THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 199/2016

In the matter between:

SABLE HILLS WATERFRONT ESTATE CC **APPELLANT**

and

SABLE HILLS WATERFRONT ESTATE HOME OWNERS' ASSOCIATION NPC **RESPONDENT**

Neutral citation: *Sable Hills Waterfront Estate v Sable Hills Waterfront Estate Home Owners' Association* (199/2016) 2016 ZASCA 170 (24 November 2016)

Coram: WALLIS and PETSE JJA, DLODLO, MAKGOKA and SCHIPPERS AJJA

Heard: 14 November 2016

Delivered: 24 November 2016

Summary: Property development – obligation of members of home owners' association to pay levies – clause in articles of association providing that levies be apportioned equally between owners of stands and units in estate – whether a reference to stands and units as reflected in the survey diagram attached to the township plan or to stands and units as registered in the Deeds Registry – question of construction of articles of association.

ORDER

On appeal from: Gauteng Division, Pretoria of High Court (Fabricius J at first instance):

The appeal is dismissed with costs.

JUDGMENT

Wallis JA (Petse JA and Dlodlo, Makgoka and Schippers AJJA concurring)

[1] This is a dispute between the developer of a residential estate called Sable Hills (the estate) and the estate's home owners' association regarding the developer's liability to pay levies imposed on members of the home owners' association by its board of directors. The respondent, Sable Hills Waterfront Estate Home Owners' Association NPC (the Association) sued the developer, Sable Hills Waterfront Estate CC (Sable Hills), in the Gauteng Division, Pretoria of the High Court to recover levies for the period from 1 March to 3 October 2012. The parties agreed that the outcome of this litigation would serve to determine Sable Hills' liability to pay levies for the period after 3 October 2012. Fabricius J held that Sable Hills was liable to pay the levies claimed by the Association. This appeal by Sable Hills is with his leave.

[2] The facts are pleasantly uncomplicated and were set out in a special case. Sable Hills acquired the estate on 2 March 2006 in terms of

Certificate of Consolidated Title T022523/06, issued in terms of s 40 of the Deeds Registries Act 47 of 1937 (the Act). At that stage it had already been laid out as a township in terms of a General Plan SG No 6889/2005 and on 15 March 2006 the local authority declared it an approved township. In accordance with the provisions of s 46(1) of the Act the Registrar of Deeds opened a separate register for the estate reflecting each of the erven shown on the general plan. One sectional title unit had been transferred to a third party, so it must also be the case that a sectional title register had been opened in terms of s 12(1)*(b)* of the Sectional Titles Act 95 of 1986 in respect of at least one erf. Between 1 March 2012 and 3 October 2012 certain erven and a sectional title unit in the estate were transferred by Sable Hills to third parties. Sable Hills remained the owner of the remainder of what had become on consolidation Portion 133 of the farm SABLE HILLS no 741, Registration Division J. R., Province of Gauteng (the remainder).

[3] In 2012 the Board of Directors fixed the levies for the estate in an amount of R1 750 per stand. Sable Hills adopted the approach that it was not obliged to pay any levies at all, but, if it was, that the remainder of the consolidated property constituted a single stand for the purpose of charging levies. The Association took the view that Sable Hills was obliged to pay a separate levy in respect of each erf or stand reflected on the general plan and forming part of the remainder. These divergent contentions were debated by way of a special case before Fabricius J. In this court Sable Hills accepts that it is liable to pay levies on a single erf constituted by the remainder, but disputes its liability to pay a separate levy in respect of each erf or stand shown on the general plan and falling within the remainder.

[4] The liability of members of the Association to pay levies arises under its articles of association. The following clauses are of particular relevance to this issue. Clause 5.1 provides that the income of the Association 'consists mainly of the compulsory monthly levies payable by members'. The members of the Association are identified in clause 4.1, which provides that the members consist of the developer – a term defined in clause 1 to mean Sable Hills – and all other persons, including legal entities, who are registered owners of residential property in the estate. Clause 5.2.1 provides that:

'The Directors will from time to time determine the levies payable as provided for in 5.1. All levy payments will be apportioned equally between the owners of Property (ie between stands and units in the estate) …'

The expression 'Property' is defined in clause 1.6 as meaning 'erven in the Township and units in the schemes'. Finally, Clause 5.3 provides that:

'The Directors may enter into an agreement to exempt or partially exempt the Developer from the payment of levies in respect of any property owned by him and not yet developed/alienated by him.'

[5] Sable Hills contends that it owns a single stand in the estate, being the remainder after transfer to individual owners of individual erven. It argues that the remainder is the only erf recognised as a separate property for the purposes of the Act and therefore the reference in clause 5.2.1 to a stand must be understood as referring to the single erf that it owns. While that erf is shown on the general plan as having been sub-divided into smaller erven for the purposes of the proposed development, these smaller erven do not as yet have any separate existence[1] and until they do they should not be taken into account for the purpose of assessing their liability to pay levies. The Association, for its part, says that the clauses

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[1] *Tshwane City v Uniqon Wonings (Pty) Ltd* [2015] ZASCA 162; 2016 (2) SA 247 (SCA) para 10.

in the articles do not refer to pieces of land as reflected separately in the Deeds Registry, but to the pieces of land shown on the general plan of the township, which for the purposes of determining the obligation to pay levies are to be treated separately.

[6] It is correct that it is only when a sub-division of the remainder is transferred to someone other than the developer that the sub-division has an existence separate from the remainder, but that does not in my view dictate the answer to the problem of identifying the stands and units referred to in clause 5.2.1. The answer lies in the proper interpretation of that clause in accordance with the established rules for the construction of documents.[2] I start, as one must, with the language of the relevant provisions.

[7] The articles do not contain definitions of the expressions 'erven', 'stands' or units' appearing in the provisions quoted in [4]. When the township was proclaimed the proclamation occurred in terms of the General Plan approved by the Surveyor-General and showing the division of the township into erven. When opening the township register the Registrar of Deeds did so in accordance with that general plan, as required by s 46(1) of the Act, which imposes the duty to open a separate register 'if land has been sub-divided into lots or erven shown on a general plan'. The stark difference between the parties is whether the reference to 'stands' in article 5.2.1 is a reference to erven enjoying separate title in the Deeds Registry, or erven as reflected on the general plan and in the township register. As regards 'units' the articles

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

contemplate that sectional title schemes known as Sable Hills 3 and Sable Hills 4 would be established as part of the overall development. Logically therefore the references to 'units' refers to units in these sectional title schemes.

[8] Linguistically clause 5.2.1 is open to both possible constructions. One looks therefore for indications in the articles as a whole that point in favour of one or the other. One that strikes one immediately is that in clause 5.2.1 the word 'stands' is used and not 'erven'. The word appears to have come into South African legal parlance via the Gold Laws, where it had particular relevance to rights to prospect for and mine gold, but it has a broad popular meaning[3] and is capable of referring to any defined piece of land, whether or not having a separate legal existence in the Deeds Registry. In the context of township development one frequently sees advertisements for the sale of stands in a township and, given the manner in which township land is registered in the Deeds Registry, that is usually a reference to the properties reflected on the general plan of the township, not to existing separate erven.

[9] It is true that in many contexts the words 'erf' and 'stand' may be virtually synonymous,[4] but whether they are to be treated as such depends on the context. Here the word 'stands' is used to explain or clarify the meaning of 'erven' where it appears in the definition of 'Property' in clause 1.6 of the articles. That follows from the fact that, after saying that levies are to be apportioned between owners of Property, the clause goes

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[3] *Greathead v Transvaal Government and Randfontein Estate and Gold Mining Co. Ltd* 1910 TS 276 at 301; *Levy v Phillips* 1915 AD 139 at 143.
[4] *Hull v Rand Township's Registrar* 1913 WLD 221 at 227 and see the definition of 'erf' in s 102 of the Act as including 'an erf, lot, plot or stand'.

on in parentheses to say 'ie between stands and units in the estate'. If the strict meaning of erven as legally separate properties were intended, there would have been no need for further definition. Accordingly, I think that the use of 'stands' is directed at indicating a broader meaning, that erven are those shown on the general plan notwithstanding that they do not yet have a separate existence.

[10] A second pointer in the language of clause 5.2.1 is to be found in the words 'in the estate' in that explanatory phrase. Clearly that comprehends the whole of the estate. The units in the estate must be the units identified in the sectional title register or registers existing in respect of identifiable pieces of land in the estate. That is so whether they are owned by the developer or by a third party. So, if the developer is also the developer of the sectional title schemes, in which at least one unit has been sold, it will be the owner of the other units in that scheme and liable to pay levies in respect of them on the plain language of clause 5.2.1. If the reference to units refers to what is reflected in the sectional title register or registers, there seems to be no reason why the reference to stands should not be a reference to the stands in the township register. After all the development of the township provides the context for the existence of the articles and therefore their interpretation.

[11] These pointers in favour of the Association's construction of clause 5.2.1 are strongly reinforced by reference to clause 5.3 of the articles. This provides for the directors to conclude an agreement with the developer for the total or partial exemption of the latter from the obligation to pay 'levies in respect of any property owned by him and not yet developed/alienated by him'. If Sable Hills' contentions were correct it would only be liable to pay one levy in respect of one property owned

by it, namely, the remainder. But the use of the plural ‘levies’ and the reference to ‘any property’ suggests that the developer, in its capacity as such, will be the owner of more than one property and incur liability to pay more than one levy. That will only be the case if the stands shown on the general plan are the basis for apportioning the levies among owners.

[12] The grounds upon which such an agreement may be concluded are also instructive. It is only permissible in relation to any property that has not yet been developed or alienated by the developer. But in the course of developing a township the developer may develop or build upon some stands as shown on the general plan and leave others to lie fallow until a later stage of the development. If the developer is only liable for one levy in relation to the remainder, and not individual levies in respect of the stands on the general plan, any development undertaken on any part of the remainder would exclude the application of clause 5.3. Indeed it would become largely academic unless the developer abandoned the township.

[13] The clause is, however, easy to apply if one is dealing with the apportionment of levies to owners on the basis that they own the land on which individual stands are laid out in the general plan and each stand is separate for the purpose of charging the levy. A developer who was intent on developing say 30 out of 300 stands could legitimately say that the expenses falling to be discharged from the levies paid by owners were largely incurred in respect of those stands and the other stands already in separate ownership, and that it would be fair therefore to exclude the payment of levies in respect of the 270 stands not yet developed.

[14] Turning from linguistic analysis to the purpose of this provision, levies are to be raised by the Association to discharge the expenses incurred by it in respect of the management of the township. The levies are to be applied to the furtherance of the main objective of the Association. According to the Memorandum of Association, that is the maintenance, upkeep and development of the services and facilities of the estate. This objective enures to the benefit of all members of the Association, both Sable Hills as the developer and the individual owners of stands or units. It is for that reason that the obligation to pay levies is to be apportioned equally among the owners on the basis of their ownership of the stands shown on the general plan. In the ordinary course equal apportionment of levies among all owners on the basis shown on the general plan is a fair result.

[15] I appreciate that the benefit derived by owners of individual erven in the estate from the expenditure by the Association, may be proportionally greater than that derived by Sable Hills. That is particularly so where the township is still in the process of development and many of the stands constituting the remainder are as yet undeveloped. Thus a security presence at the entrance to the estate may provide greater benefits to individual owners than to the developer who may have few security concerns in relation to undeveloped land. The provision of landscaping and garden services is likely to be disproportionately directed at existing residential development rather than still vacant sites. Although they will be of some benefit to the developer in that they may be attractive to prospective purchasers of stands in the township, the direct benefit is more likely to accrue to other owners.

[16] All of this, however, merely shows why clause 5.3 is part of the articles. It is intended to enable the developer and the Association to arrive at a situation where the apportionment of levies is fair to all owners of residential stands or units. The fact that the other stands that are to be developed as commercial properties, private open space or special use as a clubhouse, gymnasium, restaurant or boathouse, are excluded for levy purposes, reinforces the Association's contentions.

[17] In the heads of argument and the judgment of the court below there was considerable debate concerning the judgment in *Heritage Hill*.[5] It is unnecessary to deal with that judgment save to note that the articles of association of the home owners' association in that case were substantially different from those in the present case. For example the word 'owner' was defined as meaning the registered owner and clause 2 provided that any word or expression not otherwise defined would bear the meaning given to that word in the Deeds Registries Act. That dictated the extensive references to the Act in the judgments and was perceived to require consideration of the rating cases.[6]

[18] The different context of the present case obviates the need to analyse those judgments or the judgments in the rating cases. As far as *Heritage Hill* is concerned the articles being considered were different from those in this case. As far as the rating cases are concerned the wording of the relevant ordinances made it clear that they were dealing with registered ownership in the Deeds Registry and the context is so remote from the

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[5] *Heritage Hill Home Owners' Association v Heritage Hill Devco (Pty) Ltd* 2013 (3) SA 447 (GNP) and on appeal *Heritage Hill Devco (Pty) Ltd v Heritage Hill Home Owners' Association* 2016 (2) SA 387 (GP).

[6] Discussed fully in paras 9 to 11 of *Tshwane City v Uniqon Wonings*, fn 1, supra.

present case as to provide, on its own, grounds for distinguishing the two situations. It is seldom that a judgment interpreting an ordinary word in one context is of assistance in illustrating its meaning in a wholly different context. As Fagan CJ said in the *Consolidated Diamonds* case:[7]

'When we find in a judgment statements which attach meanings to particular words or phrases, we must remember that the Judge is dealing with those words or phrases in the context in which they occur and with reference to the subject matter to which they relate. Beyond that, a statement as to the meaning of a word or phrase would merely be *obiter dictum*. I should be loth to read a Judge's elucidation of a word with no specialised legal meaning as intending to lay down as a matter of law what that word means independently of the context in which he is dealing with it, for defining the meaning of words as such is not a Judge's function, but that of a philologist.'

[19] In the result the appeal must fail. It is dismissed with costs.

M J D WALLIS
JUDGE OF APPEAL

[7] *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA & another* 1958 (4) SA 572 (A) at 599C-E.

Appearances

For appellant:	W J Vermeulen SC (Heads of argument prepared by A B Rossouw SC and M Riley)
Instructed by:	Van Zyl Le Roux Inc, Pretoria; McIntryre & Van der Post, Bloemfontein
For respondent:	A F Arnoldi SC (Heads of argument prepared by S D Wagener SC)
Instructed by:	Kotzé & Roux Attorneys, Pretoria; Honey Attorneys, Bloemfontein.