

**HOA PENALTY FOR NOT BUILDING IN TIME: IS TAKING A HARD LINE UNFAIR?****De Wet N.O. and Others v Water's Edge Home Association; De Kock N.O. and Another v Water's Edge Home Association (A110/2022) [2022] ZAWCHC 155 (24 August 2022)**

*One often assumes that very harsh penalties are unfair and that a court will agree. There may be instances where this will ring true, but under the Conventional Penalties Act, there is more at play than just one side's perception of fairness. This judgment is a case in point relating to some owners in an upmarket estate who failed to comply with the building timeline provisions of the HOA constitution. Unsuccessful in their attempt to set aside the trustee committee's decision on procedural grounds, they next argued for reduction of the 'exorbitant' penalty. The Act however requires that regard must be had to the rightful interests of the creditor, the HOA in this instance, in imposing the levies and found here that no reduction was warranted. The summary below explains why.*

The Judgment can be viewed [here](#).

**FACTS**

The Water's Edge Home Association ('the HOA') is a home owners' association which forms part of a greater home owners' association, the Big Bay Beach Estate Property Owners Association ('the BBOA'). The trustee committee of the HOA had imposed penalties on certain owners of erven within the HOA for failing to commence building work on their erven in the time period stipulated in the HOA constitution.

The HOA constitution provided that the owners shall build within a year after taking transfer. The provisions further allowed for 'the association' to impose 'whatever penalties it deems appropriate in its sole discretion' on the owner concerned.

The HOA's trustee committee decided on the amount of the penalties for non-compliance. These were:

- In terms of the (disputed) resolution passed on 22 September 2010, all owners who had failed to commence construction by 1 January 2011 would be liable to pay penalty levies equivalent to 2 x the normal levy monthly until construction commenced;
- On 31 July 2014 this was increased to 3 x the normal levy with effect from 1 September 2014;
- On 5 September 2016 this was increased to 4 x the normal levy with effect from 1 December 2016; and
- On 12 April 2018 this was again increased to 5 x the normal levy with effect from 1 June 2018.

The non-compliant owners ('the aggrieved owners') denied liability, arguing that the decision of the HOA's trustee committee was *ultra vires* the provisions in the HOA constitution as read with that of the BBOA, essentially as such a penalty provision had to be approved at a general meeting of members, which did not occur. In addition, even if they were correctly levied by the trustee committee, the penalties were exorbitant and therefore *had* to be reduced in accordance with the provisions of the Conventional Penalties Act.

The HOA instituted action against the aggrieved owners for payment of the penalty levies (and/or retention of such levies paid under protest) in a cumulative sum of some R1.5 million plus interest and attorney and client costs (the interest rate and scale of costs claimed are permitted in terms of the HOA's constitution).

The Cape Town regional court found in favour of the HOA and this is an appeal against that outcome.

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## HELD

- An association's constitution is not only an agreement entered into by its members, but also determines the nature and scope of its existence and activities and prescribes the powers of its governing body (here, the trustee committee). At issue therefore is the proper interpretation of the relevant clauses of the HOA's constitution as read with the BBOA.
- After considering the wording of various clauses of the HOA constitution and the interplay with the constitution of the BBOA, the Court concluded that these did not require that the trustee committee was obliged to take the decision to impose penalty levies in general meeting.
- The Court therefore found that the trustee committee had validly passed the decision to levy the penalties.

*The Conventional Penalties Act*

- Section 3 of this Act is headed "Reduction of excessive penalty" and reads as follows:  
*"If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question."* (our emphasis)
- Relief by way of a reduction is in a sense discretionary and the question is not what damages were suffered but what prejudice the creditor suffered, taking into account the factors mentioned in section 3.
- A party claiming a reduction must allege and prove that the penalty is disproportionate to the prejudice suffered by the creditor. This involves proving the actual prejudice which includes "every other rightful interest which may be affected by the act or omission in question". These are, for example that:
  - if every owner had acted as the aggrieved owners herein did, or if a majority had done so, the HOA will suffer material prejudice. This because of the security problem caused by extensive ongoing building activities; the inconvenience attached to being at risk of theft or burglary, and possibly to increased insurance premiums; and the nuisance inevitably caused by building activities would have continued for a longer period than anticipated, at a substantial level. The damage caused by building activities might well increase. as it will be incurred repeatedly over an extended period, instead of occurring over a limited period and then being remedied. And it may well be that property prices in the estate will be negatively affected.
  - In addition, and importantly, deterrence was especially important for the HOA in this matter. The rationale behind the imposition of penalty levies included discouraging members from speculating with their properties (i.e. purchasing vacant plots for the sole purpose of reselling them at a later undetermined date for maximum profit).
  - The evidence showed that the penalty levies had the desired effect on most other members of the HOA who failed to comply since they ended up building their homes sooner rather than later. The properties in this HOA fell within the ultra-luxury segment of the market, with property values ranging between R5 million and R16 million. One of the aggrieved owners had no qualms about admitting that he could afford to pay the penalty levies imposed, but chose not to do so "on principle". It is thus fair to infer that, had the HOA imposed more moderate penalties, it would likely not have had the desired effect, or put differently, the same persuasive sting for individuals of substantial means.

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### | SUMMARY OF JUDGMENT |

- The aggrieved owners were not the only members who had penalty levies imposed upon them over time with the desired result. If this court is to reduce them, it may well leave the door open to those other members whose claims have not prescribed reclaiming the penalties paid (with interest). This could lead to administrative chaos.
- For these reasons any partial or full reduction is unwarranted.

The appeals of the aggrieved owners are dismissed.

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