

## HOA CLAUSE OBLIGING OWNER TO BUILD WITHIN CERTAIN TIME, FAILS

### Chapman's Bay Estate Homeowners' Association v Lotter and Others (9387/2022) [2023] ZAWCHC 35 (24 February 2023)

'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.' With these opening lines, the Court in this matter considered the wording in an HOA constitution which compelled first purchasers of erven in the estate to erect homes on the vacant erven within a certain period, failing which they will become liable for a penalty. However, when the HOA levied such penalty against a subsequent purchaser, it appeared that the import of the text used was that the first purchaser who took transfer from the developer was the one under the obligation and that such obligation did not pass to subsequent purchasers.

Many similar provisions are found in HOA constitutions of residential developments and, in each case, a court will look at exactly what the plain and simple meaning is of the actual words used. What an HOA assumes is the meaning might be very different from the words used. The judgment highlights how important it is to obtain specialist advice when drafting the constitution of an HOA.

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

## FACTS

Lötter took transfer of a vacant property in the Chapman's Bay Estate in January 2021. The property fell within the Chapman's Bay Estate development and was managed by a homeowners' association ('HOA'). Accordingly, Lötter was a member of the HOA and was bound by its constitution. The property in question was first transferred from the developer to a purchaser in 2017, was on sold and later purchased by Lötter.

In the Constitution of the HOA, clause 9.10 thereof dealt with the obligation to erect a home on the property and stipulated:

*"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.]*

At the time of purchasing, Lötter was made aware by the HOA of the implications of clause 9.10 and he acknowledged that he would be bound by the terms of the constitution, by signing a copy thereof. This is important because neither the first purchaser nor any of the successive purchasers (except for Lötter) commenced with construction on the property. Lötter started with the development of his property shortly after the transfer thereof to him and it has since been completed. He was, nevertheless, charged penalty levies by the HOA in the amount of R58 905 because the first owner of the property (having taken transfer from the developer) had failed to develop the property within three years of transfer.

This culminated in the referral of a dispute to the Community Schemes Ombud which found in favour of the HOA, and ultimately this appeal in which Lötter questioned the legal accuracy of that outcome. Lötter argued that the three year period counted in respect of the transfer "from the Developer" to the purchaser and hence the provision did not apply to him as subsequent purchaser.

## HELD

- The purpose of a provision such as the one in question here and which is often 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 HOA and the owners of the estate (whose interests the HOA 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 HOA 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.
- The HOA contends that clause 9.10 fell to be interpreted to mean that: (i) The period within which construction of a dwelling is required to commence and be completed is calculated from the date of first transfer of the property from the Developer, not from the date on which a subsequent owner - such as Lötter - takes transfer. (ii) It may accordingly transpire 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. (iii) To argue otherwise, it contended, would undermine the purpose of the provision, ultimately to the detriment of other owners within the estate. (iv) 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 proper interpretation of clause 9.10 is clearly central to the determination of the parties' dispute.***

- 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.
- Subsequent owners do not take transfer from the developer, and there is thus nothing in the clause that entitles the HOA 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.
- 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 which does not attach to the property, but to the contracting member. Thus such obligation cannot be transferred to new members.
- The provisions of clause 9.10 would in any event have no business efficacy if the HOA's contentions were upheld. 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.

#### CONCLUSION

In summary, on a proper interpretation of clause 9.10, as it stands, the HOA 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.