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

REPORTABLE

CASE NUMBER 17198/2021

In the matter between

PROPELL SECTIONAL TITLE SOLUTIONS(PTY) LTD	**APPLICANT**
and	
SUMMERVILLE HOMEOWNERS ASSOCIATION	**FIRST RESPONDENT**
601 OWNERS OF RESIDENTIAL ERVEN IN SUMMERVILLE	**RESPONDENT 2-602**

CASE NUMBER 20088/2022

In the matter between

THE RESIDENTS AND /OR OWNERS OF RESIDENTIAL	
ERVEN IN SUMMERVILLE	**APPLICANT**
and	
SUMMERVILLE HOMEOWNERS ASSOCIATION	**FIRST RESPONDENT**
BAEDEX FINANCIAL CORPORATION (PTY) LTD	**SECOND RESPONDENT**
PROPELL SEC TIONAL TITLE SOLUTION (PTY) LTD	**THIRD RESPONDENT**
CITY OF CAPE TOWN	**FOURTH RESPONDENT**

JUDGMENT

BHOOPCHAND AJ:

1. Hagley is a suburb east of Cape Town in Kuils River. Several townships, such as the Summerville development, emerged on land originally designated for agricultural purposes but rezoned for residential expansion. This judgment concerns the Summerville development, the residents who live there, and their contractual relationships with third parties.

2. There are two applications before this court. In the main application under case number 17198/2021, Propell Sectional Title Solution (Pty) Ltd as Applicant ('Propell') sues the Summerville Homeowners Association, the First Respondent ('the Association'), and 601 owners of the Residential erven in Summerville, the second-to six hundred and two Respondents ('the homeowners'). Propell seeks eight declaratory orders and an order for costs. The Association opposed the application and filed its answering affidavit. The attorneys representing the Association subsequently withdrew. The Association has not participated in this application any further. There was an exceptionally belated attempt by the Residents Group (referred to in the next paragraph) to oppose the main application. Their participation in the main application is not permitted.[1]

3. In the application under case number 20088/22, known as the counterapplication, the applicant is a group of homeowners, the Residents and/or

[1] The Residents Group provided a brief argument relating to the main application, the content of which has been ignored in this judgment.

owners of Residential Erven in Summerville, Hagley ('the Residents Group').[2] The Respondents cited in this application are the Association, Baedex Financial Corporation (Pty) Ltd ('Baedex'), Propell, and the City of Cape Town. In this application, the Residents Group sought to join four further Respondents: Renier Van Rooyen, Johan Odendaal, Colin Wagenaar, and Bonginkosi Khumalo. The latter served as Trustees of the Association in 2010.

4. The Residents Group seeks four declaratory orders and further relief, including an order for costs. Baedex and Propell opposed this application and filed their answering affidavits. The City of Cape Town filed a notice to abide but provided an explanatory affidavit relating to its involvement in the development. Renier Van Rooyen, the developer of Summerville and Trustee at all times material to these applications, likewise, chose to abide the court's judgment but filed an explanatory affidavit. The Residents Group unprecedently, in February 2024, attempted to reincarnate their entire application by filing a second set of papers wherein they included an answer to the founding affidavit in the main application. The court permitted the Residents Group to raise a supplementary affidavit to the founding affidavit of the counterapplication alone. Baedex and Propell duly answered the second set of papers to the extent that their content constituted matters of a supplementary nature. More on this later.

5. In 1997, an application was granted for rezoning, subdivision, and closure of public roads on portions 1-4 of Farm 439 and the remainder of the farm.[3] The application and approval occurred in terms of the Land Use and Planning Ordinance of 1985 (LUPO).[4] Six hundred and seven single residential dwellings, public open spaces, a service station, a neighbourhood centre, and a place of instruction were approved. The development began in earnest in about 2006 after

---

2 Since the inception of the counterclaim, the number of these applicants has grown to 161. It is unclear whether they are owners or joint owners.

3 Farm 439 was originally part of Farm 1479 and comprised four portions and a remainder, which became Erf 2501. Erf 2501 was further subdivided into 16 portions.

4 The Spatial Planning and Land Use Management Act have replaced LUPO, 16 of 2013 (SPLUMA) and the Western Cape Land Use Planning Act, 3 of 2014 (LUPA).

further applications were made to extend the validity period of the approved rezoning and subdivision. A part of the land on the envisaged development had to be excised and allocated to informal dwellers who had occupied the development site.

6. Section 29 of LUPO made provision for homeowners' associations in rezoned land. The rezoning and subdivision conditions do not specify the formation of a homeowner's association for the Summerville development. The developer envisaged that all homeowners should be members of a voluntary homeowner's association and proceeded to include this condition in the title deeds of each of the erven sold in the development.

7. The City of Cape Town, cited as the Fourth Respondent in the counterclaim, provided an explanatory affidavit, the upshot of which was that the City did not impose a condition requiring the compulsory establishment of a homeowner's association in terms of section 29 (1) of LUPO. After being a bone of contention between the parties, The Respondents Group belatedly conceded that the approval of the development did not contain a condition that required the formation of a homeowner's association in terms of LUPO.

8. There are thus two applications to consider. The court is directed to hear them together, but not as a consolidated matter.[5] The content of the declaratory relief sought across both applications is interrelated, and the key supporting documents are the same, although the reliance placed therein differs. Litigation between the key parties to the two applications has endured over ten years in various forms in this court and the Kuils River Magistrates Court. The court has endeavoured to evaluate the evidence properly placed before it, but it shall consider each application separately and, on its merits, and make the appropriate

---

[5] As per an order of court granted by agreement on the 28 April 2023. There is no order to consolidate the two applications, although the application made on behalf of Propell and Baedex sought consolidation of the matters. Propell subsequently disclaimed any reliance on the consolidation of the applications and submitted repeatedly that the applications should be determined separately on their merits.

orders relevant to each, as the evidence and the application of the law to that evidence directs.

9. This court issued two directives, the first before the hearing of oral argument, to clarify the relief sought in the main application and ascertain the position if the Residents Group did not pursue their application.[6] The second directive allowed the parties to address information of a material nature that had been placed before the court but not addressed properly or at all by them. In addition, the court asked the parties to address specific issues during oral arguments. All in all, the circumstances required it, and the parties were given ample opportunity to ventilate their matters as comprehensively as possible.

10. For convenience, the contents of the affidavits filed, and the written and oral submissions made on behalf of the parties shall be attributed to the parties rather than to the respective deponents and legal representatives that made them. The court accepts that the applications are properly authorised. To the extent that evidence identified as hearsay is referred to in this judgment, the parties can assume that the court has considered the factors identified in section 3(1) (c) of the Hearsay Evidence Amendment Act and that the court believes that such evidence should be admitted in the interests of justice.

THE TITLE DEEDS

11. The clause requiring compulsory membership of a homeowners' association, inserted in the offer to purchase and the title deeds of residential erven in the development, read as follows:

---

[6] The Residents Group had failed to abide the court orders necessitated by the postponement of the applications in February 2024 and nothing further was heard from them until the eve of the scheduled hearing.

"The transferee shall, as the owner of the herein mentioned property, be a member of the Summerville Homeowner's Association and may not sell or alienate the property without the prior written consent being obtained from the Summerville Homeowners' Association in terms of the Constitution of the Summerville Homeowners' Association."

12. The Supreme Court of Appeal, in deciding whether a clause of this nature inserted into a title deed constitutes a real or personal right, held that

"To determine whether a right or condition in respect of land is real, two requirements must be met: (a) the intention of the person who creates the right must be to bind not only the present owner of the land, but also successors in title; and (b) the nature of the right or condition must be such that its registration results in a 'subtraction from *dominium*' of the land against which it is registered. Whether the title condition embodies a personal right or a real right which restricts the exercise of ownership is a matter of interpretation. The intention of the parties to the title deed must be gleaned from the terms of the instrument i.e., the words in their ordinary sense, construed in the light of the relevant and admissible context, including the circumstances in which the instrument came into being. The interest the condition is meant to protect or, in other words, the object of the restriction, would be of particular relevance."[7]

13. The dictum in *Willow Waters* requires a case-by-case interpretation of conditions inserted into title deeds to determine whether the particular clause constitutes a real or personal right. The interpretation follows established legal principles involving the triad of text, context, and purpose.[8]

---

7 Willow Waters Homeowners Association (Pty) Ltd v Koka N.O. and Others (768/2013) [2014] ZASCA 220; [2015] 1 All SA 562 (SCA); 2015 (5) SA 304 (SCA) (12 December 2014) (Willow Waters) at paragraph 16, see also Cape Explosive Works Ltd v Denel (Pty) Ltd [2001] 3 All SA 321 (A)

8 Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA), Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) SA 518 (SCA), Coopers & Lybrand v Bryant [1995] ZASCA 64; 1995 (3) SA 761 (A), Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 (1) SA 518 (SCA)

14. The wording of the clause inserted in the Summerville title deeds poses no interpretational difficulties as it is couched in generic terms. The owner of land in the development must be a member of the homeowners' association. Owners may not sell their properties without the prior written consent of the homeowner's association, and the homeowner's consent to owners to sell their properties shall be in accordance with the provisions of the constitution. Using the word "shall" imposes a mandatory requirement and implies that an owner must be a member of the homeowner's association. On the other hand, the word "may" expresses possibility, a permissive choice to act or not, and ordinarily implies some degree of discretion.[9] The word 'may' could also be construed as a mandatory requirement.[10] The court needs to explore the context and purpose of the text relating, in particular, to the second condition to determine the ambit of any alleged restriction or embargo included in the title deeds.

15. The legal representatives had resolved any dispute as to whether the homeowner's association was formed under section 29 of LUPO as well as the nature of the homeowner's association, before oral argument was completed. There was thus no statutory compulsion on the developer (as was the case in *Willow Waters*) to insert the condition in the title deeds. The developer confirmed that he asked for the clause to be inserted into the title deeds and for the formation of a homeowner's association.[11] The developer explained that any reference to LUPO in the constitution was his attorney's error. The developer referred to clause 4.5 of the constitution, which is not in the court's copies.[12] Clause 4.6 refers to LUPO. In addition, the tenor of clause 1.2 would suggest that it was drafted under the erroneous belief that the Association was formed as a precondition of section 29 of LUPO. Clause 1.2 states that:

---

9 Cornell Law School, Legal Information Centre (https://www.law.cornell.edu/wex/may)

10 Saidi and Others v Minister of Home Affairs and Others [2018] ZACC 9 at 16 et seq, Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others (39724/2019) [2022] ZAGPPHC 208 (18 March 2022) at paras 184 et seq and the cases cited therein on the interpretation of the word "may"

11 Confirmatory and explanatory affidavits of Renier Van Rooyen

12 Clause 4.4 is repeated in the constitution.

"It is a condition precedent in any agreement of sale of any sub-divided portion and in respect of a title deed of any sub-divided portion of erf 2501 Hagley in the City of Cape Town, Stellenbosch Division, Province Western Cape, that the purchaser and subsequent owner of any sub-divided portion will be a member of the Summerville Homeowners Association and that the Summerville Homeowners Association is to consent to the transfer of a third party of a sub-divided portion."

16. The two clauses that were erroneously included in the constitution cannot, therefore, point to the developer's intention to incorporate the conditions in the title deeds. The developer stated in his explanatory affidavit that he was informed that the conditions specified in the title deeds constituted a real right over the respective erven in favour of the Association.[13] The court cannot determine the developer's intention when the conditions were inserted into the title deeds and when the erven in the development were first registered. The court looked to the other provisions in the constitution to determine whether they shed any light on the developer's initial intention to form a homeowner's association.

17. The constitution states that the Association's main business is to promote, advance, and protect its members. The objects of the Association amplify the interests of the members, the control over buildings in the common areas, maintenance and security of the complex, the development of a congenial environment to enable members to derive the maximum collective benefit thereof, adherence to conformity in home design, the control of roads and public open areas, and to ensure that the development contract between the developer and the City of Cape Town is strictly adhered to.

18. Clause 6.5 of the constitution specifies that a member shall not be entitled to sell or transfer an erf unless it is a condition of the sale and transfer that the transferee

---

[13] Many years later, at the time he deposed to his explanatory affidavit

shall become a member of the Association. A member shall first obtain the written consent of the Association, which shall be given provided that the purchaser agrees in writing to abide by the rules of the constitution. The latter provision in the constitution is couched peremptorily. It must be read together with clause 6.13.

19. Clause 6.13 of the constitution is drafted in permissive or optional terms. It states that a member who sells his erf shall, when called upon to do so, furnish the committee or the Agent with a certified extract of the lease agreement or deed of sale as proof that the transferee becomes a member of the Association, Clause 6.13 is qualified by clauses 6.5.1.1, 6.5.1.2, and 6.5.1.3, the first two of which relates to compulsory membership. Clause 6.5.1.3 imposes a further requirement, i.e., the purchaser of a unit erf has to agree in writing to abide by the rules of the constitution. The issuing of clearance certificates is linked to membership of the Association alone in the unamended version of the constitution. The wording of the amendments effected to the constitution in 2010 and dealt with further in this judgment sought to correct the link between membership, the collection of levies and the issuance of clearance certificates. ('consent/s', 'consent certificates'). The legality of the amendments is placed in question in the counterapplication.

20. The offer to purchase contains the exact condition in the title deeds.[14] In addition, it requires the purchaser to acknowledge responsibility for the payment of monthly levies to the Association. It does not link the payment of levies to the issue of certificates of consent. There is no indication in the unamended version of the constitution that the payment of levies or any debt accrued by a member to the Association would be a bar to the subsequent sale of a member's property. The clauses relating to levies are liberally couched. The tenor of the collective evidence does not point to any restrictions intended beyond the initial owners of erven in the complex. Even if the court were to accept the converse, the second stage of the inquiry does not yield a conclusive answer.

---

[14] Clause 20

21. The second stage of the inquiry relates to whether the conditions imposed in the title deeds subtract from the dominium of the land against which it is registered. A limited real right implies that whilst the dominium remains with the owner, certain rights of use and enjoyment are placed at the disposal of a third party to the owner's exclusion. The objectives and functions of the Association are directed towards developing community congeniality, cohesiveness, collaboration, and good neighbourliness. Compulsory membership of a homeowner's association and an option to obtain a clearance certificate on disposal of a property in the complex cannot be construed as a restriction on the owner's use and enjoyment of their properties.

22. What all of the aforegoing means is that the clause inserted in the title deeds of erven in the development is distinguishable from that included in the title deed in the *Willow Waters* and *Kyalami Estates*[15] matters. The interpretation of the clause provides a distinguishable outcome, i.e., that the clause does not constitute a limited real right in favour of the Association. The conditions inserted into the title deeds are personal rights arising from the constitution, binding the homeowners and the Association contractually.[16]

23. In arriving at this conclusion, the court is cognisant of the provisions of section 63(1) of the Deeds Registries Act 47 of 1937, that no deed or condition in a deed purporting to create or embody any personal right and no condition which does not restrict the exercise of any right of ownership in respect of any immovable property, shall be capable of any registration.[17] The court has also considered the cases cited in paragraph 30 of the *Willow Waters* matter before arriving at this conclusion, i.e.,

---

15 Cowin N.O. and Others v Kyalami Estate Homeowners Association and Others (499/2013) [2014] ZASCA 221 (12 December 2014) ('Kyalami Estates') (judgment was delivered on the same day as the Willow Waters matter.

16 Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others (323/2018) [2019] ZASCA 30; 2019 (4) SA 471 (SCA) (28 March 2019) at 440 F-G, Nuwekloof Private Game Reserve Farm Owners' Association v Hanekom N O and others (A163/2022) [2023] ZAWCHC 10 (30 January 20230 at para 22)

17 Willow Waters at para 21

"...the Court should be very careful in dealing with the Registry of Deeds.... It would be no light matter for the Court to declare of no value rights which have been registered against title, which have been looked upon by the public as valid, and upon the faith of which numerous transactions have been entered into.'[18]

24. Absent any explanation as to why the Association was formed, the best that interpretation of the relevant constitutional clauses does is that it categorises the Association as your everyday voluntary association, and in this case, promoting community congeniality and cohesion with a few expenses to pay. In the circumstances, the clause inserted into the title deeds cannot be construed as a real right. The conditions, at most, create a personal right between the owners and the Association. The conditions impose an obligation to join a voluntary association and an option to seek the consent of the Association on alienation of the erf as long as one remains an owner of an erf in the complex. The factors that strengthen the above reasoning are that the City of Cape Town provides municipal services to the development and maintains its common areas. Owners are expected to pay their municipal charges directly to the city. The complex is not gated. A gate was initially erected at the entrance to the complex but was removed by the City of Cape Town. Amendments effected to the constitution in 2010 are directed at rectifying these omissions. The latter aspect receives attention further in this judgment.

THE HOMEOWNER'S ASSOCIATION AND ITS CONSTITUTION

25. Development of the complex began in earnest in 2006. Clause 1.1 of the constitution states that the Association shall be deemed to have existed on 15 June 2006. Clause 31 of the constitution states that its provisions will be effective from 15 June 2006. Propell asserted that the developer drafted and adopted the

---

[18] Willow Waters (supra) at para 30 citing Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd, and Hollins v. Registrar of Deeds

constitution at the end of 2007. The Residents Group referred to a letter dated 18 January 2008 addressed to the developer. The attorneys from whom the letter emanated refer to the final drafts of the constitution and confirm that copies will be distributed amongst the various owners.[19]

26. Clause 6.1 of the constitution states that membership of the Association shall be compulsory for every registered owner of a unit erf. It is apparent that there was no written constitution at the time the development of Summerville began, and there is no evidence to contradict this observation. Owners who purchased properties before they received copies of the constitution, if at all, after January 2008 would not have seen the document when they signed their offers to purchase.

27. Clause 20 of the sample offer to purchase concerns the homeowner's association. It states that the parties agree that upon registration of the property into the purchaser's name, the purchaser will automatically be bound by the terms and conditions of the constitution, including any amendments and/or additions to it and/or any new constitution in substitution thereof, and any rules made in terms thereof. Clause 20.1 of the sample offer to purchase[20] states that:

"The Purchaser declares that it has scrutinised the constitution of the Homeowners Association and agrees to be bound thereby from the date of its occupation of the property."

28. Clause 20.4 states that the purchaser acknowledges that it is aware that as a member of the homeowner's association, it shall, with effect from the date of transfer, be responsible and liable for payment of a monthly levy to the association. There is no indication as to whether the homeowners who purchased properties in the development before the adoption and circulation of the

---

19 Annexure "LH 168" to the supplementary papers filed by the Residents Group

20 "AS5" to the founding affidavit in the main application

constitution subsequently ratified the document. The fact that the Developer's attorney drafted the constitution based on the erroneous belief that the Association was statutorily mandated is also material. There is no evidence that clauses 1.2 and 4.5 were ever amended. The latter may, on its merit, invalidate the constitution. The court shall assume that the constitution is the constitution that applies to the determination of the declaratory orders sought in the two applications.

THE AMENDMENTS TO THE CONSTITUTION

29. On 21 September 2010, a special and annual general meeting of the Homeowners Association was held. The minutes reflect that a quorum was present.[21] The minutes do not reflect the number of members present. The court understands that neither the attendance register nor a list of the members who attended the special or the annual general meeting that followed in person or by proxy is available.

30. The original constitution did not provide for external financing of the Association, nor did it stipulate that consent for the sale of properties in the development would occur upon payment of any debt owing to the Association. At the special general meeting, the developer and Trustees suggested amendments to the constitution, presumably to address the omissions and to obtain financing for the Association.

31. The minutes record that a representative of Baedex "explained in detail" how the financing from Baedex "to owners" would work. The members present voted unanimously to effect the amendments to the constitution and approve financing

[21] "AS 8" to the main application

from Baedex. The minutes of the annual general meeting reflect that a quorum was present, and the monthly levies were increased to R200 monthly.[22]

32. The amendments to the constitution entailed the insertion of clauses 15.6 and 15.7 to the constitution. Clause 15 relates to the functions and powers of the Trustee Committee. The wording of the clauses as approved read as follows:

32.1. Clause 15.6: The Trustee Committee may from time to time borrow moneys required by it in the performance of its functions or the exercise of its powers and for the purpose of the Association, the repayment of which shall be included in the levies raised in accordance with paragraph 6 above , subject to approval by the members in a general meeting of the Association.

32.2. Clause 15.7: The Trustee Committee shall give its written consent to a member selling or transferring a unit erf on application for consent by such owner if the member has paid all amounts due by the member to the Association.

33. Clause 32 deals with amendments to the constitution. Clause 32.1 stipulates that Clauses 1 (Establishment of the Association), 2 (Interpretation), 3 (the main business), 4 (Objects), 6 (Membership), 7 (levies), 8 (the common area), 33 (status of the developer), 34 (Access to the development), and 35 (development and building guidelines), may not be amended. These are entrenched provisions in the constitution and are equivalent to non-variation clauses in contracts.[23] Amendment or repeal of any other part of the constitution had to be effected by special resolution at an annual general meeting or a general meeting. The latter stipulation in the constitution illustrates an alternative interpretation when the word 'may' is used in a clause. The constitution makes provision for amendments

---

22 The previous levies amounted to R140 per month. The court was informed that the current levy amount is R290 per month.

23 Tre Donne Homeowners Association and Another v Bergwater Plase CC (A476/14) [2016] ZAWCHC 69 (9 June 2016) at paragraphs 14 et seq.

to the non-entrenched clauses but forbids any amendment to the entrenched clauses. It is debatable as to whether the constitution permitted the developer to amend these clauses, more so given that the developer and the Trustee Committee went to the membership to approve the amendments.

34. On the face of it, the amendments did not seek to amend any of the entrenched clauses. On closer scrutiny, the substance of the amendments proposed by the Trustees deals with contracts (clause 9), levies (clause 7), and the issue of clearance certificates on alienation of properties in the complex (part of clause 6, the membership clause). The amended clause 15.6 refers to clause 6, the membership clause, whereas the proposed amendment relates to clause 7, the levies clause. Clause 15.6 conflicts with clause 7, the levies clause, which has to be construed as a closed set of conditions for raising and collecting levies. Clause 15.7 conflicts with clauses 6 and 7, entrenched clauses that did not link owners' debt repayment to the issuance of consents on alienating their properties. Clause 32 of the constitution does not allow any amendments to clauses 6 or 7 of the constitution.

35. The purpose of entrenched clauses in constitutions is multifold. These include the protection of the association’s purpose, the safeguarding of members' rights and interests, and the provision of a framework for resolving disputes. Entrenched clauses prevent hasty or unilateral changes to the constitution, limit the power of leadership or majority members, ensure stability in the association's governance, and ensure that constitutional changes are carefully considered and widely accepted. The court is left with the lingering impression that the amendments to the constitution aimed to circumvent the entrenched clauses.

36. Clause 17.3 states that all general meetings other than annual general meetings shall be called special general meetings. As clause 2 of the constitution defines, a special resolution needs specific notification. This notification must specify the intention to propose the special resolution, the terms and effect of the resolution, the reasons for it, and the quora and voting requirements for the passage of the

resolution. A special resolution proposed at a special general meeting requires 21 days' notice. The resolution would be passed by a show of hands of not less than three-quarters of the total number of members present. The number present should form a quorum for a general meeting of the Association. Five per cent of the total votes of all members constitutes a quorum for a general meeting (clause 20), except that not less than three members must be personally present (where proxies would make up the remainder).

37. The Trustee Committee is the Association's Board of Trustees.[24]A Trustee is defined as one of the Trustee Committee. Clause 9 of the constitution relates to contracts and regulations. Clause 9 does not refer to other agreements beyond those with local authorities. Clause 12 states that the Trustee Committee shall consist of three members. Clause 33.1.1 permits the developer to nominate a representative to act as a Trustee on the Board of Trustees. Clause 16.6 states, among others, that no resolution or purported resolution of the Trustee Committee shall be of any force or effect or shall be binding upon the members or any of the Trustees unless such resolution is competent within the powers of the Trustee Committee.

38. Clause 15.6 permitted the Trustee committee to borrow money occasionally. The clause is ambiguous. It is unclear as to whether the funds borrowed had to be approved by the members in a general meeting, whether any additions to the levies raised had to be approved, or whether the monies borrowed, as well as any adjustment to the levies payable by members, had to be approved by the members in a general meeting. Clause 6, referred to in the amended clause 15.6 of the constitution, relates to membership of the Association. The amendment initially mooted by the developer and the Trustees referred to clause 7, the levies clause, instead of clause 6, the membership clause, the latter being the approved reference clause.

---

[24] Clause 2 of the constitution

39. The minutes of the special general meeting record that although the constitution allows the developer to make changes, the Trustees (presumably), the developer, or both wanted the owners to be part of the decision and understand its content. Clause 32.2 of the constitution allowed the developer to make changes to the constitution without the members' approval during the development period.

THE LEVY FINANCE AGREEMENT AND THE CESSIONS

40. On 9 November 2010, Baedex and the two Trustees, on behalf of the Association, concluded the Levy Finance Agreement.[25] Renier Van Rooyen and Johan Odendal, the "Developer's Trustees", signed the agreement on behalf of the Association on an unspecified date. Their signatures were not witnessed.

41. Baedex made R1 000 000 minus certain deductions available to the Association at an interest rate of 34.8% per annum, calculated daily and compounded monthly. A separate schedule listed the charges Baedex intended to levy to administer and collect the levies. The charges included cash handling fees, monthly administration and collection fees, legal fees incurred in collecting levies, and fees for issuing consents. The schedule specified arrangements for the payments to the Association and how amounts collected would be set off against the loan balance.

42. On 12 July 2011, Baedex and Propell concluded a written sale and cession agreement. The agreement and addendum make no specific reference to the Levy Finance Agreement concluded between Baedex and the two Trustees on behalf of the Association.[26] Propell avers that Baedex ceded all its rights in terms of the agreement to Propell by the terms of clause 3.3 of the sale and cession agreement between Propell and Baedex. Clause 3.3 of the sale and cession agreement states

---

25 "AS10" to the main application.

26 Propell claimed in the main application that it had locus standi to bring the application by the cession.

that Baedex cedes all their rights held in terms of the qualifying assets to Propell on the effective date, i.e., 12 July 2011. The qualifying assets listed in the sale and cession agreement schedule include Baedex's Levy Guarantee Debtor book. In an addendum to the sale and cession agreement, the definition of the Levy Guarantee Debtor Book was amended to mean all outstanding balances in terms of levy guarantee loan agreements, inclusive of all the rights flowing from any levy guarantee loan agreements and levy finance agreements (irrespective of the name given to the agreements), concluded by Baedex, as at the effective date.[27]

43. The Levy Finance Agreement incorporated the loan agreement, the collections and administration of levies agreement, the power of attorney agreement, and the cession agreements. The cession agreement would be effected upon an event of default. The terms of the agreement classify the cession as a pledge or a cession *in securitatem debiti*. The security cessions as rectified included the right to issue consents on alienation of an erven and the right to the levies owed by the homeowners. The security cessions covered the Association's obligations to Baedex arising from the contract. The principal debt between the homeowners and the Association is intended to secure the repayment of the secured debt. [28] The agreement permitted Propell to collect levies from the homeowners until the association's debt was discharged.

44. On 8 February 2017, Propell obtained an order from this court to rectify the Levy Finance Agreement.[29] The Association was cited as the Respondent in the application for rectification. The rectification involved deleting clause 6 of the Agreement and replacing it with the rectified clause. Clause 6 related to the security cessions and collection of Levies. The rectified clause allowed for the following:

---

27 Andres Van Schaik, the deponent to Propell's founding affidavit in the main application, signed the undated addendum on behalf of Baedex and Propell.

28 Grobler v Oosthuizen 2009 (5) SA 500 (SCA), Engen Petroleum Ltd v Flotank Transport (Pty) Ltd (876/20) [2022] ZASCA 98 (21 June 2022)

29 Case number 24358/2016. Clause 6 of the agreement was rectified and In addition, the description of how the Association was formed was amended by court order.

44.1. As security cover for all of the Association's obligations to Baedex, the Association ceded and pledged to Baedex by way of cession *in securitatem debiti*:

44.1.1. the right to issue consents to owners on transfer, alienation, or other disposition of any erf in the township ("the consent claims"),

44.1.2. the rights to any claims for loss suffered due to theft or misappropriation of trust monies that it has or may acquire against the Fidelity Fund ("the theft claims"),

44.1.3. The rights to the levies and non-levy amounts owing by owners to the Association at the commencement of the agreement and in the future ("the contributions claims")

44.2. The cession of the contributions claim would only occur upon the occurrence of an event of default; after that, such cession shall take place automatically and without any further notice or any steps or formalities required by either party,

44.3. The Association ceded future rights in anticipation without the need for the parties to take any further steps to give effect to the cession,

44.4. The Association's reversionary rights were retained unless the Association ceded any of the security rights (the consent, theft, and contributions claims) to a prior cessionary,

44.5. The Association appointed Baedex from the commencement date as its lawful attorney and agent with the power of substitution to do all things necessary to collect the outstanding owner amounts, attending to prior cessionaries, applying the monies received under such collection in reduction or settlement of the outstanding loan, to sign any document for the purpose above and generally for such purpose to do everything necessary in addition to that and the Association was

required to confirm everything that Baedex had to do in terms of a power of attorney contained in this clause,

44.6. The security collections and the power of attorney would remain in full force and effect for as long as the Association remained indebted to Baedex, notwithstanding any cancellation of the loan agreement for whatever reason,

44.7. The Association authorised Baedex to fulfil the collection and administration services for the duration of the loan, as long as any amounts remain owing to Baedex as the exclusive and sole agent of the Association. Baedex undertook to:

44.7.1. Issue monthly statements of accounts to owners reflecting the levies and non-levy amounts payable by the owners

44.7.2. Trace most recent owner details,

44.7.3. Send demands to owners who had failed to pay levies on the due date

44.7.4. Take steps as it deemed appropriate in its reasonable discretion to recover payment of outstanding owner amounts, including appointing attorneys as it considered appropriate to institute legal proceedings against defaulting owners in its name or the name of the Association, cancelling the mandate of any attorney who had already been instructed to initiate such proceedings, grant concessions to defaulting owners and/or conclude any other settlement arrangements or compromises as it deemed appropriate with defaulting owners on behalf of the association,

44.7.5. Divulge such information to bondholders as may be required to ensure the bondholder's cooperation during the collection process,

44.7.6. Charge and debit the levy accounts of owners with all levies and non-levy amounts payable to the Association by the owners,

44.7.7. Set off and apply all monies received in collecting the outstanding owner amounts in reduction or settlement as the case may be of the outstanding loan balance,

44.7.8. Debit the outstanding loan balances with all legal and other costs incurred and owed to third parties in recovering outstanding owner amounts,

44.7.9. Issue consents when required.

44.8. The appointment of Baedex as exclusive and sole agent regarding collection and administration services would not derogate from Baedex's rights as cessionary of the security,

44.9. The Association would be liable for any expenses incurred by Baedex and payable to any third party in fulfilling the collection and administration services, which shall be debited to the loan as and when such costs are incurred

44.10. Baedex will furnish the Association with a monthly schedule reflecting the outstanding owner amount as at the monthly advance date of the preceding calendar month, the total monies recovered from owners up to the monthly advance date, all fees and costs incurred in the collection or administration of the outstanding owner amount and the application of the funds received, monthly collections progress report setting out the current status of all collection matters, and any other report reasonably requested by the Association regarding the collection and administration services provided that Baedex has access to the necessary data and has the system capacity needed to generate such other report.

45. The court could not help but notice that the order of 6 February 2017 was obtained by the attorney firm representing the Association.[30] The Association subsequently dismissed this attorney firm sometime in August 2020.[31] Amendments to

30 "AS 12"

31 "AS 21"

agreements are usually effected by the consent of the other parties to the contract. The court raised the issue of a conflict of interest on the part of the attorney firm representing both Propell and the Association. The attorney representing Baedex and Propell in the counterapplication explained how this situation arose. The court is not convinced that no conflict of interest occurred. When the rectification order was obtained, Propell had a power of attorney to represent the Association in matters relating to the Agreement. Propell would have provided instructions for itself and the Association in the rectification application.

46. The terms of the Agreement provide some insight into the growth of the loan. Baedex undertook to make the first advance of the loan of R1m to the Association. For the duration of the loan, Baedex undertook to advance to the Association a monthly amount equivalent to the monthly levies due to the Association, credit interest accrued, and subtract its fees. Baedex held a right to exclude certain levy amounts from its advances to the Association. Baedex agreed to make further loan advances to the Association. Baedex's fees included initiation fees, collection and administration fees, legal costs, and other expenses incurred in collecting outstanding levies. Baedex would capitalise the charges due and payable by the Association to the outstanding loan balance, which would supposedly not exceed the loan amount of R1m. The Association could obtain re-advances on the amounts which had been pre-paid or repaid.

47. The levy amounts collected from the owners would be applied in a sequence comprising payment to the Association, a set off against the outstanding loan balance in payment of fees and costs, set off against the outstanding loan balance in payment of interest, set off against that portion of the outstanding loan balance attributable to the financing of any additional levy, and finally against the remaining outstanding loan balance. The court was informed, upon direct inquiry, that the current loan balance is approximately R15m, half of which comprises interest charges. The court understands that all the levies collected since 2020 have been allocated to reducing the outstanding loan amount. Propell denies that the homeowners are responsible for the payment of the debt. They allege that the

homeowners are expected to pay their levies alone, the right to collect them being ceded to Baedex. With the collapse of the Association and the enforcement of the cession agreement, the liability to settle the loan amount falls to both the paying and non-paying homeowners.

48. The nature of the cession agreement described in the levy finance agreement is akin to a pledge and not an out-and-out cession. In the rectified section 6 of the Agreement, it is noted that the classification of the cession *in securitatem debiti* was removed from the original clause 6. Although the cession agreement involved the Association as cedent, Baedex as cessionary, and the homeowners as the debtor of the Association, i.e., a triangle of parties to the cession Agreement, the cession takes place in the event of default without the concurrence of the homeowners.[32]

49. The court turns to consider the relief sought in the main application.

THE RELIEF SOUGHT IN THE MAIN APPLICATION

50. Considering the decade-long history of litigation in this court as well as in the Kuils River Magistrates Court between the key proponents, i.e., Propell in the main application and the Residents Group in the counterapplication, and other homeowners the court has undertaken to consider and adjudicate the plethora of declaratory orders sought in both applications. The legal principles of granting or refusing declaratory orders are now trite.[33] Justice and convenience demand that the declaratory orders sought across both applications are adjudicated.[34]

---

32 Lynn & Main Incorporated v Brits Community Sandworks CC (348/2007) [2008] ZASCA 100 (17 September 2008) at para 6

33 Section 21 (1)(c) of the Superior Courts Act 10 of 2013, which replaced the identical section 19(1)(a)(iii) of the repealed Supreme Court Act 59 of 1959, and numerous cases, including Durban City Council v Association of Building Societies, 1942 AD 27_at 32A, Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd (237/2004) [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) at para 18, Erasmus, Superior Court Practice at D228 and the cases cited therein.

34 Adbro Investment Co Ltd v Minister of the Interior and Others 1961 (3) SA 283 (T) at 285 B-D, Eagles Landing Body Corporate v Molewa NO, 2003 (1) SA 412 (T) at 432, NAPTOSA and Others v Minister of

51. There is, in effect, no opposition to the eight declaratory orders sought by Propell in the main application.[35] The Association's lawyers had withdrawn, and no representations were made on behalf of the Association at the hearing of the applications. The main application thus falls to be heard on the papers filed by Propell alone. This does not mean that the court will rubber-stamp the orders sought by Propell.

52. In response to the issues raised in this court's second directive, Propell reminded the court of the dicta expressed in paragraphs 21 to 23 of *Four Wheel Drive Accessory Distributors CC v Rattan NO.*[36] These paragraphs confine a judge to the issues pleaded by the parties, emphasise the judge's independence, impartiality, and neutrality, and warn that the risk of judicial intervention may create an apprehension of bias. The parties must identify the dispute, and the court must determine that dispute and that dispute alone. *Four Wheel Drive* and *Fischer v Ramahlele* permit a court to consider legal points emerging from the papers, including the documents the parties relied upon. The relevant paragraph reads as follows:

"There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided."[37]

53. Propell seeks a multitude of declaratory orders. A declaratory order which concerns a right, is a question of law that the court must determine. The court then exercises a discretion on whether it grants or refuses the order. The court must examine all

---

Education Western, Western Cape Government and Others (4842/99) [2000] ZAWCHC 9; 2001 (2) SA 112 (C) (20 October 2000)

35 Propell provided a revised set of declaratory orders which are reflected in the final orders made by this court. To the extent that this reflects an amendment to Propell's notice of motion in the main application, the amendments are granted.

36 2019 (3) SA 451 (SCA), see also Fischer v Ramahlele (203/2014) [2014] ZASCA 88 (4 June 2014)

37 para 22 Four Wheel Drive) Fischer & another v Ramahlele & others 2014 (4) SA 614 (SCA) para 13, affirmed by the Constitutional Court in South African Police Service v Solidarity obo Barnard [2014] ZACC 23; 2014 (6) SA 123 (CC) para 210, and Molusi & others v Voges NO & others [2016] ZACC 6; 2016 (3) SA 370 (CC) para 28. Katritsis 1966 (1) SA 613 (A)

relevant factors from the assembled body of evidence to comply with the two-stage procedure required to determine whether to grant or refuse a declaratory order.[38] Nothing in the court's directives or this judgment offends the dicta in *Four Wheel Drive* and *Fischer v Ramahlele*.

54. Propell also emphasised that the two applications were not consolidated for hearing, and each had to be heard on its own merits or lack thereof. The complete wording of each declaratory order sought is reflected in the orders made at the end of this judgment.

55. The first declaratory order sought is that the Association was not statutorily created in terms of LUPO when the parent erf of the development was rezoned and sub-divided and that the Association is a voluntary association.

56. The assertion is supported by the evidence, namely the rezoning documents establishing the development. The City of Cape Town subsequently confirmed this position. The Residents Group (in the context of the counterapplication) no longer disputes this assertion. Although Propell has not identified an existing, future, or contingent right to obtain this declaratory order, the court is inclined to grant it to bring finality to this issue.

57. Propell has not satisfactorily demonstrated any existing, future, or contingent right to realise the second, third, and fourth declaratory orders it seeks. The declaratory orders sought, relate to the rights of the Association and its members. The court understands that Propell has undertaken a stepwise exercise in obtaining orders leading up to the main relief it seeks about the validity of the levy finance agreement and the security cessions contained therein. Propell submitted that determining these declaratory orders will assist in finalising the dispute between the parties.

---

[38] Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam 1995 (4) SA 1 (A) at 14F). In Durban City Council v Association of Building Societies 1942 AD 27

58. The second declaratory order pursued by Propell relates to the membership of the Association. Propell seeks an order that the Association consists solely of owners of units' erven in the development.

59. Propell relies on the deeds of sale, the title deeds, and the constitution, which requires prospective owners to become members of the Association. Propell indicates that the developer drafted and adopted the constitution at the end of 2007. The Association was deemed to have existed on 15 June 2006, and the constitution's provisions were applicable on the same date.

60. As alluded to earlier in this judgment, the deeds of sale contain the clause that each purchaser has scrutinised the constitution of the Association and agrees to be bound thereby. It is apparent that there was no constitution between 2006 and 2008, when the constitution was finalised and circulated. A reference to a non-existent document at the time of purchase cannot bind the buyer to its contents or membership of a non-existent Association. There is no indication that the developer (or seller in the context of the offer to purchase) sought to obtain the consent of the owners who bought property before the introduction of the constitution (or before a copy was handed over to the owners) to be bound by its terms.

61. Thus, an unknown number of owners can validly raise the defence that they are neither bound to membership in a non-existent Association nor its constitution. The second declaratory order Propell seeks cannot be granted.

62. The third declaratory order sought by Propell depends on the court's finding concerning the second declaratory order. The order sought relates to the copy of the constitution attached to Propell's founding affidavit. Propell wants the court to affirm that the constitution, as amended in 2010, governs the relationship between the Association and its members.

63. The court cannot grant this order partly for the same reasons provided concerning the second declaratory order sought. In addition, the 2010 amendments to the original constitution are inconsistent with its provisions.

64. On the face of it, the amendments did not seek to amend any of the entrenched clauses. Still, on closer scrutiny, the substance of the amendments proposed by the Trustees deal with contracts (clause 9), levies (clause 7), and the issue of consents (part of clause 6, the membership clause). The amended clause 15.6 sought to circumvent the substance of two entrenched clauses, namely clauses 6, the membership clause and clause 7, the levies clause, by inserting the additional clause under a different article of the association. Clause 15.7 conflicts with clauses 6 and 7 as well. Clause 6 did not link the repayment of an owner's debt to issuing clearance certificates on alienating their properties. The court has dealt with the purpose of entrenched constitutional clauses. The aforegoing questions the validity of the amendments effected to the constitution. In the circumstances, the declaratory order sought cannot be granted.

65. The fourth declaratory order sought by Propell is that the Association has a real right against the members as imposed by the conditions of their respective title deeds. Propell relies on sample copies of the offer to purchase and title deeds of erven in the development to support this assertion. Propell cited the *Willow Waters* and *Kyalami Estates* matters to support their contention that the conditions included in the title deeds constitute real rights.

66. The court has considered this aspect and has provided reasons for finding that the conditions included in the title deed *in casu* are not real rights. The court has also found that the peculiar wording of the conditions in the title deeds distinguishes them from the characterisation of the rights in the title deeds under consideration in the *Willow Waters* and *Kyalami Estates* cases. In the premises, the fourth declaratory order cannot be granted.

67. As for the fifth declaratory order sought, Propell contends that it, as cessionary of the Association, can decline to furnish its prior written consent for transferring any immovable property of its members until all outstanding amounts for that particular property have been settled. In the sixth declaratory sought, Propell asserts that the Agreement, as rectified, governs the contractual relationship between the Association as cedent and Propell as cessionary as well as the relationship between Propell and the homeowners. In the seventh declaratory order sought, Propell contends that any claim held by the Association against the homeowners has been validly ceded to the Applicant. Propell has demonstrated an interest in determining these rights. It would be convenient to consider the three declaratory orders sought together.

68. In support of the fifth, sixth, and seventh declaratory orders sought, Propell refers to the Levy Finance Agreement concluded by the Association and Baedex on 9 November 2010 and the subsequent Sale and Cession Agreement concluded by Baedex and Propell on 12 July 2011 and attached copies of the respective agreements to its papers.

69. Propell states further that it sent monthly levy statements to the owners of the residential properties as part of its obligations under the Agreement. Propell refers to the rectified clause 6 of the Agreement obtained from this court on 8 February 2017. Propell refers further to the amendment of the description of the formation of the Association that was also obtained in the court order.

70. Propell refers to clauses 6.1 and 6.2 of the rectified Agreement concerning the contributions and cession claims, the former about the right to issue consents and the latter which would take effect automatically and without notice or formalities upon an event of default.

71. Propell states that the Association breached the Agreement by cancelling its insurance on 31 March 2020 and receiving a qualified 2019 annual financial statement. As these constitute events of default, all amounts due by the

homeowners to the Association have been automatically ceded to Propell. Propell is the only party that can now collect the levies.

72. Propell's written heads of argument merely reproduce the allegations in the founding affidavit.

73. Propell has relied upon the conditions in the title deeds, the constitution, and the Agreement to support the declaratory orders sought by it. The sequence of orders sought indicates that they are interrelated and interdependent. It is apparent to the court that the Agreement is weighted in favour of Propell. If, on closer scrutiny of these documents, it becomes evident (which is the case) either partly or conclusively that the constitution's provisions did not authorise the agreement, then the court cannot grant the fifth, sixth, and seventh declaratory orders sought by Propell.

74. As alluded to in the review of the constitution's provisions, the amendments were aimed at circumventing clauses 6 and 7. In its written submissions, Propell criticised the action of the Trustee Committee on 3 August 2020 for the same reason: effectively amending clause 7 of the constitution relating to levies. Propell seeks an order declaring that resolution unlawful and void *ab initio* yet fails to appreciate that the same argument applies to the 2010 amendments made to the constitution. [39] The constitution did not authorise the amendments of 2010.

75. As clause 7 of the constitution is an entrenched clause, cession of the right to collect levies on behalf of the Association to Propell upon default is inconsistent with the constitution. Likewise, the cession of the right to issue consents on behalf of the Association to Propell in the event of default is inconsistent with the constitution. The imposition of levies and the issuing of clearance certificates constitute entrenched constitutional powers, so they cannot be ceded to a third party.

---

[39] Paragraphs 26 and 27, Propell's heads of argument in the main application.

76. The court has dealt with the election of five Trustees at the annual general meeting, two of whom were the "Developer's Trustees." The latter two, including the developer, signed the Levy Finance Agreement, with its onerous terms, even though the constitution specified that the Trustee Committee comprise three members, and the resolution required three signatories.

77. The court is cognisant of the principle that parties entering into contracts freely should be held to the terms of their contracts. On the issue of whether Propell was obliged to familiarise itself with the internal arrangements of the Association, Propell cited the case of *Grundling v Beyers and others*[40] which refers to *Royal British Bank v Turquand*,[41] and *Foss v Harbottle*[42] in response to issues raised in the second court directive. Neither the *Turquand Rule* nor the Rule in *Foss v Harbottle* apply to contracts involving a voluntary association.[43]

78. In its written submissions, Propell alleged that there is no evidence whatsoever that Propell or Baedex was aware of the internal arrangements of the Association. Propell submitted that the Association provided the necessary warranties as per the Agreement and had, by its conduct at the annual general meeting of 2011, ratified the agreement with Baedex. The submissions are incredulous and fall to be rejected out of hand. Clause 1 of the Agreement defines the "constitution" to mean the constitution of the Association, as amended from time to time. As a financier making a sizeable loan to a voluntary association, it is inconceivable that Baedex would not have called for the Association's founding documents. Propell has relied upon the constitution's provisions to lend credence to its assertion that the Agreement was validly authorised. A representative of Baedex was present at the 2010 meeting when amendments were made to the constitution to enable the association to secure the loan. Clause 12 of the Agreement relates to general

---

40 Grundling v Beyers and others 1967 (2) SA 131 (W)

41 Royal British Bank v Turquand, (1856) 119 E.R. 886

42 Foos v Harbottle (1843) 67 e.r. 189

43 The court did raise the essence of the rule in oral argument in response to a submission made on behalf of the Residents Group

undertakings and additional terms. Clause 12.4 requires advanced notification of any proposed changes to the constitution. This clause and clause 1 of the Agreement presuppose that Baedex possessed and knew of the provisions original constitution when the Agreement was concluded.

79. Cession agreements, like all other agreements, are subject to proper authorisation, failing which they may be declared invalid. The court does not have to make this finding regarding the fifth, sixth, and seventh declaratory orders sought in the main application. However, sufficient evidence indicates a lack of authority to conclude the agreement. In the premises, these declaratory orders, as sought, cannot be granted.

80. The eighth declaratory order sought by Propell relates to the resolution of the Association's Trustees taken on 3 August 2020. The Trustees resolved to withdraw all legal proceedings instituted by the Association against any resident or member of the Association. The Trustees resolved further to halt legal actions against any resident or member to recover arrear levies and/or costs owed to the Association. The Trustees, in addition, terminated the mandate of the Association's attorneys.

81. The relief sought can be easily disposed of. Clause 6.7.4 of the Agreement empowers Propell to recover payment of outstanding owner amounts and the costs incurred in its name. The Association as cedent cannot enforce its rights once a security cession takes effect. Propell had the right to institute these proceedings in its own name in terms of the cession. Since the court has exercised its discretion to refuse the preceding orders, this declaratory order cannot be granted. In the premises, the court need not burden this judgment with the allegations and submissions made on behalf of Propell concerning the eighth declaratory order sought.

82. Propell has been largely unsuccessful in the main application. The Association's involvement was limited to filing an answering affidavit, and the court has rejected

any involvement of the Residents Group in this application. The appropriate cost orders in the main application will be considered later in this judgment.

THE COUNTERAPPLICATION

83. The counterapplication is fraught with flaws, namely repeated and serious failures to abide by the court rules and court orders, failure to comply with the specified periods for the filing of additional papers, failure to file, index, and paginate the papers timeously or at all, failure to issue notices of intention to amend papers, amending papers without approval, and including new material in the replying affidavits. Furthermore, the legal representatives were confused about the applicants they represented, paid little attention to detail, permitted unsubstantiated allegations in the papers, and unnecessarily duplicated documents and lengthy confirmatory papers. An unprecedented second set of papers with a new notice of motion and an answer to the main application was filed in February 2024. Nothing further was heard of the Residents Group until the eve of the rescheduled hearing in May 2024, when they once again provided a barrage of documents belatedly.

84. This court entertained the allegations in the second affidavit to the extent that they comprised allegations supplementing the counterapplication[44] In addition, any information of a material nature that was included in the annexures was also considered. The court shall deal with some of these aspects in this judgment. With the papers in the counterclaim extending way beyond 1500 pages, the court can only deal with relevant and legally cogent aspects of the declaratory orders sought.

85. For now, the court proceeds to the relief sought by the 161 Applicants cited in the last incarnation of the papers. They are referred to collectively as the Residents Group. The Association is cited as the first Respondent. The Association did not

---

[44] On 28 July 2023, the court permitted the Residents Group to supplement their papers.

participate in this application. Of the Respondents, Baedex, the second Respondent, and Propell, the third Respondent who opposed the application, shall be referred to by name or as Propell.[45] Of the further Respondents the Residents Group sought to join, the City of Cape Town and Renier van Rooyen provided explanatory affidavits. The three other trustees who served in 2010 did not receive the notice of joinder and did not participate in the application.

86. Propell repeated the contention raised in the main application that the applications had not been consolidated for hearing and adjudication. Each "application should be considered on its own merits or demerits thereof and that there cannot be any cross-pollination between the two separate and distinct applications."

87. The Residents Group's first declaratory order concerns the Association. The Residents Group sought affirmation that the Association was wrongfully constituted and/or established and never existed from inception as it was neither established in terms of LUPO nor the Sectional Titles Act and/or the common laws of South Africa. During the oral argument, Counsel for the Residents Group informed the court that it had withdrawn this declaratory order. It should have been apparent to the Residents Group that there was no merit in pursuing this aspect of their case once the City of Cape Town filed its explanatory affidavit in April 2023. They persisted. The supporting allegations and documents comprised a significant part of the counterclaim. They must have caused the Respondents considerable time and effort to traverse those documents as the court did. The court has factored the latter into the order of costs it makes.

88. The second declaratory order sought relates to a resolution allegedly made by the Trustees on 21 September 2010 regarding the amendments to the Association's constitution. This order sought is ill-informed. A special general meeting occurred on 21 September 2010. The Residents Group did not provide evidence of a

[45] Baedex, according to the deponent to the answering affidavit, has changed its name to Propell Specialised Finance (Pty) Ltd (para 20, page 118 record)

resolution the Trustees took on that date. The amendments to the constitution were suggested by the Trustees and the developer well before 21 September 2010, as evidenced by the notice of the special general meeting included in the second set of papers filed by the Residents Group. There is no basis for the declaratory order sought. Again, the Residents Group persisted with obtaining unsustainable relief despite being informed of their error.

89. The **third declaratory order** sought by the Residents Group concerns the 2010 amendments to the constitution, which included the insertion of clauses 15.6 and 15.7 to permit the Association to make a loan and pledge its assets in favour of Baedex. The Residents Group wants the court to declare the amendments unlawful, null and void and to set them aside.

90. The Residents Group attached a copy of the constitution to the application.[46] Suppose the constitution's provisions did not permit the amendments to the constitution. In that case, the changes voted for and effected by the special general meeting of 21 September 2010 are unlawful and fall to be set aside. The latter is partly a restatement of the written submission made on behalf of Propell. It would also mean that the Trustee's resolution dated 20 October 2010 and the Agreement concluded between the Association and Baedex would suffer the same fate. The question is whether the Residents Group have made a case that the amendments are unlawful and, therefore, null and void.

91. The Residents Group alleged that the Association circumvented the constitution's provisions to secure the loan. The Residents Group alleged that the amendments were not effected in compliance with the constitution and referred to the requirements of the amendments clause. They alleged that the Association alone has the right to impose levies against its members. The rights to the levies remain personal between the Association and its members, and it is impossible to circumvent that position.

---

46 "SHG 4"

92. The constitution is the contract between the Association and the homeowners. The constitution delegates setting and collecting levies to the Trustee Committee. The levies clause in the constitution is entrenched. The provisions of the clause may not be amended. Although the Association outsourced the function of levy collection almost from its inception, the right to collect levies which is entrusted to the Trustee Committee, is not a right that can be transferred or ceded. The same principle applies to the issuing of clearance certificates. The nature of the personal right thus created, i.e., the homeowner's obligation to the Association, within the peculiar circumstances of this case, would suggest that it excludes its transfer.

93. In the second set of papers, the Residents Group identified two groupings of Applicants. The first were owners of properties before the amendments were effected. It is alleged on their behalf that they were not alerted to the proposed amendments and were not subsequently requested to agree to them. The second group purchased properties after the amendments to the constitution were made, and the Association secured the loan. It is alleged on their behalf that they should have been informed of the loan and the debts of the Association.

94. The court observed from the constitution's provisions that the levies (clause 7) and consent clauses (part of clause 6 of the membership clause) were entrenched. The court noted further that the amendments were directed at circumventing the provisions relating to the levies and issuing consents contained in the entrenched clauses. The court did not have to find in the main application that the amendments effected to the constitution were beyond the powers of the Association as conferred by its constitution and, therefore, fell to be set aside.

95. The Residents Group attached a notice issued on 13 August 2010 by the company managing the Association. The notice informed homeowners of the special general meeting on 22 September 2010.[47] The meeting was held on 21 September

[47] "LH163", the minutes reflect that the special general meeting was held on 21 September 2010

2010. The notice refers to the intention to amend the constitution and contains the proposed amendments as the developer and Trustees envisaged. However, the notice did not comply with the constitutional requirement to explain the reasons for and the effects of the proposed amendments. The notice states that the developer can change the constitution, but the Trustees wanted the owners to participate in the decision and understand its content.

96. The notice does not refer to any presentation by a financier or any proposal to obtain immediate financing for the Association. The constitution required the notice to specify all items on the agenda of the meeting. The minutes of the special general meeting indicate that a decision to approve financing was taken at this special general meeting. Propell relied on this notice to answer the repeated allegations of the Residents Group that there was no meeting and that Propell could not produce the attendance register of the special general meeting. Propell states that the notice was evidence of the meeting being held but disavowed any prior knowledge of the notice.

97. The fact that the notice gives the incorrect date for the meeting, i.e., 22 September 2010, one day after the meeting was held, escaped the parties' attention. Clause 18.2 of the constitution relates to an accidental omission to give notice of a meeting, any resolution, any other notification, or to present any documents. The clause states that non-receipt of a notice shall not invalidate the proceedings or any resolution passed at any meeting. It does not address the instance where defective notices are given. An accidental omission presupposes a factual occurrence. There is no evidence in the papers to support such an occurrence.

98. The incorrect date reflected on the notice may have invalidated it or rendered it voidable. If the notice is otherwise valid, and the error is merely a clerical mistake, the notice may be deemed effective if the recipients waive any objection to it. If a recipient acted appropriately, the recipient could be estopped from raising a defence of this nature. As mentioned, the Residents Group did not attack the notice on the grounds above. The fact, however, is that the owners were invited to

be part of a decision that required a special general meeting. The notice was defective in material respects, i.e., the date, the failure to provide reasons for the amendment or the effects of the amendment, as well as the failure to indicate that immediate funding for the Association from an external source would be considered and voted upon.

99. Propell relied upon the minutes of the special general meeting, which indicated that a quorum was present and that the decision to change the constitution was agreed upon unanimously. Scrutiny of the minutes records the names of three persons present and accounts for two more persons, i.e., the developer who co-signed the minutes and Willem Le Roux, who made a presentation on behalf of Baedex. The minutes record that the proposals to amend the constitution were carried unanimously.

100. Propell submitted in response to the notice as well as the defects apparent therein, that the Residents Group had not relied upon it in support of the third declaratory order sought. The Residents Group did not contend that they received insufficient notice, as their case was that the meeting did not occur at all. Propell relied upon clause 18.2 of the constitution relating to the accidental omission to give notice of a meeting. This did not invalidate the proceedings, nor was any resolution passed at the meeting. Propell submitted, surprisingly, that the amendment of the constitution was optional. The members unanimously approved the funding from Baedex and ratified it by their conduct at the 2011 annual general meeting. Propell needs to be corrected concerning the latter submission, as there was no reference to any financing by Baedex in the minutes of either the 2010 or 2011 annual general meetings. The minutes of the 2011 annual general meeting refer at most to Baedex taking over the collection of levies and an inquiry as to why the fees for Baedex had more than doubled.

101. In response to the second court directive, the Residents Group submitted that the date reflected on the notice did impact the decision to amend the constitution. They argued that if they had attended the meeting, there would have been a

register to indicate their attendance. The homeowners did not know about the meeting, and the notice needed to be corrected. Concerning the omissions in the notice, the Residents Group submitted that the homeowners were entitled to know about the agenda of the meetings.

102. The difficulty concerning the notice is that it is properly before the court, constitutes evidence supplementing the counterapplication, and its contents or lack thereof, are material to the decisions taken at the 2010 special general meeting. Propell had, in a similar vein, provided and relied upon the minutes of the special general meeting and the 2010 and 2011 annual general meetings, as well as the constitution of the Association, without determining whether the decisions taken at the meeting were within the powers of the Association. Propell also relied upon the notice in their answering affidavit and written and oral submissions to prove that the 2010 special general meeting had occurred. Both parties were allowed to respond to what was glaringly apparent to the court before this judgment was finalised, and their submissions were duly considered. The court finds this evidence to be material to determining whether the amendments effected to the constitution were valid.

103. The court has considered several cases regarding the requirement to provide notice of a forthcoming meeting. The following dicta are relevant to these cases.

"The respondent failed to give proper notice of the meeting to the applicant who was entitled to same. This failure is an irregularity which invalidates the proceedings. Resolutions taken at a meeting where persons who were entitled to receive notice or required to receive notice thereof did not receive such, are ordinarily invalid.[48] The application of the above rule need not be applied absolutely where the issues decided are non-contentious, trivial or of a formal

[48] Nyoka v Cricket South Africa (2011/8727) [2011] ZAGPJHC 32 (15 April 2011) and the cases cited therein, namely Mtshali v Mtambo 1962 (3) SA 469 (GWLD) at 472 D-E; Wessels and Smith v Vanugo Construction 1964 (1) SA 635 (O) at 636G-637H; African Organic Fertilizers and Associated Industries v Premier Fertilizers Ltd 1948 (3) SA 233 (N) at 239-241; Visser v Minister of Labour 1954 (3) SA 975 (W) at 983C-984E)

nature.[49] However, the Courts have applied a common sense approach taking all relevant factors into account, including the nature of the business to be transacted."[50]

104. The nature of the business to be transacted at the 2010 special general meeting was neither trivial, formal, nor of a non-contentious nature. In the circumstances, the Trustees did not give notice of the meeting, which was consistent with the constitutional requirements.

105. The Residents Group raised several further contentions regarding the financing of the Association in 2010. They asserted that there was no provision in the constitution to make or secure loans without the consent of the Residents. The reasons for taking the loan were not disclosed to the Residents. There was no indication that the Association was struggling financially due to the failure to collect levies. For the Association to secure the loan, it needed to circumvent the constitution by amending it. The amount owed to the loan account was R25 million. Propell did not challenge the latter allegation. The amendments to the constitution permit the Trustee Committee to borrow the monies required to perform its functions and exercise its powers. The amendment to the constitution allowed the Trustee Committee to borrow the funds needed by it. No evidence before the court relates to the second requirement, i.e., the need for financing.

106. As alluded to, the defective notice failed, among others, to provide reasons for the amendments and did not disclose the imminent financing of the Association. The constitution contains a material provision relating to the overall financial state of the Association. Clause 7.8 of the constitution, an entrenched clause, relates to the shortfall in financing the activities of the Association. The clause exempts the

---

49 Visser v Minister of Labour (supra), African Organic Fertilizers and Assoc Industries v Premier Fertilizers Ltd (supra))

50 (African Organic Fertilizers and Associated Industries v Premier Fertilizers Ltd (supra) at 241 and Visser v Minister of Labour (supra) at 983C)

developer from paying levies if he owns a unit erf in the complex. However, the developer is required for the duration of the development period to:

"...pay the difference between the actual expenses incurred (by) the Association, and the aggregate of the levies payable (as opposed to paid) jointly by the members who are the registered owners of the unit erven each month from time to time, plus any other income earned by the Association, including, inter alia, additional levies payable by members...excluding any provisions for a reserve fund."

107. The minutes of the 2010 annual general meeting do not contain any information relating to the finances of the Association to determine why the external financing was necessary, given that the developer was required to make up part of the shortfall in the expenses incurred by the Association during the development period. The minutes reflect that there was discussion about the financial statements, the budget, the levies, proposals to finance an electrified fence from another source, and the appointment of the auditors.

108. The Association's trustees were appointed. Five Trustees were appointed: two from the developer, Renier van Rooyen and Johan Odendal, and three on behalf of the owners. The election of Trustees did not comply with the provisions of the constitution, which allowed for three Trustees, the wording of which is interpreted to include the developer's representative. The number of trustees appointed by the 2010 annual general meeting impacted the resolution that led to the conclusion of the financing agreement with Baedex.

109. A copy of the annual general meeting minutes a year later stated that 473 owners were represented in person or by proxy at the meeting as per the attendance register. The minutes reflect that the Association had an income of R177 548 (allegedly inflated from the previous year's income) and expenses of R972 460

with a surplus of R67 414. R445 922 was listed as expenses for security and an equal amount for salaries and wages.

110. The minutes refer to Topnotch, the entity managing the estate on behalf of the Association, and that Topnotch could not pay all the invoices. 428 erven still required development. Further discussions centred around the guards, garden services, armed response, increased levies payable by members to R250 per month, and the accommodation of informal occupants outside the development. Specific reference was made to the request to reduce Topnotch's management fees, as "Baedex is now collecting the levies." There was an inquiry about why Baedex's fees had more than doubled. Reference was also made to owners who were not paying their levies. There was no specific reference to the security and cession agreements forming part of the levy finance agreement concluded with Baedex.

111. The content of the minutes of the annual general meeting of 2011 provides some interesting background information relating to the development. Costs were incurred to repair and maintain the access control gate. Although the development was advertised as a gated community, the court understands that the City of Cape Town removed the gated access as it was not part of the rezoning application. The court understands further that the City has and continues to provide services and maintain the common areas.

112. The reference to 428 erven that still required development as of 19 July 2011 meant that there were fewer erven developed at the time of the 2010 annual general meeting. The court needed to be provided with the number of homeowners who were members of the Association in 2010 or 2011, which would have provided a clearer background to the issues relating to the voting and passage of the constitutional amendments and the approval of the loan in 2010. The court also pondered the high cost of security and salaries if only 173 erven of the 601 had been developed up to this stage of the development and whether those costs were attributable to the Association or were the developer's costs.

113. The following dictum from *Grundling v Beyers* and others is relevant to the third and fourth declaratory orders sought by the Residents Group:

> "Now, the constitution does specify certain acts which the Union is required or permitted to do; it often specifies too the manner in which those acts are to be done. The former is the Union's powers, the latter, its internal management. If it exceeds the former powers, that is, does an act that the constitution does not require or permit it to do, that act is *ultra vires* and null and void. Such an act cannot be validated by ratification or estoppel…If the act is within its powers, but the manner of doing it deviates from or is contrary to the constitution, it is not null and void; at most, it is voidable, but it can be validated by ratification or estoppel."[51]

114. It is thus apparent that the 2010 amendments to the constitution of the Association went beyond the powers of the Association as contained in its constitution. A defective notice of the special general meeting was issued, the amendments relating to levies and the issuing of consents were not permitted, the reasons for and the effect of the amendments were not explained, and no notice of the intention to consider and approve immediate financing for the Association was given. The Residents Group must prevail as far as the third declaratory order sought in the counterapplication is concerned.

115. The **fourth declaratory order** attacks the Trustees' resolution of 20 October 2010, which was issued before the conclusion of the levy finance agreement.

116. It would ordinarily be unnecessary for the court to consider the case presented by the Residents Group and the opposition to it by Baedex and Propell following its finding that the constitution did not authorise the 2010 amendments. However, due to the protracted litigation between the key parties, the need to bring finality

---

[51] Grundling v Beyers and others 1967(2) SA 131 (WLD) at 139H-140A

to these applications, and out of an abundance of caution, the court shall undertake the exercise to consider the fourth declaratory order sought by the Residents Group.

117. The developer and the Residents Group included copies of the resolution passed by the Trustees at a meeting held on 20 October 2010 ("the Resolution, the Trustees Resolution").[52] The heading of the resolution states that the resolution is an annexure to the loan agreement, i.e., the levy finance agreement. The Trustees resolved:

117.1. to obtain a loan from Baedex upon such terms and conditions as may be required by Baedex,

117.2. to cede and pledge the following assets in favour of Baedex as continuing covering security for the performance of its obligations from time to time due or owing to Baedex, including, without limitation, its obligations in respect of the loan:

117.2.1. all rights, title, and interest in and to the levies and non-levy amounts ("the levies") concurrently and in the future owing to the Association,

117.2.2. the right to issue consents and any existing or future claims of any nature which it has or obtains against any third party which fails to comply with the title deed restrictions contained in the title deeds of such unit erven and the constitution of the Association as these relate to consents,

117.2.3. all rights, title, and interest in and to any claims for loss suffered due to theft or misappropriation of trust monies that it has or may acquire against the fidelity fund established in terms of the Estate Agency Affairs Act 112 of 1976.

---

52 "AVS 6" in answer to the counterapplication, and "RvR6" to the explanatory affidavit provided by Van Rooyen.

117.3. That all levy amounts are payable in advance by owners and that the Association ratifies the amount and terms of payment of all levies that have already been declared and imposed on owners,

117.4. To appoint Baedex irrevocably and on behalf of the Association as its lawful agent and attorney for the duration of the loan for as long as any amounts remain owing in terms of the agreement, to collect the levies on its behalf and to issue consents on the terms set out in clause 6 of the agreement,

117.5. The Association authorises the imposition of the collection and administration charges as detailed in the schedule hereto with immediate effect,

117.6. The Association irrevocably authorises Baedex to debit the interest, fines, collection, and administration charges to the levy accounts of the owners on behalf of the Association as and when such amounts are incurred in relation to the unit erven owned by the particular owners,

117.7. Any two Trustees of the Association be and are hereby authorised to negotiate the terms of the agreement as they, in their absolute discretion, deem fit, to sign the agreement and /or any amendments to the documentation as mentioned above upon such terms and conditions as they may in their absolute discretion deem fit... [53]

118. The resolution's content indicates that the Trustees received a copy of the levy finance agreement before signing it. The Resolution included a schedule outlining, among other things, the loan amount and the 34.8% interest rate charged daily and compounded over twelve periods that would be levied on it.

119. The Residents Group contended that the resolution to take the loan violated the homeowners' rights as contained in the constitution, and the Trustees acted *ultra vires*. They asserted that the right between the Association and themselves was a personal right that could not be ceded. The Association was not entitled to cede

---

[53] "RvR6" to the Replying Affidavit in the counterclaim. The resolution has not been reproduced verbatim.

its rights to Baedex. The developer presided over the amendments and ceded the rights to Baedex.

120. The Residents Group alleged that the Trustees needed to meet to resolve the terms of the resolution. The resolution required the signature of three trustees, but only two signed. They alleged that the resolution gave rights to Baedex alone (meaning that it was heavily weighted in favour of Baedex). The terms of the resolution were inconsistent with the constitution.

121. Propell responded by contending that the Agreement was preceded by a special general meeting with the required quorum, approved by the owners at the annual general meeting, and later reconfirmed at a subsequent general meeting. As alluded to, the latter allegation is incorrect. The 2010 and 2011 annual general meeting minutes do not refer to the levy finance agreement. The 2011 annual general meeting references Baedex taking over the levy collections and the level of fees it charges.

122. The two Trustees who signed the resolution were the "Developers Trustees." As alluded to, the constitution permitted the developer to appoint one Trustee. There is no evidence that the Trustee Committee met to consider the resolution. This is not surprising considering the disclosure made by Andre van Schaik, a director of Baedex and Propell, that his office drafted the resolution signed by two Trustees.[54] In answer to the Residents' Group's allegations, van Schaik accepted that the constitution required the Trustee Committee, i.e., three Trustees, to sign the Resolution. Van Schaik accepts that the resolution was signed by Van Rooyen and Odendal, two out of three trustees. Van Schaik states that at that stage, the Association had only three trustees, and Baedex's legal advisors advised him that the two signatories of the resolution legitimated the document (as far as Baedex was concerned).

---

[54] Para 35, Propell's answer to the allegations relating to the terms of the Resolution and the loan raised by the Residents Group in the second set of papers

123. The resolution specifies that any two Trustees, as they, at their absolute discretion, deem fit, can sign the Agreement and make any amendments to it. Neither the original constitution nor the amendments provided the Trustees with this power, nor was there compliance with the requirement that resolutions had to be passed by a majority of Trustees (only 2 out of 5 Trustees signed the resolution at the relevant time).

124. Neither the constitution nor the resolution held by members in the special general meeting held on 21 September 2010 (to the extent that can be ascertained by the minutes) permit the Trustees to cede any of the Association's assets, its obligations in terms of issuing consents, its rights to make claims for theft against the fidelity fund, or to surrender its legal standing to a financier in so far as the loan agreement was concerned. Clause 16.6 of the constitution states that members are not bound by resolutions taken by the Trustee Committee that go beyond their powers. In addition, the entrenched clauses of the constitution relating to levies and the issuing of consents on alienation of properties by owners would render cession of these powers, i.e., the right to collect levies and issue consents, unconstitutional and invalid.

125. Propell contended in its written submissions that the decision to obtain financing from Baedex was taken unanimously at the special general meeting. The resolution is not illegal or inappropriate. The Residents Group denied that there ever was a special or annual general meeting. Propell submitted that clause 15.1 of the constitution empowered the Trustee Committee to conclude the loan agreement with Baedex without the member's approval. Clause 15.1 defines the ambit of the powers of the Trustee Committee. The flaw in this argument is that the Trustee Committee and the developer decided to go out to the membership to include them in the decision-making process. Once they had done so, they were obliged to obey the constitution's provisions, regardless of the rights allegedly enjoyed by the developer. Propell also cited clause 16.3 of the constitution, which related to a quorum of members for a meeting of the Trustee Committee. A quorum for a meeting and the conclusion of a contract are two different matters.

126. Propell referred further to clause 18.2 of the constitution regarding the number of votes required to carry a motion. Propell argued that a member of the Association could not evoke the court's aid concerning an irregular act in its internal management that can be validated or sanctioned by a majority in a subsequent general meeting. Propell cited the Turquand Rule in support of the latter contention. The rule does not apply to contracts with associations, but if the argument raised is about the essence of the rule, i.e., prior knowledge of the internal arrangements of the association, then that argument has already been rejected. Propell's reliance on the warranties provided by the Association in clause 11 of the levy finance agreement in support of its alleged ignorance of the constitutional provisions of the Association is also rejected. Propell required a special resolution of the Association to validate the contract between itself and the Association. It is also incorrect that the notice of the special general meeting was part of the late answer of the Residents Group to the main application and, thus, subject to an application to strike out as it did not constitute material supplementing the counterapplication. The annexures were included and referred to as part of the supplementary allegations to the founding affidavit in the counterapplication. Propell was afforded the time and opportunity to respond to the allegations, supplementing the counterapplication and its annexures.

127. There is no need to consider the brief argument made by the Residents Group that the Agreement offends public policy and is thus unenforceable.

128. The court finds that the Resolution exceeded the powers of the Trustees and the Association. The Association was not permitted to cede entrenched functions relating to levies and the issuing of consents. The Trustees who signed the resolution were not empowered to do so. There was no meeting of the Trustee Committee to consider the terms of the resolution. The resolution was prepared in the offices of Propell. In the premises, the court has no hesitation in making the fourth declaratory order sought by the Residents Group. It follows that the levy finance agreement concluded by the two Trustees and Baedex is also invalid.

129. Two further issues relating to the Agreement deserve a mention in this judgment. The Residents Group attached a copy of a notice issued by the Association's managing company dated 12 April 2014. It addressed the homeowners and informed them that Propell intended to terminate its contract with the Association.[55] The notice states that Propell decided not to fund the non-paying owners. The notice states further that Propell referred to the *Willow Waters* case, and as bondholders stood first in line to recoup their debt owed by owners, there was no guarantee that Propell would get their money once a property was sold. The notice further stated that Willie Le Roux of Propell estimated that the Association owed Propell about R3.3 million. The Agreement required the Association to pay the outstanding loan within three months after the notice of termination. The notice adds that Propell was unprepared to put themselves in more debt. An agreement was reached with Propell to pay the debt over 24 months. The notice goes on to say that Propell is only funding the owners who are paying their levies, and the Association would have to double their income (presumably to settle the debt), hence the increase in levies. The levy collection would have to revert to Topnotch (the company managing the Association).[56]

130. In its answering affidavit, Propell dismissed the notice and the averments made by the Residents Group as hearsay and inadmissible. Propell made no attempt to confirm or refute the notice or to state whether it had been retracted. The court finds that this notice is relevant and material to the issues raised in these applications. The parties were invited to make submissions on this notice in addition to the other issues raised in the court's second directive. The court has alluded to the basis upon which hearsay evidence is considered in this judgment.

131. It suffices to say that a notice of contract termination implies that a party intends to end the contract. The notice period, as well as the arrangements for the repayment of Propell's debt, was outlined in the contract. No evidence is placed

---

55 "LH 165" and paragraph 38 of the second set of papers filed by the Residents Group.

56 "LH165"

before the court to gainsay that the notice period had run its course and that the Levy Finance Agreement had terminated.

132. Propell stated that the loan agreement was between Baedex and the Association. Propell "never loaned any money to the Association." The latter allegation begs the question of how the loan amount has increased tangentially over fourteen years and threatens to continue into perpetuity. Propell states further that one of the reasons why Baedex or Propell have not sued the Association for the outstanding loan amount is that the Association is defunct and that there are no longer any Trustees.

COSTS AND ANCILLARY ISSUES

133. The two applications attracted a whole host of intervening applications, including applications for condonation, postponement of the hearings, and joinder applications. The orders made concerning them are not repeated in this judgment.

134. On 11 February 2024, this court granted a postponement of the hearings and made the requisite orders as to costs. The court condoned the Residents Group's late filing of its second set of papers to the extent that it contained allegations supplementing the founding affidavit in the counterapplication. The court had permitted the Residents Group to supplement their founding affidavit in an order dated July 2023. The court had considered the second set of papers filed by the Residents Group. As the affidavit and the annexures contained allegations and submissions of a material nature, the papers were permitted in the interests of justice. The counterapplication, as supplemented, allowed the parties to ventilate their positions as comprehensively as possible in attempting to bring finality to the protracted dispute between them. The court order was made subject to a striking-out application to be raised by Propell.

135. Propell's application to strike out material from the second set of papers filed by the Residents Group is granted in so far as it relates to paragraphs 53 to 92 of the second set of papers. They are struck from the record, and the appropriate cost orders are given below.

136. Both Propell and the Residents Group sought adverse cost orders against each other.

137. Regarding costs in the main application, the Association filed its answering affidavit but had no further involvement. The court understands that the Association has been dissolved in the interim. No order of costs is warranted in favour of the Association. The Residents Group failed to file their papers timeously, and although they submitted written arguments and were allowed to raise oral arguments, the court has decided to ignore their submissions. As indicated in the preceding paragraph, their answer to the main application is struck from the record. The Residents Group cannot claim any costs from opposing the main application.

138. Determining costs in the counterapplication is more tenuous. The Residents Group made lengthy allegations relating to the legality of the Association. In addition, the court has outlined the epic effort required to traverse their papers to understand the ambit of their case and has to consider their flagrant disobedience of the court rules and court orders. The legal representatives of the Residents Group must shoulder the responsibility for much of the transgressions that ensued. The Residents Group alleged in their condonation applications that they were engaged in fending off the numerous cases brought against them in the Kuils River Magistrates Court, and they could not divert funds to these applications. Propell confirmed the court's view that the counterapplication was unnecessary as all of the issues raised therein could have been raised in opposition to the main application. The legal representatives submitted that they could not proceed until they received funding to represent the Group. The costs order in the

counterapplication has to reflect the court's displeasure regarding the conduct of the counterapplication.

139. The court declines to make any orders regarding case number 2944/2013. The application was not placed before the court. The parties can consider that any further relief they sought in their respective notices is dismissed. The *rule nisi* issued by this court for the joinder of the sixth, seventh, and eighth Respondents is discharged. The court believes that the Fifth Respondent failed to fully explain the allegations made against him as the developer of the complex and member of the Trustee Committee in the counterapplication. No cost orders were sought against the fifth Respondent, and none will be made.

140. In conclusion, the court then makes the orders that follow.

ORDERS

The following orders relate to the relief sought in case number 17198/2021.

141. It is declared that the First Respondent (the Summerville Homeowner's Association) is a voluntary association and that it was not a condition in terms of the Land Use and Planning Ordinance 15 of 1985 that a homeowner's association be formed when the rezoning and subdivision of portions 1to 4 of Farm 439 and remainder farm 439, Hagley, were approved.

142. The court declines to declare that the First Respondent consists solely of members who are owners of Unit Erven of the rezoned and subdivided portions 1 to 4 of Farm 439 and remainder Farm 439, Hagley, which was consolidated and now known as erf 2501, Hagley**.**

143. **The court declines to declare that** the constitution of the Summerville Homeowners Association and any legitimate amendments to it govern the relationship between the First Respondent (the Summerville Homeowners Association)and its members**.**

144. **The court declines to declare that** the First Respondent (The Summerville Homeowners Association) has a real right against the members as referred to above, as imposed by the condition of their respective title deeds.

145. **The court declines to declare that** the Applicant (Propell as cessionary) of the First Respondent (the Summerville Homeowners Association as cedent) can decline to furnish its prior written consent for the transfer of any immovable property of the members/owners, referred to in paragraph 2 until all outstanding amounts for that property as per the Constitution have been settled.

146. **The court declines to declare that** the Levy Finance Agreement as rectified, between Baedex Financial Corporation (Pty) Ltd and its successor in title and rights, the Applicant (Propell) and the Summerville Homeowners Association dated the 9th November 2010 governs the contractual relationship between the Applicant (Propell as cessionary) and the First Respondent (Summerville Homeowners Association as cedent) and Respondents (the Homeowners) 2-602.

147. **The court declines to declare that** any claim(s) that the First Respondent (the Summerville Homeowners Association) has or may have against Respondent 2-602 in terms of the First Respondent's Constitution has been validly ceded to the Applicant (Propell).

148. **The court declines to declare** the resolution dated August 3, 2020, unlawful, null, and void ab initio.

The following orders relate to the relief sought in case number 20088/2022.

149. **The court declines to declare that** the Summerville Homeowners' Association has been unlawfully and wrongfully constituted and/or established and to be deemed to have never existed from inception on the basis that the property development was neither established in terms of the Land Use Planning Ordinance of 1985 nor in terms of the Sectional Title and/or the common laws of the Republic of South Africa.

150. **The court declines to declare that** the resolution made by the Trustees of the time of the Summerville Homeowners' Association dated 21 September 2010, in terms of which the said Trustees resolved that the Constitution of the SHOA, has to be amended, unlawful, null and void and therefore to be set aside.

151. **The court declares that** the amendment of the Constitution of the Summerville Homeowners' Association, in particular, the amendment of clauses 15.6 and 15.7 of the aforesaid constitution in terms of which it was amended, to allow the SHOA to make a loan and subsequently pledge its assets as security for the abovementioned loan in favour of Baedex Financial Corporation (Pty) Ltd, unlawful, null and void and is set aside

152. **The court declares that** the resolution made by the Trustees at the time of the Summerville Homeowner's Association dated 20 October 2010 in terms of which:

    152.1. The Association obtained a loan from Baedex Financial Corporation (Pty) Ltd in the amount of R1 000 000 (One Million Rand) upon such terms and conditions as may be required by Baedex;

    152.2. The Association cede and pledge certain assets (as described in sub-clauses 2.1 to 2.3 of the Levy Finance Agreement in favour of Baedex Financial Corporation (Pty) Ltd as continuing covering security for the due performance of all the obligations from time to time due or owing

to Baedex, including without limitation its obligations in respect of the loan;

152.3. Payment of all levies and non-levy amounts every month and in advance by owners as from the date the resolution is taken;

152.4. any payments to the Association by and on behalf of the owners shall be deemed to have been made upon the date on which such payment is received in the Association's nominated banking account;

152.5. The Association, to the extent necessary, ratifies the amount and terms of payment of all ordinary levies, special levies, additional levies, and non-levy amounts that have, as at the date of passing of this resolution, already been declared and imposed on owners;

152.6. The Association irrevocably appoints Baedex Financial Corporation (Pty) Ltd as its lawful agent and attorney for the duration of the loan and as for as any amounts remain owing in terms of the agreement, to collect the levies and non-levy amounts on its behalf and to issue consents on the terms set out in clause 6 of the agreement;

152.7. The Association authorises the imposition of the collection and administration charges as detailed in the schedule hereto with immediate effect;

152.8. The Association irrevocably authorises Baedex Financial Corporation (Pty) Ltd to debit the interest, fines (if applicable), and collection and administration charges to the levy accounts of the owners on behalf of the Association as and when such amounts are incurred in relation to the unit erven owned by the particular owners;

152.9. Any two Trustees of the Association be and are hereby authorised to negotiate the terms of the Agreement (incorporating the cession and pledge and the appointment of Baedex Financial Corporation (Pty) Ltd as the Association's agent as referred to in paragraphs 2 and 4 of this resolution) as they in their absolute discretion deem fit, to sign the agreement, and/or any amendments to the documentation mentioned above, upon such terms and conditions as they may in their absolute discretion deem fit, and to sign all documents, and to do all such other

things as may be necessary or requisite to give effect to the terms of all these resolutions, thus ratifying and confirming all such things done and documentation already signed as if duly and properly authorised at the time of execution thereof, **is unlawful, null and void and is set aside**.

The court makes the following cost orders :

153. There is no order as to costs in case number 17198/2021,

154. In case number 20088/2022, the Residents Group is entitled to sixty per cent (60%) of their costs as agreed or taxed. Counsel's costs are to be recovered (fully) and taxed on the 'A' scale.

155. Propell's application to strike out material in the counterapplication is granted with costs to the extent outlined in this judgment.

Ajay Bhoopchand

Acting Judge of the High Court

Western Cape Division

23 July 2024

Case Number 17198/2021

Counsel for the Applicant: S Mouton

Attorney for the Applicant: Francois Burger

Case Number 20088/2022

Counsel for the Applicant: A A Mbenyana

Attorney for the Applicant: Keith Jenkins

An attorney with right of appearance for the 2nd and 3rd Respondents: F Burger

Date of hearing: 13,14 May 2024

This judgment was delivered to the parties by e-mail at 10h00 on Tuesday, 23 July 2024. The delay in delivering this judgment was occasioned by the opportunity afforded to the parties to supplement certain aspects of their submissions.