view, is that what is actually transferred from the first owner of the property (having taken transfer from the developer as described in clause 9.10), to subsequent purchasers, is the obligation to have developed the property within three years after transfer. Clause 7.5 and clause 9.10 are therefore not compatible should the applicant's interpretation of the latter be accepted.
38. In terms of clause 7.8, a member "*shall not be entitled to alienate or transfer a Residential Erf by means of re-sale or to sell any interest in a juristic person that owns such Residential Erf, which sale effectively constitutes a transfer of the property, unless it is a condition of the alienation and transfer that:-*
- ... 7.8.3 *he obtains a clearance certificate from the Association which shall be given provided*
- ...
- 7.8.3.4 *all obligations of the Registered Owner in terms of the Constitution have been complied with in full.*"
39. It appears that the applicant takes the view that, given its own construction of clause 9.10, the provisions of clause 7.8.3.4 need not be complied with by the first owner of a property. There is no evidence on record as to how clause 7.8.3.4 has been implemented in relation to subsequent purchasers in circumstances where the three-year building obligation has not been fulfilled.
40. Clause 9.7 is linked to clause 7.8. The former provides that: "*Any amount due*

by a Member by way of a levy shall be a debt due by him to the Association, the obligation of a Member to pay the levy shall cease upon his ceasing to be a member of the Association, without prejudice to the Association's right to recover arrear levies. No levies paid by a Member shall under any circumstances be repayable by the Association on his ceasing to be a Member. A Member's successor in title to a Residential Erf shall be liable as from the date upon which he becomes a Member pursuant to the transfer of the Erf to pay the levy attributable to that erf. No Member shall transfer his Residential Erf until the Association has certified that the Member has at the date of transfer fulfilled or his financial obligations to the Association".

41. On the applicant's interpretation of clause 9.10, the "*levy attributable to that erf*" for which a new member would become liable, would include a penalty levied as a result of the non-development of the property. The applicant argues that penalty levies under clause 9.10 attach to the property in question, and for that reason successive owners are held liable for the payment thereof.
42. I do not agree. On a proper interpretation of clause 9.10 it is the responsibility of the member who takes transfer from the developer to construct a dwelling within three years after transfer. It is a personal obligation undertaken on the basis of the contractual nature of the constitution. It does not attach to the property, but to the contracting member. For that reason, such obligation cannot be transferred to new members, as is acknowledged by clause 7.5.
43. The provisions of clause 9.10 would have no business efficacy if the applicant's contentions were upheld (see *Government of the Republic of South Africa v York Timbers Ltd (2) supra* at para [15]). This is because, if the purpose is (on the plain wording of the clause) to encourage owners to build within three years of taking transfer from the developer, that purpose can never be served by imposing penalties on subsequent owners where the three-year period has expired. In such circumstances it is impossible for subsequent owners to comply with the clause. Imposing penalties potentially in perpetuity from year 4 onwards does not give effect to the purpose of the clause. It simply provides an additional, and probably substantial, source of income for the applicant – one

that is not necessarily authorised by the provisions in the constitution setting out the Trustee Committee's rights and duties in relation to the levying of rates:

- "9.1 *The members shall be jointly liable for expenditure incurred by the Association.*
- 9.2 *The Trustee Committee shall from time to time, impose levies upon the Members for the purpose of meeting all the expenses which the Association has incurred, or which the Trustee Committee reasonably anticipate the Association will incur in respect of facilities and services in connection with the Estate and the payment of all expenses necessarily or reasonably incurred in connection with the management of the Association and its affairs.*
- 9.3 *In calculating levies the Trustee Committee shall take into account income, if any, and by the Association.*
- ...
- 9.5 *The Trustee Committee shall estimate the amount which shall be required by the Association to meet the expenses during each year, together with such estimated deficiency, if any, as shall result from the preceding year, and shall impose a levy upon the Members equal to or as near as is reasonably practical to such estimated amount. The Trustee Committee may include in such levies an amount to be held in reserve to meet anticipated future expenditure not of an annual nature.*
- ...
- 9.6 *The Trustee Committee, may from time to time, impose special levies upon the Members in respect of all such expenses as are mentioned in clause 9.2, and such levies may be made in the sum or by such instalments and at such time or times as the trustee committee shall think fit.* {Emphasis added.]

44. The power to impose levies is primarily focused on meeting the reasonably incurred expenses of the applicant. The automatic (and indiscriminate) imposition of penalty levies on subsequent owners by reason of a first owner not having fulfilled its obligation under clause 9.10 to the applicant, falls outside of the powers of the trustees in circumstances where clause 9.10 itself does not

provide such an entitlement.

45. In summary, therefore, on a proper interpretation of clause 9.10 as it stands, the applicant is entitled to impose penalty levies only upon owners who purchase properties in the Estate directly from the developer. It is not entitled to charge subsequent owners with such levies. The clause does not say what the applicant means for it to say. Redrafting is required.
46. It follows from the discussion above that I do not agree with the applicant's interpretation of clause 9.10. I also do not agree with the interpretation placed on it by the first respondent, namely that the three-year period should start afresh every time a property is transferred to a subsequent owner. There is, for the reasons already stated, no room for such an interpretation on the wording of the clause.
47. In coming to this conclusion, I take heed (as the applicant's counsel has urged the Court to do) of what is set out in *Beadica supra* at para [80], namely that "*a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law; including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it*".
48. In the present matter, however, the wording of the clause does not bear out the wide interpretation given to it by the applicant in support of the purpose for which it has been included in the constitution. Whether the clause is unfair, unreasonable or harsh does not enter the debate.

The third respondent's adjudication order

49. I turn to consider the third respondent's adjudication in light of the discussion above.
50. The applicant contends that paragraph 1.4.1, read with paragraph 7.1, of the order is ambiguous in that it might be interpreted to suggest that the applicant transfers levies imposed on a previous owner. I have already indicated that the previous owner had settled his levies in full, and that the first respondent's complaint was that levies were imposed on him despite the fact that he developed his property. The fact that the third respondent was under the impression that the matter concerned the "inheritance" of levies is borne out by his reasoning in the adjudication award.
51. The applicant argues that, insofar as the third respondent's ruling is premised on the erroneous assumption that levies imposed on a previous owner are transferred to a new owner, the third respondent erred. His order is liable to be set aside. Irrelevant considerations were taken into account, alternatively, the order is not rationally connected to the information before the third respondent (in the language of, respectively, section 6(2)(e)(iii) and section 6(2)(f)(ii)(cc) of PAJA).
52. The applicant submits further that the third respondent's order falls to be set aside because he relied on the Conventional Penalties Act 15 of 1962 ("the CPA") despite the fact that neither of the parties had referred thereto. Neither the applicant nor the first respondent was given notice of the fact that the third respondent would consider the complaint on the basis of the CPA, and could therefore not make submissions in that regard. The order was thus procedurally unfair as contemplated in section 6(2)(c) of PAJA.
53. In any event, the applicant submits, the third respondent's reliance on the CPA was misplaced because, for an order to be made in relation to the reduction of a penalty under section 3 of the CPA, a complainant is required to plead and prove that the penalty complained of is "*out of proportion to the prejudice suffered by the creditor*" (see *Murcia Lands CC v Erinvale Estate Home Owners Association* [2004] 4 All SA 656 (C) at paras [21] to [28]). *In casu*, the first respondent did not rely on the CPA and there was thus no evidence before the third respondent upon which he could

assess whether the penalty imposed by clause 9.10 was disproportionate to the prejudice suffered by the applicant.

54. The applicant submits, lastly, that the third respondent erred in regarding the imposition of penalty levies as amounting to unfair administrative action under PAJA. The imposition of the penalties does not amount to administrative action because they are imposed in terms of a private contractual arrangement concluded between private persons. The terms of the applicant's constitution are not enforceable against the public at large, and the applicant does not exercise a public power or perform a public function when imposing the levies (see the definition of "administrative action" in section 1 of PAJA, and see *Mount Edgecombe supra* at paras [19] to [20], and [23] to [24]).
55. A consideration of the third respondent's adjudication award bears out the validity of the applicant's complaints. The third respondent misunderstood the factual position (the legal principles governing judicial review based on mistake of fact are set out in *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and another* 2020 (4) SA 453 (SCA) at para [23]), erred in treating the imposition of the levies as administrative action, and embarked on a determination of the dispute on the basis of the CPA upon which neither of the parties had relied, without giving them an opportunity to make submissions in that regard. Had this been a run-of-the-mill judicial review application under PAJA the adjudication order would have been set aside and referred to the third respondent for re-adjudication.
56. Given, however, this Court's views as regards the proper interpretation of clause 9.10, and given the nature of the Rule 57 statutory appeal, how is the Court to determine the dispute? Section 57 of the Act does not set out a Court's powers in determining the statutory appeal. The applicant came to Court for the setting aside of the adjudication order. Although the applicant's case did not turn solely on the narrow ground of an error of law (since it had, in the alternative, been brought under PAJA), the Court has come to a conclusion on the basis of a question of law.

57. Section 54 of the Act provides that an adjudicator may decide as follows in determining an application:

- “(1) *If the application is not dismissed, the adjudicator must make an order-*
- (a) granting or refusing each part of the relief sought by the applicant;*
 - (b) in the case of an application which does not qualify for a waiver of adjudication fees, apportioning liability for costs;*
 - (c) including a statement of the adjudicator's reasons for the order; and*
 - (d) drawing attention in the prescribed form to the right of appeal.*
- (2) *An order may require a person to act, or refrain from acting, in a specified way.*
- (3) *The order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate.*
- (4) *The order must set the time-*
- (a) when the order takes effect; or*
 - (b) within which the order must be complied with.*
- (5) *...”*

58. As the statutory appeal is in the nature of a “*review, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly* (see *Tikly v Johannes supra*), I am of the view that the Court is entitled to grant an order which the adjudicator would have been entitled to grant under section 54 of the Act, *mutatis mutandis*.

59. This approach will be reflected in the order set out below.

Costs

60. The application was not formally opposed, and there will accordingly be no

order as to costs.

Order

61. In all of these circumstances, it is ordered as follows:

(1) The appeal in terms of section 57 of the Community Schemes Ombud Service Act 9 of 2011 (“the Act”) is upheld to the limited extent set out in paragraph 2 of this order.

(2) Paragraph 1.4.1, read with paragraph 7.1, of the adjudicator’s order dated 5 May 2022 made in terms of section 54 of the Act is set aside and replaced with the following order:

“The Respondent is ordered, with immediate effect, to desist from imposing penalty levies in terms of clause 9.10 of its constitution upon any owners in the Estate other than those who took transfer of their properties from the developer”.

VAN ZYL AJ

I agree and it is so ordered.

SHER J

Appearances:

For the applicant:

J.B. Engelbrecht, instructed by
BVPG Attorneys

The first respondent in person

No appearance for the second and third respondents