IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Case no: 17258/2019

Reportable

In the matter between:

BARONETCY ESTATE HOMEOWNERS ASSOCIATION Applicant

and

MOHAMED ABDULAHI Respondent

and

Case no: 8985/2022

In the matter between:

BARONETCY ESTATE HOMEOWNERS ASSOCIATION Applicant

and

MOHAMED ABDULAHI Respondent

Heard: 29 January 2026

Further submissions: 19 March 2026

Delivered: 18 August 2026

Summary: Homeowners association — application for demolition of portion of dwelling exceeding height restriction in architectural rules — claim for specific performance — whether court should exercise discretion to refuse — cost of compliance disproportionate to harm — City issued final occupation certificate - demolition refused. Municipal Planning By-law, 2015 — s 62(1)(b)(i) — design guidelines of a HOA may not introduce more restrictive rules than those provided in the development management scheme — whether section 142 preserves an association whose constitution was approved under LUPO - restriction not declared void but held unenforceable against the respondent in these proceedings as a matter of public policy.
Conduct rules — daily fine for occupation of dwelling without occupancy clearance certificate issued by the association — whether fine exigible where occupier holds an occupation certificate issued by the City — interpretation — held not — Conventional Penalties Act 15 of 1962, section 3 — reduction of penalty out of proportion to prejudice suffered — principles restated.

ORDER

The following order shall issue:

1. The application under case number 17258/2019 (the demolition application) is dismissed.

2. The application under case number 8985/2022 (the penalties application) is dismissed.

2. The applicant is ordered to pay the respondent's costs in both applications, including the costs reserved in the application for consolidation determined by Mangcu-Lockwood J on 5 August 2024, costs of counsel to be taxed on Scale B.

3. The costs occasioned by the applicant in respect of its claim for arrear levies shall be borne by the respondent.

JUDGMENT

HOLDERNESS J

[1] Before this Court for determination are two separate applications. In the first, the applicant, Baronetcy Estate Homeowners Association (the applicant), seeks the demolition of the portion of the roof of the dwelling of the respondent, Mr. Mohamed Abdulahi (the respondent), which it alleges fails to comply with its Architectural Rules or guidelines (the demolition application). In the second, the applicant seeks payment of penalties raised against the respondent for what

it alleges to be his unlawful occupation of the property (the penalties application).

[2] The applicant manages Baronetcy Estate in Parow, Western Cape, consisting of 298 residential erven (the Estate), and, as part of its mandate, enforces the rules applicable to the functioning of the Estate, including its Architectural Rules. The respondent is the owner of Erf 2[...], also known as 3[...] D[...] Crescent, Baronetcy Estate (the property), and of two further erven within the Estate.

[3] The demolition application was launched on 1 October 2019 and the penalties application on 30 May 2022. On 5 August 2024, Justice Mangcu-Lockwood granted an order consolidating the two applications in terms of Uniform Rule 11, with costs to be costs in the cause.

[4] The respondent brought a conditional counter-application in the penalties application to review and set aside the applicant's refusal to consider his application to relax the applicable height restriction. That counter-application was withdrawn, the respondent's case being that it had been rendered moot by the January 2024 affidavit of the Estate architect, Mr. Pieter Syfret. I need not deal with it any further.

[5] The applications are both opposed. Mr. De Wet and Mr. Brink appeared for the applicant in the demolition and penalties applications respectively. Mr. Bothma, together with Mr. Matiso, appeared for the respondent in both applications.

[6] Both applications are brought on motion, and in both the applicant seeks final relief. In the demolition application it seeks an order for specific performance in the form of the demolition of part of the respondent's dwelling. In the penalties application it seeks payment of a liquidated sum. The affidavits nevertheless disclose disputes of fact on a number of matters which are material to the relief sought, which fall to be determined in accordance with the well-established principles set forth in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[1]

[7] The rule was restated in *National Director of Public Prosecutions v Zuma*, where Harms DP observed that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts, and that unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.[2]

[8] The material facts in this matter are, for the most part, common cause. In respect of the disputed facts, where the respondent has seriously and unambiguously addressed the fact in issue, I am obliged to accept his version, save where his allegation or denial is so far-fetched or clearly untenable that I would be justified in rejecting it on the papers.

[9] The averments by the respondent are neither far-fetched, nor untenable, nor was it suggested in argument that any of them can be described as such.

Factual background

[1] *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E–635C, per Corbett JA, Miller and Nicholas JJA and Galgut and Howard AJJA concurring. The passage considers and qualifies the formulation in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E–G.

[2] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26.

[10] The Estate was created after subdivisional approval was granted by the City of Cape Town (the City) in terms of the now repealed Land Use Planning Ordinance 15 of 1985 (LUPO). The applicant was established as a homeowners' association in terms of section 29 of LUPO.[3]

[11] The applicant's constitution annexed to the founding affidavit (the Constitution) is described, on the cover page thereof as being 'APPROVED 11 NOVEMBER 2008' and as being subject to a 'Second amendment: August 2017'. In paragraph 2 of the Constitution, the 'Architectural Rules' are defined as follows: '(previously known as the architectural guidelines) prescribing the architectural requirements for Dwellings in the Estate, as approved by the City of Cape Town and as amended from time to time'.[4]

[12] Clause 5.2 of the Constitution provides that upon registration of ownership of an Erf in the name of a purchaser, membership of the Association by such purchaser shall be automatic and obligatory, and Members shall be obliged to comply with the provisions of this Constitution and Rules.

[13] The respondent purchased the property on 4 May 2015. Ownership of the property was registered in his name on 23 June 2015. On 29 June 2015, the City of Cape Town Municipal Planning By-law, 2015 (the By-law) was promulgated.[5] It repealed LUPO and came into effect on 1 July 2015.[6]

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[3] Section 29(2) of LUPO provides: 'A home owners' association coming into being by virtue of the provisions of subsection (1) ... shall be a body corporate; shall have a constitution which ... has as its object the control over and maintenance of buildings, services and amenities arising from the sub-division concerned ... and shall have as its members the owners of land units arising from the sub-division concerned, who shall be jointly liable for expenditure incurred in connection with the association.'

[4] 'Rules' are defined as 'The Conduct Rules, Building Contractor Rules, Architectural Rules and such other sets of rules as the Association may determine from time to time.'

[5] The By-law was approved on 25 March 2015 and promulgated on 29 June 2015.

[6] In terms of section 77 of the Western Cape Land Use Planning Act (LUPA).

[14] The applicant states in its founding affidavit that the applicable rules 'relate to the enforcement of the Estate's Architectural Rules'. It thereafter refers to the conduct rules, and annexes as a copy of the 'applicable rules', the "Baronetcy Estate Conduct Rules", first issued on 25 April 2019 (the 2019 Conduct Rules). The 2019 Conduct Rules incorporate 'Architectural Guidelines' which are thereafter referred to as the Architectural Rules, at para 2.5 thereof.

[15] The Architectural Rules were annexed to the Constitution and did not form a separate annexure to the applicant's founding affidavit. However, it appears from the cover page thereof, that the Architectural Rules were effective from 1 September 2016 (the 2016 Architectural Rules).

[16] Clause 14 of the 2016 Architectural Rules sets out the applicable height restrictions in the Estate. Clause 14.3 provides:

> '14.3 No portion of any building will be higher than 7.5m above the Natural Ground Level (NGL) at any point, measured directly vertical to the higher point or or alternatively the grade line.'

[17] The 2016 Architectural Rules do not define what a grade line is or how it is to be measured.

[18] Placing reliance on the dictionary definition of a 'grade line',[7] and a professional land surveyors' report and diagram attached thereto,[8] the respondent contends that based on the applicant's own wording in clause 14.3 of

[7] The Merriam Websters Dictionary defines a 'grade line as 'the longitudinal reference line or slope to which a highway or railway is built'. Mc-Graw-Hill Dictionary defines it as a line usually marked with stakes or monuments, each having an elevation referred to a common datum (point), by measurements or computation from such elevations and stakes, a grade is established between the terminal points.'

[8] From which it appears that the respondent's property has two slopes, one a steep slope of 38 degrees and one of 8 degrees.

the Architectural Rules, the measurement from the grade line puts his building in compliance.

[19] The applicant alleges that the building that the respondent constructed on the property:

> '7.1 Exceeds the 7.5 metre maximum height restriction prescribed by the Architectural Rules.
>
> 7.2 Exceeds the building lines recorded in the approved building plans. For instance, the approved height of Roof C was 163,375 metres while the actual height that was built for Roof C was 163,75, thereby exceeding by 375mm; and
>
> 7.3 Was not done in accordance with the approved plans.'

[20] The respondent, in answer, states that he purchased the property and commenced construction in 2015, and highlights that the 2019 Conduct Rules relied upon came into effect years after his plans were approved and construction commenced.

[21] The applicant, in reply, states, somewhat unhelpfully, that: '[t]he contents of these paragraphs is irrelevant. If the Respondent wanted to amend its approved building plans, then he should have followed the procedure that is set out in the rules. The Respondent and his builder were aware of this'. It omits to deal with the issue pertinently raised, that the 2019 rules cannot retrospectively apply to the approval of plans and the construction of the respondent's dwelling in 2015.

[22] The respondent submitted his building plans to the applicant on 8 September 2015. The applicant's Estate architect, Mr. Pieter Syfret (Mr. Syfret), approved the respondent's plans on 21 October 2015. The applicant approved the plans on 23 October 2015. The respondent commenced construction shortly thereafter.

[23] In its founding affidavit, the applicant relies on an email which it sent to the respondent dated 29 January 2016, recording that 'the respondent started with construction on the property without the necessary plan approval from the City. This caused the Applicant to threaten to impose a fine on the Respondent…Eventually the City approved the respondent's plan and the applicant confirmed, in writing, that the Respondent could proceed with the construction on the property'.

[24] In reply, Mr. Syfret stated that prior to September 2016, relaxation applications were handled by requests per e-mail and a site inspection, with the plan, on the relevant erf, with the architect. He averred that the respondent should have proactively applied for an amendment of his plans before commencing the casting of the first floor slab, as required by the architectural guidelines and rules.

[25] Mr. Syfret referred to the architectural guidelines of November 2008, which according to him, are the last 'City certified architectural guidelines' specifically clause 7.2.2 which provides that:

> 'Designers are expected to respect view lines of neighbours where roofs will block views. The association will enforce the use of flat roofs where this will assist in keeping view lines open. Top floors will have their FFL to highest point of roof restricted to 3.5 metres.'

[26] Mr. Syfret annexed 'Draft Architectural Guidelines for Phase 9' to his affidavit. He describes them as being identical to the 2016 guidelines. Clause 7.2.2 of the 2008 guidelines provides that:

> 'No portion of any building will be higher than 7.5m above the natural level at that point. **Note:** Natural Ground Levels (NGL) are considered as the levels documented on the current Site Development Plan at the time of the sale of the Erf.
> **<u>Note</u>:** The Association may, on application, approve a departure from its above requirement where a difficult sloping site requires a special relaxation.'

[27] Mr. Syfret acknowledged that the previous Estate architect approved the house with the roof at the level that exceeded the height restriction, and that he only became aware thereof when the height certificate was sent to him.

[28] It is not clear from the record when the building reached roof height. The firm constructing the roof slab, Quickslab Precast Concrete Decking, in an email dated 4 May 2017, informed the respondent's contractor, Mr. Tony Di Leva (Mr. Di Leva), that the depth of a reinforced concrete support beam above the entertainment area had to be increased to keep within safety factors. This resulted in an increase in the height of a small portion of the northwest corner of the flat concrete roof.

[29] Mr. Di Leva liaised with the applicant's on-site engineer, Mr. Syfret, and held numerous site meetings with him regarding the increase, in the belief that it remained in accordance with the 2016 Architectural Rules.

[30] On 20 March 2017, the applicant requested that the respondent submit a height certificate for the completed dwelling. Mr. Di Leva submitted the requested certificate on 29 March 2017. Shortly thereafter, on 4 May 2017, Mr. Orlandi advised the respondent of the increase in beam depth to 800mm.

[31] According to the evidence of the respondent, Mr. Di Leva attempted on a number of occasions to explain to Mr. Syfret that he had used the natural gradient height line,[9] on which basis the average roof height was 65mm below the applicable restriction,[10] but Mr. Syfret insisted that the NGL be used and directed the respondent to apply for relaxation of the requirement in clause 14.3.[11]

[32] Acting on such direction, the respondent applied for relaxation of the height requirement for the already-built roof, including rider plans and a photograph of the completed corner, which showed that a small portion of the roof (according to the respondent, 6.76% of the entire roof area on the furthest northwest corner exceeds the vertical line by 375mm). An updated height certificate, together with an NGL survey map, was submitted to the applicant on 3 May 2017.

[33] The respondent's immediate neighbour, Mr. Waseem Pillay, the owner of Erf 2[...]2 (Mr. Pillay), inspected the respondent's approved plans before designing his own house so as to minimise its impact upon him.

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[9] That is, directly below the midpoint between roof slab corners.

[10] As appears from the report of land surveyor Jacques Rossouw of Cape Geomatics, annexed to the respondent's answering affidavit.

[11] Clause 14.3 of the 2016 Architectural Rules permitted use of either the Natural Ground Level or the grade line.

[34] In a letter dated 26 May 2017, Mr. Pillay objected to the issue of a height certificate to the respondent, recording that the increased height directly impacted his view and the value of his property. He averred that had he known the dwelling would be 375mm higher than provided for in the respondent's approved plans, he would have designed his own house accordingly. Another one of the respondent's neighbours, Mr. Sardine, by contrast, consented to the relaxation.

[35] The respondent, while admitting that a small portion of the roof exceeds the maximum height restriction by 375mm, asserts that this does not impair the view of any other property on the Estate.

[36] Construction of the respondent's house was completed on 26 June 2017. On 5 July 2017, the applicant informed the respondent that it would not issue him an occupancy certificate, by implication refusing his request for a relaxation (by 375mm) of the height restriction applicable within the Estate.

[37] The Constitution was amended for a second time in August 2017 and, on 18 September 2017, the applicant advised the respondent that it had resolved to compile a policy for the amendment of height restrictions. On 20 September 2017, the respondent applied to the City for relaxation of the height restriction, Mr. Pillay being invited to make representations.

[38] The City's official conducted an *in loco* inspection at Mr. Pillay's house on 8 November 2017, in the presence of, among others, the other City officials and Mr. Syfret. The City's Building Inspector, Mr. Claude Muller, confirmed

that Mr. Pillay's view was unobstructed and that the small area in question had no impact on his property, which the applicant does not gainsay.

[39] The applicant only enacted a Height Relaxation Policy on 22 November 2017.

[40] On 30 November 2017, the applicant's committee resolved not to issue the respondent an occupancy certificate. On the same day, the City issued him a temporary occupancy certificate. On 1 December 2017, the respondent informed the applicant that he would take occupation that month. In response, the applicant informed him on 15 February 2018 that should he do so without the requisite occupancy certificate, it would impose a fine of R700 per day.

[41] On 12 March 2018, Mr. Orlandi wrote to the City on the applicant's behalf, strongly objecting to it entertaining the application without the applicant's notification, recording that no application for relaxation had been received from the respondent in terms of the applicable rule, and accusing the City of acting unlawfully in accepting drawings before they had been endorsed by the applicant's committee. Mr. Syfret requested that the City reject the application and threatened legal action should it fail to do so.

[42] The applicant's opposition was to no avail. The City's Municipal Planning Tribunal (MPT) approved the respondent's application for amendment of the height restriction on 16 April 2018. Mr. Pillay's subsequent appeal was dismissed by the City on 2 August 2018, and on 4 September 2018 the City issued the respondent a final occupation certificate.

[43] On 25 April 2019, the applicant adopted the 2019 Conduct Rules (the 2019 Conduct Rules),[12] which post-date both the approval of the respondent's plans and the construction of his dwelling by some years, and which post-date his occupation of the dwelling in December 2017 by approximately sixteen months.

[44] The demolition application was instituted on 1 October 2019. Shortly thereafter, on 11 October 2019, the respondent's attorney, Mr. Ahmen, proposed to the applicant's attorney, Mr. Graham, that the matter be referred to mediation, and requested an inspection *in loco* of Mr. Pillay's property. These requests were, for reasons that do not appear from the record, declined.

[45] In a letter dated 5 August 2019, the respondent's attorney of record, Mr. Max Ahmen of Ahmen and Hamman Attorneys (Mr. Ahmen) raised an allegation of capricious and discriminatory decision-making on the part of the applicant, recording that between 8 August 2017 and 24 July 2018 the applicant had approved numerous applications for relaxation of the Architectural Rules, in some cases before, during and after construction, without any instruction to demolish.[13] In the same letter, on the respondent's behalf, Mr. Ahmen withdrew the earlier contention that the City was entitled to override the provisions of the Constitution.

[46] On 17 August 2021, after the applicant delivered its replying affidavit, it invited the respondent again to submit an application for the approval of new building plans.

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[12] Annexed to its founding affidavit as "BE3".

[13] Copies of the relevant minutes of meetings of the applicant were annexed to the respondent's answering affidavit.

[47] In an affidavit by Mr. Sean Stuttaford, the chairman of the managing committee, deposed to on 21 December 2023, it appears that the demolition application was set down for argument before Nuku J on 25 August 2021. After considering what is described as 'some argument', Nuku J postponed the application *sine die* for the respondent to enter into discussions with Mr. Pillay regarding his objection to endeavour to resolve the impasse, and to formally apply for an amendment to the approved building plans with applicant, hopefully with the approval of Mr. Pillay.

[48] On 13 October 2021, the respondent submitted a formal application to the applicant for relaxation of the height restriction. The applicant approved that application subject to the respondent obtaining Mr. Pillay's consent and paying certain fines.

[49] The respondent appealed only the aspect of the decision that related to the payment of certain fines. The applicant upheld the appeal on 14 February 2022, granting relaxation subject only to Mr. Pillay's consent being obtained. On 30 May 2022, the applicant instituted the penalties application.

[50] On 13 January 2026, Mr. Ilarion Orlandi, the portfolio manager for the applicant (Mr. Orlandi), deposed to an affidavit stating that during the course of preparation of the applicant's heads of argument in this matter, it became evident that the incorrect 2019 Conduct Rules had been annexed to the founding affidavit. He annexed the 2016 Conduct Rules which he stated is, in relevant part, identical to the 2019 Conduct Rules, in particular clause 2.5.6 which, in both documents, provides that:

> ‘A fine of R700,00 per day will be issued until occupancy clearance certificate is issued by the COMMITTEE if the dwelling was occupied.’

[51] Mr. Orlandi further attached a copy of the minutes of the Committee Meeting of the applicant held on 16 February 2016 at which the 2016 Conduct Rules were formally adopted. He sought leave for this further affidavit to be admitted.’

[52] The respondent opposed the filing of this further affidavit. For reasons set out below, the affidavit does little to assist in the determination of the matter. Inasmuch as it does place the correct version of the 2016 Conduct Rules before the court, it is admitted. I pause to mention that it could not however only have come to the applicant’s attention that the incorrect document was annexed during the course of preparation of its heads of argument, as this oversight was pointedly raised by the respondent in its answering affidavit, deposed to on 6 July 2020.

The applicant’s submissions

[53] I turn now to consider the submissions advanced on behalf of the applicant in both the demolition and the penalties applications.

[54] In the demolition application, the applicant’s claim is one for specific performance, in accordance with the well-established principle that a party to a binding agreement who is ready and willing to perform his own obligations is prima facie entitled to demand performance of the other party’s reciprocal obligations.

[55] At the outset, it bears mentioning that Mr. De Wet fairly conceded that there is no precedent for demolition at the behest of the applicant in circumstances such as these, particularly where the City granted a deviation, approved the respondent's plans, and issued temporary and final occupancy certificates.

[56] The applicant, however, emphasised that when the respondent chose to build his house while simply ignoring the obligations imposed on him by the 2016 Conduct Rules and Architectural Rules, including seeking the views of his neighbour and building only in accordance with approved plans, he did so at his peril.

[57] Regarding the exercise of the court's discretion, the applicant highlighted that the applicable case law deals with where the party seeking enforcement has the option of claiming damages, and that the applicant does not have such an option available to it as it is not suffering monetary damages. It contended that the respondent's position is entirely self-created, as he knew when the ground floor was built that his plans were not compliant, and should have engaged with the Estate architect before proceeding.

[58] The applicant placed emphasis on the fact that by purchasing a property in the Estate, the respondent voluntarily submitted to the applicant's rules, citing the following passage by Ponnan JA in *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others* (*Mount Edgecombe)*:[14]

[14] *Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others* [2019] ZASCA 30; 2019 (4) SA 471 (SCA) (*Mount Edgecombe)*.

> 'When the respondents chose to purchase property within the estate and become members of this Association, they agreed to be bound by its rules. The relationship between the Association and the respondents is thus contractual in nature. The conduct rules, and the restrictions imposed by them, are private ones, entered into voluntarily when an owner elects to buy property within the estate. By agreement, the owners of property within the estate acknowledge that they and their invitees are only entitled to use the roads laid out within the estate subject to the conduct rules.'[15]

[59] Over a century ago, in *Farmers' Co-operative Society v Berry,*[16] Innes JA held that the right to specific performance is beyond doubt, subject only to the court's discretion and save for where performance is impossible, and that the election whether to claim performance or damages lies with the injured party, subject to such discretion.

[60] The court's discretion must, of course, be exercised judicially. It is not circumscribed by any fixed rules, and each case must be judged according to its own facts and circumstances.[17]

[61] In *Ethekwini Municipality v Cooperativa Muratori and Cementisti - CMC di Ravenna Societa Cooperativa,*[18] the Supreme Court of Appeal (the SCA) affirmed that in deciding whether to order specific performance, the court has a true or strict discretion, that is a choice between permissible alternatives, and that specific performance will not be granted where compliance with the order will be impossible to enforce,[19] will be unduly onerous and lead to undue

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[15] Id para 19.
[16] *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343.
[17] *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) (*Haynes)* at 378G; as well as *Benson v SA Mutual Life Assurance Society* [1985] ZASCA 114;1986 (1) SA 776 (A) at 782F-783C.
[18] *Ethekwini Municipality v Cooperativa Muratori and Cementisti - CMC di Ravenna Societa Cooperative* [2023] ZASCA 95; 2023 (6) SA 384 (SCA) paras 37 and 38.
[19] *Murray & Roberts Ltd v Alstom S&E Africa (Pty) Ltd* [2019] ZAGPJHC 300; 2020 (1) SA 204 (GJ) para 12.

hardship or where the order may lead to a lengthy dispute as to what its obligations are.[20]

[62] On the issue of undue hardship, the applicant contended that as the cost which the respondent would have to incur to comply with his approved plans is less than 20% of the value of his property, and the fact that he is clearly a man of means who owns three properties in the Estate, ordering him to perform would not operate unduly harshly against him.

[63] Turning now to the applicant's submissions advanced in the penalties application, Mr. Brink on behalf of the applicant submitted that any uncertainty as to retrospectivity of the 2016 Conduct Rules had been resolved by the affidavit of Mr. Orlandi, and that, properly interpreted, clause 2.5.6 of the 2016 Conduct Rules sanctions the imposition of the penalty, irrespective of the respondent's possession of a City occupation certificate, as clause 2.5.5 subordinates the City's certificate to that of the applicant's.

[64] Mr. Brink contended further that clauses 2.5.7 to 2.5.9 demonstrate that the certification regime is concerned only with the applicant's own requirements.

[65] The applicant's stance was that section 62(1)(*b*)(i) of the By-law does not apply to its rules, as section 142 thereof preserved the Constitution approved under LUPO prior to the By-law's commencement, and that any other interpretation may be 'constitutionally suspect'.

[66] On the question of whether the penalties imposed by the applicant fall to be reduced under section 3 of the Conventional Penalties Act 15 of 1962 (the Penalties Act), the applicant submitted that the respondent's own conduct, in particular that he did not apply to regularise the building work until directed to do so by Nuku J, and that he came to court with unclean hands, rendered the penalty proportionate, and that this Court should have regard to the hardship said to have been suffered by Mr. Pillay and to the respondent's evident means.

The respondent's submissions

[67] In respect of the demolition application, the respondent resisted the relief sought on three bases. Firstly, that the deviation was authorised by a caveat in the approved building plans, which prioritised structural integrity over architectural design, and that the deviation, which was necessitated by a safety-related instruction from the structural engineer rather than any deliberate departure by the respondent, did not constitute a breach at all.

[68] Secondly, that the applicant had, in principle, approved the deviation subject only to Mr. Pillay's consent, as recorded in the minute of 3 March 2022, and that Mr. Pillay's failure to challenge the City's final decision approving the height relaxation and issuing the respondent with a final certificate of occupation, amounted to acquiescence in it.

[69] Thirdly, that this was an appropriate case for the exercise of this Court's discretion against specific performance, having regard to the minor and *de minimis* nature of the deviation, its structural origin, the City's approval of the

relaxation, a remedial cost exceeding R1,4 million, and Mr. Pillay's asserted obstructiveness.

[70] In respect of the penalties application, the respondent submitted that the 2019 Conduct Rules could not be invoked retrospectively to conduct predating their adoption in April 2019, and that on a proper construction of clauses 2.5.5 and 2.5.6 of the 2016 Conduct Rules, which the applicant ultimately sought to rely on, no penalty was exigible where a City occupation certificate had been obtained, as clause 2.5.5 expressly sanctions occupation on that basis and subordinates the applicant's own certificate to the City's.

[71] Moreover, the respondent contended that this was an appropriate case for the application of section 3 of the Penalties Act, the applicant having failed to establish any financial prejudice and the penalty claimed being grossly disproportionate to any prejudice shown.

[72] The respondent submitted further, an argument this Court considers logically anterior to those above, that the applicant's 2016 Architectural Rules were themselves unenforceable under section 62(1)(*b*)(i) of the By-law, being more restrictive than the DMS, and that section 142 of the By-law, properly construed, did not exempt the applicant from that provision merely because its Constitution had first been approved under LUPO, particularly since the 2016 Architectural Guidelines were adopted only after the By-law's commencement.

The validity of the Architectural Rules under the By-law

[73] Having concluded that, in my discretion the demolition application must fail, it is not strictly necessary to decide whether the 2016 Architectural Rules are valid. This issue was, however, fully argued and addressed in further written submissions delivered after the hearing. It is an issue of general importance in

my view, and it may fall to be determined should my decision not to order specific performance not survive scrutiny by a higher court. It is addressed on this alternative basis and does not go to the root of the reasons for the order I make in the demolition application.

[74] It bears mentioning that the applicant's rules by all accounts have been amended more than once, and the parties have not always been consistent regarding which version is relied upon.

[75] The applicant in its founding affidavit relied upon the 2019 Conduct Rules which it annexed. It is now common cause that those rules cannot govern conduct predating their adoption,[21] and the applicant does not contend they should operate retroactively. The applicant now relies on the 2016 Conduct Rules and the 2016 Architectural Rules, as stated in the January 2026 affidavit of Mr. Orlandi.

[76] The chronology of events is important. The respondent submitted his plans to the applicant on 8 September 2015. They were approved by Mr. Syfret on 21 October 2015 and by the applicant on 23 October 2015. Construction commenced shortly thereafter, the precise date is unclear.

[77] The 2016 Architectural Rules appear to have been adopted on 1 September 2016 and therefore cannot govern the initial approval of the respondent's plans by the applicant. It is self-evident that the power of an association to amend its rules from time to time binds members going forward.

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[21] On 25 April 2019.

[78] It follows that the rules governing the approval of the respondent's plans in October 2015 were the Architectural Guidelines adopted on 11 November 2008 (the 2008 guidelines).

[79] One of the confounding issues in this application is the unsatisfactory state of the papers, in particular with regard to the 2008 guidelines.

[80] Mr. Syfret describes the 2008 guidelines as the last guidelines certified by the City, and cites clause 7.2.2 firstly as providing that designers are to respect the view lines of neighbours where roofs will block views and elsewhere attributing a different provision to clause 7.2.2, namely that no portion of any building will be higher than 7.5 metres above the natural level at that point, and that NGLs are those documented on the Site Development Plan (SDP) at the time of sale of the erf. He furthermore states that the applicant may on application approve a departure from that requirement where a difficult sloping site requires a special relaxation.[22]

[81] These distinctions are significant, as they determine whether the question of validity arises at all. If the 2008 Guidelines restricted building heights to 7.5 metres, it would follow that the restriction upon which the applicant places reliance was not introduced by the 2016 Architectural Rules but was contained in an instrument in force before the commencement of the By-law.

[82] It bears mentioning that the applicant's complaint is not that the plans ought not to have been approved, but rather that the respondent did not build in

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[22] In terms of Draft Architectural Guidelines for Phase 9, which Mr. Syfret describes as 'identical' to the 2016 Guidelines.

accordance with the approved plans, and that the completed roof exceeds the restriction in clause 14.3 of the 2016 Architectural Rules by 375 mm.

[83] The evidence regarding when the building reached a height which exceeded the height restriction threshold is also unsatisfactory. On a conspectus of the evidence, it appears that construction commenced in 2015 (shortly after the plans were approved) and that the roof slab was built only in 2017, that is after the 2016 Architectural Rules were in effect.

[84] The applicant requested a height certificate for the completed dwelling on 20 March 2017. The certificate was delivered by Mr. Di Leva on 29 March 2017. An updated height certificate together with a NGL survey was delivered on 3 May 2017 and construction was completed on 26 June 2017.

[85] It appears on the evidence before me that whatever the precise date upon which the roof slab was cast, it cannot have preceded the commencement of the 2016 Architectural Rules on 1 September 2016.

[86] Arising from the foregoing, the rules appear to govern the conduct by the respondent of which the applicant complains, and it is upon clause 14.3 of those rules that the applicant's case is founded. It is therefore the validity of the 2016 Architectural Rules which falls to be considered.

[87] Section 62(1)(*b*)(i) of the By-law provides that the constitution of an owners' association may provide for the control, administration and management of design guidelines for buildings and landscaping on land units arising from a subdivision, provided that design guidelines may not introduce

more restrictive development rules or land uses than provided in the development management scheme.

[88] The restriction imposed by the guideline must be considered together with and compared to the parameter which the DMS permits for the land unit or property in question. The design guideline restriction is common cause. Clause 14.3 of the 2016 Architectural Rules provides that no portion of any building will be higher than 7.5 metres above the natural ground level at any point, measured directly vertical to the higher point, or alternatively the grade line.

[89] The second is supplied by the By-law itself. The property falls within Single Residential Zoning 1. The development management scheme, which is Schedule 3 to the By-law,[23] fixes the maximum height of a building in that zoning by reference to the area of the land unit, measured from base level to the wall plate and to the top of the roof.[24] For a land unit of the extent of the property, the maximum height to the top of the roof is 11 metres.[25]

[90] The comparison is therefore between a Scheme which permits 11 metres to the top of the roof above base level, and a guideline which permits 7.5 metres to any point of the building above natural ground level or the grade line.[26] The difference between the two figures is 3.5 metres, and nothing on the record

[23] Section 22 of the By-law: the DMS is the scheme in Schedule 3.

[24] Item 22(c) of Schedule 3 to the By-law, read with the table of floor factor, floor space, height and building lines in Single Residential Zoning 1. [Wording to be confirmed against the gazetted Schedule. The datum was expressed as base level at the material time and was substituted by existing ground level with effect from 3 February 2020.]

[25] See also the summary of zonings and development rules in Chapter 4 of the Scheme. The operative provision is item 22(c). The summary was substituted with effect from 1 July 2016 and from 3 February 2020 and was deleted and replaced with effect from 1 October 2025.

[26] Two of the three variables differ. The datum is not the same, base level and natural ground level being distinct measures; and the point at which the measurement ends is not the same, the Scheme measuring to the top of the roof and the guideline to any point of the building. The comparison is not one of like with like, but nor is the margin between the two narrow or negligible.

suggests that a difference of that order is attributable to the datum or to the measuring point rather than to the substance of the restriction. Indeed, the guideline is the stricter in method as well as in magnitude, since it constrains every point of the building rather than the highest point only.

[91] The 2016 Architectural Rules accordingly introduce a more restrictive development rule than that provided in the DMS and appear to fall within the prohibition in the proviso to section 62(1)(*b*)(i).

[92] The applicant relies on section 142, which preserves an approval in force under a law repealed by the Land Use Planning Act, *in casu* LUPO, and regards it as having been issued in accordance with the By-law subject to the conditions under which it was issued.[27] Its Constitution having been approved under LUPO, it contends that section 62(1)(*b*)(i) has no application to it, and that any other interpretation would be constitutionally suspect.

[93] I am not persuaded that this is indeed correct. Section 61(10) provides that a homeowners' association established in terms of a previous planning law and existing at the commencement of the By-law is deemed to be an owners' association established in terms of it.[28] Sections 2(1) and 2(2) provide that the By-law applies to all land within the City and binds every owner and user of land.

[94] Historical and newly-established associations are accordingly placed on an equal footing going forward. In the present matter, the respondent became a

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[27] Section 142(1). The subsection was substituted by the Municipal Planning Amendment By-law, 2025 with effect from 1 October 2025.

[28] Section 61(10). 'Planning law' is defined in section 1 as the Townships Ordinance 33 of 1934 or LUPO, whichever is applicable.

member of the applicant upon registration of transfer on 23 June 2015, a little over a week before the By-law took effect on 1 July 2015. However, the rule which he is said to have breached was made some fourteen months after the By-law took effect.

[95] Section 142 is a savings provision preserving the continued force of a pre-existing approval. In my considered view, it does not authorise an association thereafter to amend its rules and adopt new and more restrictive guidelines, as the applicant did in 2016, free of the limits which the By-law had by then imposed on such rule-making.

[96] Mr. Brink submitted that section 62(4), which makes certification a condition of the effectiveness of an amendment concerning a section 62(1)(*a*) matter, is inapplicable because the 2016 amendments concerned the conduct rules rather than the Constitution itself. The submission is correct as far as it goes, but it does not assist the applicant.

[97] The certification regime in the By-law is limited. Section 62(2) obliges the City to certify that a constitution complies with subsection (1)(*a*) only, and section 62(4) makes certification a condition of effectiveness only for an amendment concerning a subsection (1)(*a*) matter.[29] Design guidelines appear in subsection (1)(*b*). The By-law therefore does not provide for certification for design guidelines at all. It follows that they are neither certified nor certifiable.

[98] It follows that nothing turns, for the purposes of section 62(1)(*b*)(i), upon the averment by the applicant that its 2016 Architectural Guidelines have been

[29] Sections 62(2) and 62(4) of the By-law.

submitted to the City but not yet certified, nor upon Mr. Syfret's description of the 2008 guidelines as the last City-certified guidelines.

[99] The prohibition operates upon the content of a guideline, whether or not the rules in which it is set out are certified, certifiable or neither. The absence of the City's approval is, however, of potential significance in another regard, to which I now turn.

[100] Clause 2 of the Constitution defines the Architectural Rules, previously known as the Architectural Guidelines, as those prescribing the architectural requirements for dwellings in the Estate, as approved by the City and as amended from time to time.[30]

[101] The obligation which clause 5.2 imposes upon a member upon registration of ownership is an obligation to comply with the Constitution and the Rules, and the Rules are defined by reference to the same clause.[31]

[102] The question which then arises is whether a member is obliged to observe rules imposed by the applicant which the City has not approved or certified. Mr. Syfret's evidence is that the guidelines of November 2008 are the last which the City certified, and the applicant averred that the 2016 Architectural Guidelines were submitted for certification but have not been certified.

[103] On that evidence, it would be open to the respondent to contend that the 2016 Architectural Rules are not Architectural Rules as the applicant's own

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[30] Clause 2 of the Constitution. 'Rules' are defined in the same clause as the Conduct Rules, Building Contractor Rules, Architectural Rules and such other sets of rules as the Association may determine from time to time.
[31] Clause 5.2 of the Constitution.

Constitution defines them, and that clause 5.2 does not attach to them at all. That contention, were it sound, would dispose of the applicant's reliance on clause 14.3 without recourse to the By-law. This was not addressed in argument and I accordingly take it no further.

[104] The respondent's argument encounters a difficulty of its own, arising from the definitions. 'Development rule' is defined in the By-law as a provision, restriction or condition in the DMS which sets out the permissible extent of the land use in terms of a zoning, and 'land use' by reference to the same Scheme.[32] Read with those definitions substituted, the proviso would forbid design guidelines from introducing provisions of the Scheme, which a private instrument could never do.

[105] The definitions are, however, prefaced by the words 'unless the context indicates otherwise', and in my view the context does so indicate. The proviso closes with 'than provided in the development management scheme'. This makes sense only if the proviso contemplates that a guideline may contain a restriction of the same character as a development rule, and forbids its being stricter than that of the Scheme. A construction which deprives express words of their function is one which the unitary approach propounded in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*[33] counsels against.

[106] I am conscious of the fact that design codes in private estates are commonly stricter than the DMS. That is frequently their purpose. If the proviso means what I have suggested that it means, the private rules imposed by Home

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[32] Section 1 of the By-law, definitions of 'development rule' and 'land use'.
[33] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) paras 18 and 19.

Owners' Associations (HOAs) are, to the extent that they are more restrictive than the DMS, potentially unenforceable.

[107] This consequence has a far-reaching effect, but it is the consequence of a choice which the City appears to have made deliberately. Municipal planning is an exclusive municipal executive competence under section 156(1) of the Constitution read with Part B of Schedule 4, which the City exercised through the promulgation of the By-law.

[108] The By-law includes the Scheme, which fixes the development parameters for every land unit in the City. An interpretation permitting a private association to impose, by amendment of its own rules, a more restrictive land-use regime than the Scheme would substantially undermine that scheme of municipal control.

[109] Another municipality in this Province has expressly provided that design guidelines may introduce more restrictive development rules than the zoning scheme.[34] That the City chose the opposite formulation is, in my view, significant.

[110] The applicant relied heavily on the SCA decision of *Mount Edgecombe*, and in particular on the finding that it cannot be said that ordaining a lower speed limit within an estate than that prescribed by national legislation goes beyond promoting, advancing and protecting the interests of members or is unreasonable, and that there was no conflict between the National Road Traffic Act 93 of 1996 (the NRTA) and the association's rules because the consensual

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[34] Stellenbosch Municipal Land Use Planning By-law, 2022, which provides that design guidelines may introduce more restrictive development rules than the rules provided for in the zoning scheme. This is of course a more recent By-law of a different municipality and carries no interpretive authority over the By-law.

limit of 40 km/h was lower than the statutory limit of 60 km/h, the mischief at which the NRTA was aimed being achieved *a fortiori*.[35]

[111] The argument is that the present case is the same. A stricter private rule regarding the maximum building height in the Estate serves the purpose of the public one and cannot conflict with it. This is a persuasive submission, which I now turn to consider.

[112] To my mind, the answer lies in the difference between the two statutory schemes. The NRTA does not regulate homeowners' associations. It fixes a public speed limit and says nothing whatsoever about the content of an estate's conduct rules. To my mind, that is why the SCA held that the rules had no public law content, that the association was not purporting to carry out any function under the NRTA, and that the position might have been different had it sought to appropriate powers thereunder.[36]

[113] The By-law stands on a different footing. Sections 61, 62 and 63 regulate owners' associations as such. Section 61(10) deems a pre-existing association to have been established under the By-law. Section 62(1) prescribes what its constitution must and may provide for. Sections 62(2) and 62(4) subject part of that content to municipal certification. Lastly, section 62(7) obliges the association to enforce its constitution.

[114] The City has thus expressly encroached upon what an estate's rules may contain. An association making design guidelines under the By-law is not, as in

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[35] *Mount Edgecombe* paras 22 and 25.

[36] Id paras 21 and 25.

Mount Edgecombe, operating in a sphere which the legislation leaves untouched.

[115] In my view and for these reasons, this matter is clearly distinguishable from *Mount Edgecombe.* Section 62(1)(*b*)(i) forecloses it by expressly providing that the association's design guidelines may not introduce more restrictive development rules than the Scheme. [37]

[116] There remains the question of consequence, which was not addressed in argument. It bears emphasising that as this issue is not ultimately dispositive of the order which I intend making, the parties will not be prejudiced by not having an opportunity to make submissions in this regard.

[117] A contravention of a statutory prohibition does not invariably render void that which contravenes it. In *Cool Ideas 1186 CC v Hubbard*,[38] the Constitutional Court held that the building contract there in question remained valid, the prohibitions being directed not at the validity of construction contracts but at the entitlement of an unregistered builder to receive payment.[39] The enquiry is directed not at whether a prohibition exists but at what it is aimed at, determined purposively and in the context of the instrument as a whole.

[118] Factors which in my view weigh against declaring the rules in question a nullity are, firstly, that section 62(1)(*b*)(i) does not create an offence, nor does it make an express provision as to invalidity.[40] Secondly, a declaration that the

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[37] Id para 28, substituted order.
[38] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC) (*Cool Ideas).*
[39] Id at paras 47 and 51, per Majiedt AJ. The contrary view of Jafta J at para 102 was that of a judgment concurring in the order only.
[40] Id paras 53, 54, 57, 58 and 60.

restriction is void would operate beyond these parties and affect the other 297 members of the Estate, none of whom is before me, nor is the City.

[119] Section 63 is triggered only by a failure to meet an obligation under section 61(5)(*d*) or section 62(1)(*a*)(ii), or by an association ceasing to function effectively.[41] Neither appears to contemplate the adoption of an over-restrictive design guideline. There is no provision for certification for a subsection (1)*(b)* matter, and no offence is created.

[120] On a purely regulatory reading, the proviso would carry no sanction whatsoever and would be reduced to exhortation.

[121] The course which accommodates both considerations is to approach the matter as one of enforcement rather than of validity. In *Cool Ideas,* the main judgment, having accepted the prohibition, did not treat the consequence as automatic. The apex court held that it will often be contrary to public policy for a court to enforce an award at odds with a statutory prohibition, but that it will not always be so, and that the force of the prohibition must be weighed against countervailing considerations.[42]

[122] That is the enquiry which *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[43] enjoins courts to undertake: firstly, whether the term itself is so unreasonable as to be contrary to public policy; and

[41] Section 63 of the By-law.
[42] *Cool Ideas* paras 57 and 58.
[43] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC) (*Beadica).*

secondly, whether the term being unobjectionable, its enforcement in the particular circumstances would be contrary to public policy.[44]

[123] I do not find it necessary to strike down the restriction, nor do I intend doing so. On a consideration of the evidence and all the relevant considerations in this matter, I am of the view that it would be contrary to public policy for this Court to enforce, by an order for the demolition of part of a dwelling, a height restriction which section 62(1)(*b*)(i) of the By-law appears to forbid an owners' association to introduce.

[124] Public policy is informed by the values of the Constitution, and the value engaged here is the exclusive function of municipal planning vesting in the City. Enforcement would give the imprimatur of this Court to conduct which the City, acting within its exclusive competence, has legislated against. My conclusion in this regard is confined to the enforcement of the restriction against the respondent in these proceedings. I do not make any finding whether the 2008 Architectural Guidelines, had the applicant relied upon them, would have been subject to section 62(1)(*b*)(i), nor upon the question raised but not decided regarding the effect of the rules not having been approved or certified by the City, neither having been argued before me.

The enforceability of the rules notwithstanding municipal approval

[125] Assuming the 2016 Architectural Rules to be valid, I turn to whether the City's approval of the relaxation, and the issue of final occupation certification, answers the applicant's claim that the respondent remains in breach of his obligations to it.

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[44] *Beadica* paras 36, 37 and 58, applying *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC).

[126] As a starting premise, I accept that the applicant's rules are contractually binding upon the respondent and are, in principle, enforceable independently of, and irrespective of, any relaxation granted by the City. The relationship between a HOA and an owner of property within the estate it manages is contractual in nature,[45] and by electing to purchase property within the Estate the respondent voluntarily submitted to the applicant's Constitution and rules, including those governing height, and agreed to adhere to the applicant's architectural and other guidelines.[46]

[127] The SCA in *Mount Edgecombe* held that once it is accepted that such rules are private ones, an argument that the association is thereby usurping the functions of the recognised authorities, or contravening the provisions of the relevant statute, cannot be sustained.[47]

[128] It follows that the fact that the City has approved the amendment application and issued a final occupation certificate to the respondent does not override his independent contractual obligation to the applicant, whose rules may, and frequently do, go further than what the City requires. Indeed, this is generally the very basis upon which owners in an estate bind themselves together. An owner may accordingly comply with the City's requirements and yet fall foul of the applicant's own, more stringent, rules.

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[45] GJ Pienaar and JG Horn *Sectional Titles and Other Fragmented Property Schemes* 2 ed (2020) at 516 and the authorities there cited.

[46] Pienaar and Horn at 51: The directors or trustees of a homeowners' association are usually empowered to make rules, regulations and architectural guidelines binding on all members.

[47] *Mount Edgecombe* para 21. The reference there is to a different statute, but the principle applies analogously.

[129] Compliance with the former is not, by itself, an answer to the applicant's claim. Section 39(2)(*a*) of the By-law expressly provides that an approval under the By-law does not release anyone from the duty to comply with a requirement in the constitution of an owners' association. That is express support for the conclusion reached here.

[130] This much was, in the end, common cause, the respondent having withdrawn, through Mr. Ahmen's letter of 5 August 2019, the earlier contention that the City was entitled to override the Constitution, subject always, of course, to the anterior question of validity addressed above.

[131] The applicant's claim is one for specific performance in the form of an order compelling the respondent to demolish a portion of the building constructed by him which exceeds the approved plans and the height restriction in the 2016 Architectural Rules. It is common cause that the height of the building does not comply with the approved plans. The applicant contends that not merely a corner of the roof, but the entire roof slab, exceeds the restriction by 375mm.

[132] The applicant's claim rests on the well-established principle that a party to a binding agreement who is ready and willing to perform his own obligations is prima facie entitled to demand performance of the other party's reciprocal obligations. This position was confirmed by the Appellate Division in *Benson v SA Mutual Life Assurance Society*,[48] where the court held that although a court will, as far as possible, give effect to a plaintiff's election to claim specific performance, it has a discretion in a fitting case to refuse to order it and leave the plaintiff to claim and prove damages.

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[48] *Benson v SA Mutual Life Assurance Society* [1985] ZASCA 114; [1986] 2 All SA 30 (A).

[133] That discretion, although it must be exercised judicially, is not confined to specific types of cases, nor circumscribed by rigid rules, and each case must be judged in the light of its own circumstances.[49] This passage has been cited with approval in this division in the context of determining whether it would be inequitable to hold a party to strict performance of his contract.[50]

[134] Specific performance will not, however, be granted where compliance with an order will be impossible to enforce,[51] or will be unduly onerous and lead to undue hardship, or where the order may generate a lengthy dispute as to the extent of the obligation it imposes.

[135] Of further relevance is the fact that the demolition sought, properly characterised, is a contractual or private-law remedy rather than a statutory remedy of the kind contemplated in section 21 of the National Building Regulations and Building Standards Act 103 of 1977 (the National Building Act).

[136] This Court is accordingly not compelled to order demolition once non-compliance is established but retains a true discretion as to the form and extent of relief, including refusing demolition altogether. It is notable that the applicant did not suggest otherwise, nor did it ask in the alternative for a lesser remedy. It seeks an order of demolition of the entire roof slab.

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[49] Id at 782D–F, where Hefer JA referred to *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) and cited what De Villiers AJA had said at 378 of that decision.
[50] *Santos Professional Football Club (Pty) Ltd v Igesund and Another* 2003 (5) SA 73 (C) at 80–81.
[51] *Murray & Roberts Ltd v Alstom S&E Africa (Pty) Ltd* [2019] ZAGPJHC 300; 2020 (1) SA 204 (GJ) para 12.

[137] The SCA in *BSB International Link CC v Readam South Africa (Pty) Ltd and Another*[52] aptly described the remedy of demolition as 'draconian'.[53] That matter was not decided under section 21 of the National Building Act. It was litigated as a private, neighbour-law claim, the Court holding that section 21 had no bearing on it. The Court said:

> 'In a case such as this a court is possessed of a broad general discretion to be exercised after affording due consideration to all the relevant circumstances. Obviously, before granting a partial demolition order a court would have to be satisfied that the illegality complained of is capable of being addressed by such an order and that it is practically possible to do so. Depending on the circumstances, this may require evidence to be given by experts such as engineers and architects to ensure that the structural integrity and safety of the building are not compromised when partially demolished.'[54]

[138] There is no expert evidence before me regarding the effect a partial or total demolition of the roof would have on the structural integrity and safety of the respondent's dwelling, which I consider a relevant factor in the exercise of my discretion. Further relevant considerations include the degree and cause of non-compliance, any disproportion between the cost of compliance and the harm sought to be averted, the conduct of the parties, including conduct inconsistent with enforcement, delay, and whether an alternative remedy such as damages would adequately vindicate the applicant's rights.

[139] A highly relevant factor, pertaining to the City's approval of the height relaxation, is that neither the applicant nor Mr. Pillay took any step,

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[52] *BSB International Link CC v Readam South Africa (Pty) Ltd and Another* [2016] ZASCA 58; 2016 (4) SA 83 (SCA) (*BSB*).
[53] *BSB* para 27.
[54] *BSB* para 29.

notwithstanding their evident unwillingness to consent, to set aside the City's contrary and final decision.

[140] The applicant contends that not merely a corner of the roof, but the entire roof slab, exceeds the restriction by 375mm. The respondent's evidence is that the excess affects a small portion of the roof at the furthest north-western corner, constituting 6,76 per cent of the entire roof area, and that it arose from the increase in the depth of a single reinforced concrete support beam above the entertainment area.

[141] The respondent's evidence is supported by the report of the land surveyor annexed to his answering affidavit and by the photograph of the completed corner which accompanied his application for relaxation. This material dispute cannot be resolved on these papers. It is accordingly the respondent's version which I am bound to accept, and it is upon that version that the deviation falls to be characterised.

[142] The same approach governs several of the further facts upon which I rely. The respondent's clear and unambiguous evidence is that the increase in the depth of the beam was required by the firm constructing the roof slab in order to keep within safety factors and was not a deliberate departure by him from his approved plans. This appears from the email of 4 May 2017.

[143] The respondent averred that Mr. Di Leva liaised with Mr. Syfret and held site meetings with him concerning the increase, and that the cost of the remedial work exceeds R1,4 million. No contrary valuation or estimate was put up by the applicant.

[144] A further material fact which emerged from the respondent's evidence is that the increased height does not impair the view or the use and enjoyment of any other property in the Estate. This is fortified by the finding of the City's building inspector, Mr. Muller, following the inspection *in loco* of 8 November 2017, which the applicant does not gainsay.

[145] The applicant enjoined the court, in addition, to have regard to the hardship said to have been suffered by Mr. Pillay. Mr. Pillay is not a party to these proceedings. What is before me is his letter of objection of 26 May 2017 and the fact of his unsuccessful appeal to the City. To the extent that the applicant's assertion of hardship goes beyond that material and is disputed by the respondent, it is not a matter upon which I am able to make a finding in the applicant's favour on motion.

[146] Having carefully considered the facts of this matter, and in particular that the deviation is so minor as to aptly be described as *de minimis*, that the respondent increased the height contrary to the approved plans on account of safety and structural integrity concerns rather than in blatant disregard of the applicant's rules, and the marked disproportion between the remedy sought and the harm it seeks to address, the remedial cost exceeding R1,4 million (now significantly more undoubtedly), I am not inclined to exercise my discretion in favour of ordering the demolition sought.

[147] A further relevant consideration is that the City approved the relaxation and dismissed Mr. Pillay's appeal. While I accept that this is not determinative of the contractual question between the parties, it is nonetheless a material

factor militating against the draconian remedy of demolition. It is further apposite that the applicant's own architectural committee resolved on appeal to approve the relaxation subject only to Mr. Pillay's consent, in which circumstances it hardly seems appropriate to impose the harshest sanction available.

[148] Finally, the applicant delayed in launching the demolition application until 2019, in respect of a house which, to its knowledge, had been occupied by the respondent since 2017. This too weighs against the order sought, even allowing for the applicant's efforts in the interim to resolve the dispute.

[149] I have considered the argument advanced on the applicant's behalf that the respondent's conduct ought not to be countenanced, in particular, that he provided an outdated height certificate, sought to by-pass the applicant by applying to the City directly, and that Mr. Pillay's consent was in fact never obtained, together with the submission that the respondent's position is entirely self-created, and the submission that this Court should not become 'supine and spineless in the face of a litigant who has defied his obligations'.[55] I am not persuaded, however, that these factors, properly weighed against the considerations set out above, justify the order sought, particularly where the applicant did not ask, in the alternative, for any lesser remedy.

[150] For these reasons, the demolition application must fail. There is no reason why costs should not follow the result.

Evaluation - the penalties application

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[55]See *Industrial & Mercantile Corporation v Anastassiou Brothers* 1973 (2) SA 601 (W) at 609.

[151] For purposes of the penalties application, it is undisputed that the respondent took occupation of the property during December 2017 without a certificate of occupancy having been issued by the applicant.

[152] Regarding the applicant's claim for outstanding levies, the respondent tendered payment in full of the arrear levies claimed a few days before the hearing. The applicant contends that it remains entitled to costs in respect of that relief.

[153] The applicant claims penalties levied against the respondent at the rate of R700 per day, amounting to R3 695 843,28, together with interest at 26% per annum, compounded and debited monthly in arrears to date of payment.[56] The penalty of R700 per day equates to approximately R21,000 per month, which is more than ten times the ordinary levy of R2,000 per month

[154] The applicant initially also sought payment of arrear levies, but the respondent tendered payment of the full amount outstanding a few days before the hearing. The applicant contends that it remains entitled to its costs in respect of that relief.

[155] The applicant relies on the powers conferred on its committee by clause 14 of the Constitution, which vests the management and administration of the applicant in the committee, empowered to exercise all the applicant's powers

[56] Calculated at 18 November 2025, the date on which the certificate of balance was signed by Mr Orlandi, the applicant's portfolio manager. The notice of motion claims the lesser sum of R1 229 226,63, the balance being sought under the rubric of further and/or alternative relief. The figures do not appear to tie up. 3 314 days at R700 is R2 319 800. Occupation from December 2017 to the date of the certificate of balance on 18 November 2025 is some 2 900 days. The composition of R3 695 843,28, and how much of it is interest is unclear. In terms of the notice of motion the applicant claims R1 229 226,63. An award of some three times the sum claimed will not ordinarily rest on a general prayer for alternative relief. Paragraph 115 presents the figure of about R21 000 a month as a compounding rate, whereas footnote 51 derives it from the daily penalty.

and, without limiting the generality of that power, to 'propose revisions to and enforce the Constitution and Rules' (clause 14.2).

[156] Clause 2.5.5 of the 2016 Conduct Rules provides: '[n]obody may move into a dwelling without an occupation certificate issued by the City of Cape Town. The City of Cape Town will not issue an occupation certificate unless the COMMITTEE has issued an occupancy clearance certificate which is to be handed in with all other documents required by the City of Cape Town'.

[157] Clause 2.5.6 provides that:

> 'A fine of R700,00 per day will be issued until an occupancy clearance certificate is issued by the COMMITTEE if the dwelling is occupied.'

[158] A materially identical clause 2.5.5 of the 2019 Conduct Rules was relied upon in the applicant's founding papers.

[159] The question that remains is whether clause 2.5.6 permits the imposition of the daily penalty notwithstanding the respondent's possession of a City occupation certificate. On the applicant's construction, the penalty is payable irrespective of the City certificate, for so long as the applicant's own clearance certificate has not been issued. On the respondent's construction, occupation on the strength of a City certificate is expressly sanctioned by clause 2.5.5, and the fine attaches only to occupation without one.

[160] On the applicant's construction the requirement in clause 2.5.5 that the City will not issue its certificate unless the committee has issued clearance makes the committee's certificate a precondition of the City's, with the result

that clause 2.5.6 ties the fine to the committee's certificate alone. That contention falls to be tested against the language, context and purpose of the clauses read together.

[161] This falls to be resolved on the well-known unitary approach to interpretation set out in *Endumeni*,[57] where Wallis JA held that interpretation is a single, integrated exercise. A court must consider the language of the provision, the context in which it appears, and its apparent purpose together from the outset. Courts no longer read the text in isolation first and only resort to context if ambiguity arises.

[162] As Mr. Bothma submitted, correctly in my view, the interpretive exercise requires this Court to determine whether, notwithstanding that occupation is permitted upon possession of a City occupation certificate, the applicant is nevertheless entitled to impose penalty levies on account of its own clearance certificate not having been issued.

[163] Applying the unitary approach, I prefer the respondent's construction. The opening sentence of clause 2.5.5 is the prohibitory statement: '[n]obody may move into a dwelling without an occupation certificate issued by the City of Cape Town'. The corollary of that prohibition is that occupation is permitted upon receipt of such a certificate.

[164] The fact that the applicant will not issue its own certificate does not detract from the permission thereby granted. This reading is borne out by context. In clause 2.5.5, the applicant subordinates its own certificate to that of the City, such that a member is not permitted to occupy a dwelling on the

[57] At paras 18 and 19.

strength of an HOA certificate alone, whereas occupation is explicitly sanctioned on the strength of a City certificate.

[165] It is also borne out on a purposive interpretation. The evident object of the clause is to avoid unlawful occupation of dwellings, and it must have been apparent to the drafters that a City occupation certificate is the relevant prerequisite for occupation.

[166] The applicant's contrary construction, that clause 2.5.6 applies irrespective of whether the City has issued a certificate, sits uneasily with that same subordination in clause 2.5.5 and would produce the unbusinesslike result that occupation lawfully sanctioned by the local authority nonetheless triggers an open-ended and, on the facts of this matter, very substantial and unlimited daily penalty.

[167] I have carefully considered the applicant's contextual argument, drawn from clauses 2.5.7 to 2.5.9 (dealing with external finishes and landscaping), that its issuing of occupation certificates addresses only its own requirements and is indifferent to the City's separate concerns. However, that argument does not in my view displace the correct and more contextually coherent reading of clause 2.5.5 itself.

[168] I am further of the view that the temporary certificate of 30 November 2017 meets the requirement imposed in terms of clause 2.5.5 for the period from the date the respondent took occupation to 4 September 2018. The final occupation certificate issued by the City on 4 September 2018 covers the balance of the period claimed. It follows that the respondent held an occupation

certificate issued by the City throughout the period in respect of which the penalty is claimed.

[169] The penalties application accordingly falls to be dismissed.

[170] Bearing in mind the jurisprudence of our appellate courts namely that, even if a single issue may dispose of a matter, it is desirable for a court to determine all of the issues before it, I shall consider the issue of whether the penalty, if exigible, would fall to be reduced in terms of section 3 of the Penalties Act, and if so, to what extent.[58]

[171] Section 1(1) of the Penalties Act provides that a stipulation whereby a person is, in respect of an act or omission in conflict with a contractual obligation, liable to pay a sum of money or to deliver or perform anything for the benefit of a creditor, either by way of penalty or as liquidated damages, shall be capable of being enforced in any competent court.[59] Section 1 accordingly affirms *pacta sunt servanda*, and reduction under section 3 is an equitable exception to it.

[172] Section 3 provides:

> 'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the

[58] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC) para 21; *Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others* [2017] ZASCA 138; 2018 (1) SA 471 (SCA) para 26; *Minister of Home Affairs and Others v Somali Association of South Africa and Another* [2015] ZASCA 35; 2015 (3) SA 545 (SCA) para 18.
[59] Section 1(1) of the Conventional Penalties Act 15 of 1962. *Steinberg v Lazard* [2005] ZAGPHC 363; 20/03/01 (18 February 2005) at p 6.

> penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

[173] It is well established that the penalty claimed is a penalty stipulation as contemplated in section 1 of the Penalties Act, and that reliance on section 3 need not be specially pleaded, this Court being entitled to raise it *mero motu* where it appears e*x facie* the pleadings, provided the issue is fully canvassed in evidence and argument.[60] It is likewise well established that financial damages are not the sole criterion of prejudice.

[174] The onus rests on the debtor, here, the respondent, to prove that the penalty is out of proportion to the prejudice suffered.[61]

[175] The facts upon which the reduction rests are not in dispute. The applicant does not assert that it has suffered any financial prejudice. The rate at which the penalty was levied, the amount of the ordinary monthly levy, the number of erven in the Estate, the date upon which the respondent took occupation, the dates upon which the City issued its temporary and final occupation certificates, and the fact that the arrear levies have now been paid in full, are all either common cause or appear from the applicant's own papers.

[176] Moreover, the onus under section 3 may be discharged without the respondent as the debtor leading evidence at all. The nature of this matter, and those facts or circumstances which are not in dispute, or which may safely be

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[60] *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* [2007] ZAWCHC 35; 2008 (3) SA 47 (C) (*Plumbago*) para 18.
[61] *Steinberg v Lazard* [2006] ZASCA 55; 2006 (5) SA 42 (SCA) para 7.

inferred, may themselves reveal a disproportion entitling a court to decline to award the full amount claimed.[62] That is the position *in casu*.

[177] This Court has a discretion, conferred by the Penalties Act, to reduce penalties found to be inequitable.[63] Prejudice, for these purposes, extends beyond pecuniary loss. As Snyman J explained in *Van Staden v Central South African Lands and Mines*,[64] 'everything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor in his property, his person, his reputation, his work, his activities, his convenience, his mind, or in any way whatever interferes with his rightful interests as a result of the act or omission of the debtor, must, if it is brought to the notice of the Court, be taken into account', the test being a value judgment, made as at the date of hearing.[65]

[178] In *Murcia Lands CC v Erinvale Country Estate Homeowners Association (Murcia Lands)*,[66] Budlender AJ explained that the enquiry proceeds in three stages: first, whether the penalty is out of proportion to the prejudice suffered by reason of the breach; and second, if so, whether it would be equitable to reduce it; and third, the extent of the reduction.

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62 *Chrysafis v Katsapas* 1988 (4) SA 818 (A) at 828I; *Smit v Bester* 1977 (4) SA 937 (A) at 941A–943A; *National Sorghum Breweries (Pty) Ltd t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd* [2000] ZASCA 70; 2001 (2) SA 232 (SCA) para 8; and see *De Wet NO and Others v Water's Edge Home Owners Association* (A110/2022) [2022] ZAWCHC 155 para 23.
63 *Tremendous Property Investment 8 CC and Another v Kenntner Wilderness Dune Development (Pty) Ltd* (2433/2007) [2012] ZAWCHC 104 (7 February 2012) para 28.
64 *Van Staden v Central South African Lands and Mines* 1969 (4) SA 349 (W) (*Van Staden*), cited with approval in this division in *Courtis Rutherford and Sons CC v Sasfin (Pty) Ltd* 1999 JDR 0490 (C) at 13.
65 *Van Staden* at 352G–353B.
66 *Murcia Lands CC v Erinvale Country Estate Homeowners Association* [2004] ZAWCHC 12; [2004] 4 All SA 656 (C) para 14.

[179] In *Western Credit Bank Ltd v Kajee*,[67] the court held that 'out of proportion' does not require a penalty to be outrageously excessive before a court will intervene:

> 'What is contemplated ... is that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor not to reduce penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be [awarded].'

[180] In *Plumbago*, Bozalek J in this division held that the best method of determining whether a penalty was excessive is to compare the creditor's position had the debtor not defaulted with its position should it obtain judgment for the full sum sought.[68]

[181] In this matter, there is no evidence that the applicant is financially worse off than it would have been had the respondent obtained the occupation certificate, as envisaged in *Plumbago*.

[182] The applicant does not assert that it has suffered any financial prejudice as a result of the respondent's breach. Its case rests substantially on the proposition that, were every owner to disregard the applicant's rules as the respondent is said to have done, the basis of the applicant's existence would fall away. That is a rightful interest cognisable under *Van Staden*,[69] but it speaks to the harm of rules being broken in general rather than to any harm actually suffered by the applicant on the facts of this case.

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[67] *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) at 391B–D.
[68] *Plumbago* para 31.
[69] *Van Staden* at 352H.

[183] There is no evidence of an increase in similar infractions following the respondent's breach, nor of any actual erosion of the applicant's authority. There is, moreover, no evidence that the minor height infraction in issue has materially impacted the rights or interests of the applicant or its members. This is not a flagrant breach of the kind committed by an owner who builds an additional floor materially impacting a neighbour's views or use and enjoyment of his property.

[184] Weighed against this is a penalty of R3 695 843,28, compounding at 26% per annum, a monthly rate of approximately R21 000, against an ordinary monthly levy in the Estate of approximately R2 000.[70]

[185] Comparing, as I am enjoined to do, the applicant's position had the respondent obtained a clearance certificate promptly with its position upon judgment for the full amount claimed, the disproportion is, in my view, stark, and I agree with the respondent that the penalty bears no rational relationship to any prejudice actually established.

[186] This must, however, be weighed against matters properly militating against the respondent, namely that he proceeded to occupy without the requisite certificate, that he did not apply to regularise the building work until directed to do so by Nuku J, that he is said to have provided an outdated height certificate, and that he by-passed the applicant in favour of the City rather than pursuing further engagement with it.

[70] Calculated at R700 per day over 3 314 days, which, at approximately R21 000 per month, is roughly ten times an ordinary monthly levy of R2 000.

[187] Two of those matters require qualification. The assertion that the respondent furnished an outdated height certificate is disputed by him, his evidence being that Mr. Di Leva delivered the certificate requested on 29 March 2017 and delivered an updated certificate, together with a natural ground level survey, on 3 May 2017. The characterisation of his approach to the City as a by-passing of the applicant is likewise disputed, his evidence being that he applied to the City after the applicant's committee had resolved, on 30 November 2017, not to issue him with an occupancy certificate. Neither dispute can be resolved on these papers, and the respondent's allegations in this regard must be accepted.

[188] What is common cause is that the respondent took occupation in December 2017 without a certificate issued by the applicant's committee, and that he did not make formal application to the applicant for relaxation of the height restriction until 13 October 2021, after the matter had been postponed by Nuku J for that purpose.

[189] These factors bear upon the extent, rather than the existence, of any reduction. I should add that, the applicant having by the date of hearing recovered the underlying arrear levies in full, there can no longer be any suggestion that the penalty is compensating for irrecoverable levy arrears.

[190] Having regard to all of these considerations, I am satisfied that, to the extent any penalty would otherwise be payable, the penalty claimed is disproportionate to the prejudice suffered by the applicant, and that it is equitable that such penalty should be substantially reduced under section 3 of the Penalties Act.

[191] I accept, as was the case in *Murcia Lands,* that the applicant had a rightful interest in ensuring compliance with the terms of the contract. It was entitled to impose a penalty clause to compel the homeowners to carry out their obligations under the contract by providing appropriate consequences should they default.[71]

[192] The question which remains to be determined is to what extent such a penalty falls to be reduced.

[193] Any prejudice suffered by Mr. Pillay cannot be taken into account as prejudice to the applicant. In terms of section 3, the enquiry relates to the prejudice suffered by the applicant. The applicant sues in its own right, and the prejudice to Mr. Pillay, who is not a party to these proceedings, bears no relevance.

[194] In *Murcia Lands,* Budlender AJ found that the question whether a penalty is out of proportion may be assessed in three ways. By looking at comparable situations in which the desired result was achieved, by looking at the size of the penalty, and of the penalties in general, in relation to the income and expenditure of the creditor, and by exercising one's sense of fairness and justice.[72]

[195] In my view, on the facts of this case the third of these is apposite. In the majority of the decisions involving penalties, they concerned a penalty for failure to build within time, expressed as a multiple of the monthly levy. The penalty in issue here is of a different kind, as it is a fixed daily amount rather than a multiple of the levy.

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[71] See *Murcia Lands* at para 24 and *Western Bank Ltd v Meyer, De Waal, Swart & Another* 1973 (4) SA 695 (T) at 699H.

[72] *Murcia Lands* para 37.

[196] A further consideration is the nature of the prejudice from the breach in question. The prejudice which the Court took into consideration in *Murcia Lands* and *De Wet N.O. and Others v Water 's Edge Home Association; De Kock N.O. and Another v Water's Edge Home Association*[73] was the harm caused by unbuilt or half-built erven: noise, dust, traffic, damage to roads and verges, security risk from building activity, the aesthetic and amenity value to purchasers of knowing that building will end within a defined period, and the deterrence of speculative plot-holding. Occupation of a finished house causes no building nuisance and, if anything, reduces rather than increases the security risk of an unoccupied structure.

[197] The applicant's rightful interest in members not simply helping themselves to occupation in defiance of its rules is an important consideration, but it is an interest of a lesser order than the one which sustained the penalties in the decisions to which I have referred.

[198] A further and final consideration is that a penalty which runs until the creditor issues a certificate is open-ended in a way that a building penalty is not. A penalty for failure to build is brought to an end by the debtor's own performance.

[199] A penalty for occupying without a certificate which the creditor declines to issue cannot be brought to an end by the debtor at all, save by vacating his home. Put differently, the magnitude of a penalty such as in the present matter is a function of the applicant's inaction as much as of the respondent's default. This impacts both on whether the penalty is out of proportion and on what is equitable.

[73] *De Wet N.O. and Others v Water 's Edge Home Association; De Kock N.O. and Another v Water's Edge Home Association* (A110/2022) [2022] ZAWCHC 155 (24 August 2022) para 29.

[200] In conclusion, in my view the most equitable basis upon which to reduce the penalty *in casu* is to reduce the daily penalty to a more reasonable amount of R150 per day, and to limit the duration of the penalty to the date upon which the applicant itself upheld the respondent's internal appeal and granted the relaxation subject only to Mr. Pillay's consent, that is 14 February 2022, as to my mind at this date the continued withholding of the applicant's occupancy certificate ceased to serve any discernible interest. On my estimate this would amount to 1,536 days. Accordingly, the total penalty I would have ordered would be R230,400.[74]

[201] The interest applicable would run on the reduced sum only. I emphasise that this finding is made in the alternative only, against the possibility that my construction of clauses 2.5.5 and 2.5.6 is held to be wrong. It does not form part of the order which I make.

[202] For the reasons set out in this judgment, the demolition application is dismissed.

[203] In the penalties application, I find, on a proper construction of clauses 2.5.5 and 2.5.6 of the 2016 Conduct Rules, that no penalty is payable in respect of any period during which the respondent held an occupation certificate issued by the City, and that he held such a certificate throughout the period claimed.

[204] In the alternative and on the basis that it is not necessary to the order I make, that the enforcement of the height restriction against the respondent by way of an order for demolition would be contrary to public policy. I decline to

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[74] If the date upon which the respondent took occupation is taken to be 1 December 2017 as the exact date does not clearly appear from the record.

declare that restriction void. In the alternative, had a penalty been exigible, it would have fallen to be reduced under section 3 of the Penalties Act.

Costs

[205] It remains to say something about the manner in which this litigation has been conducted, since it bears upon costs.

[206] The applicant founded both applications upon the 2019 Conduct Rules. That those rules could not govern conduct occurring in 2017 was pertinently raised by the respondent in his answering affidavit deposed to on 6 July 2020. The applicant did not put the 2016 Conduct Rules before this Court until Mr. Orlandi's affidavit of 13 January 2026, some five and a half years later, and then upon the explanation that the error had come to light during preparation of its heads of argument.

[207] That explanation cannot be accepted. The applicant also declined the respondent's proposals of October 2019 for mediation and for an inspection *in loco*, for reasons which do not appear from the record.

[208] In the demolition application, there is no reason why costs should not follow the result. The same applies to the penalties application. The costs of the consolidation application were reserved by Mangcu-Lockwood J on 5 August 2024 to be costs in the cause, and they follow the same course.

[209] In my view, the respondent ought to bear the costs occasioned by the applicant's claim for arrear levies, which the respondent tendered in full shortly before the hearing.

[210] Having taken into account the complexity of the matter and the importance to the parties, I am of the view that costs of counsel on Scale B is appropriate

Order

[211] For all the reasons set out in this judgment, the following order shall issue:

1. The application under case number 17258/2019 (the demolition application) is dismissed.

2. The application under case number 8985/2022 (the penalties application) is dismissed.

4. The applicant is ordered to pay the respondent's costs in both applications, including the costs reserved in the application for consolidation determined by Mangcu-Lockwood J on 5 August 2024, costs of counsel to be taxed on Scale B.

5. The costs occasioned by the applicant in respect of its claim for arrear levies shall be borne by the respondent.

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M HOLDERNESS
JUDGE OF THE HIGH COURT

<u>Appearances</u>

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Instructed by: Smith Tabata Buchanan Boyes & Biccari Bollo Mariano Inc. (BBM LAW)

Respondents: Adv. PS Bothma and Adv L Matiso

Instructed by: Ahmen & Hamman Attorneys