IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 3794/2010

In the matter between:

RIVERLAND RESORT SHAREBLOCK (PTY) LTD. APPLICANT

and

LINDSAY JANE LETSCHERT RESPONDENT

JUDGMENT

Delivered on 25 April 2012

SWAIN J

[1] The conduct of the respondent which has given rise to the present dispute between the parties, is the painting by the respondent, of the window frames and external doors in a grey colour, of a dwelling which the respondent is entitled to occupy, by virtue of her ownership of a shareblock at the applicant's River Resort, where a number of free standing dwellings, have been erected by owners of shareblocks, within their respective use areas.

[2] The applicant, Riverland Resort Shareblock (Pty) Ltd. seeks a *mandamus* in the form of an order directing the respondent "to remove,

replace, or rectify any windows or external doors already installed in the aforesaid buildings, where they are not made of, and finished in bronze aluminium or natural (unpainted) hardwood". Ancillary interdictory relief is also sought, which is aimed at preventing the respondent from installing windows and external doors (including garage doors) in the future unless the "windows and doors are made of and finished in either bronze aluminium or natural (unpainted) hardwood". Further interdictory relief is sought that the respondent be restrained from installing any windows or external doors, until the respondent has obtained the approval of the applicant, to do so.

[3] When the respondent purchased the particular shareblock in the applicant, there was an existing dwelling erected on the demarcated area, which the respondent was entitled to occupy, in terms of the applicant's use agreement. The respondent wished to effect alterations and improvements to the dwelling and consequently submitted her plans for approval to the board of the applicant. It is common cause, she was obliged to do this in terms of Clause 3.3 of the use agreement which reads as follows:

"No building shall be erected on the Site until plans and specifications thereof have been submitted to and approved by the Board, which approval shall not be unreasonably withheld. No buildings shall be erected in conflict with any such approved plans and specifications".

[4] It is also common cause that when the respondent purchased the dwelling, the respondent took cession of the seller's rights and obligations in terms of the use agreement, and is bound by its terms.

[5] It is also common cause that the applicant's board delegated approval of plans and specifications to its building committee, who published a building design code, a copy of which is included in the papers. Although the respondent did not admit that such delegation was lawful, no grounds were advanced why the delegation was not permitted. No argument was advanced in this regard by Mr. Smithers S C, who appeared for the respondent, and need not concern me any further.

[6] It is trite that the applicant is a company incorporated under the Companies Act, and that a use agreement is an agreement between a member of a shareblock company and the company, which sets out the terms and conditions, on which the member is entitled to exercise the right conferred on him or her, in the articles, to occupy a particular section of the company's property, linked to his or her shares.

Lawsa Vol 25 Part 1 (First re-issue) paragraph 14

[7] A use agreement may contain restrictions on structural, or other alterations, by members to the company's property.

Lawsa *supra* at paragraph 39

In addition, in terms of clause 22 of the use agreement, in the event of the respondent breaching any term of the use agreement and remaining in breach after due notice of the breach, the applicant may cancel the use agreement, obtain repossession of the site and sell the respondent's shareblock.

[8] What all of the above makes clear is that the relationship between the parties is contractual.

[9] In addition, by virtue of the fact that no claim was advanced by the respondent, for a review of the conditions attached by the building committee to the approval of the respondent's plans, I am not concerned with a determination of whether such a review, could be advanced on the facts of this case.

de Ville – Judicial Review of Administrative Action in South Africa - First Edition Pg 47

Pennington v Friedgood & others
2002 (1) SA 251 (C) at paragraphs 36 – 42

Body Corporate of the Laguna Ridge Scheme No. 152/1987
v
Dorse
1999 (2) SA 512 (D) at 522 G – H

[10] The approval by the building committee of the respondent's plans was couched in the following terms:

"I refer your buildings reflected on the above plan & am pleased to confirm the Committees approval of same subject to

1. You getting the necessary approvals from the relevant authorities.

2. All work to conform to National Building Regulations SABS 0400/1990, the resorts Building Design Code and Annexure R R 3" of the use agreement".

[11] The provisions of the building design code in issue read as follows:

"WINDOWS, EXTERNAL DOORS
Hardwood or bronze aluminium external doors and windows are permitted. The general size and shape to conform to the surrounding buildings".

[12] The crux of the dispute relates to the meaning to be ascribed to the word "hardwood" and more particularly whether this word not only defines the material from which external doors and windows are to be constructed, but in addition defines a particular colour to which external doors and windows must conform.

[13] On the papers there is nothing to indicate that the building design code, was formulated by agreement between the applicant and the

owners of individual shareblocks such as the respondent. The applicant simply states that the building design code was "published to give owners and prospective owners notice of what will be approved".

The building design code may conveniently be referred to as a "decisional referent" being standards or criteria, that the decision maker (being the building committee) will have reference to when making a decision.

Baxter Administrative Law - pg 89

This term, although formulated by the learned author, in a public law context, can in my view, be equally applied in the present context.

[14] Although the building design code, may not have its origin in agreement, between the building committee and individual shareblock owners, this is not significant in interpreting the clause in question, because there is little or no difference, between contracts, statutes and other documents in the approach to their interpretation.

Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012) at para 18 note 14

In this case Wallis J A (at paragraph 18) described the correct approach to interpretation as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in

the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used".

[15] As to the correct approach where the Court is faced with two or more possible meanings, that are to a greater or lesser degree available on the language used, Wallis J A expressed himself in the following way (at paragraph 26):

"Here it is usually said that the language is ambiguous although the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem the apparent purpose of the provision in the context in which it occurs, will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration".

[16] On the evidence the building design code was published to give owners and prospective owners, notice of what would be approved. The object was no doubt to ensure consistent and predictable decisions by the building committee, albeit at the expense of

individualised discretion in considering the approval of plans placed before it.

Baxter *supra* at pg 416

[17] The introduction to the building design code conceptualises what its purpose and objective is, in the following terms:

"Riverland Estate represents a totally unique development along 2.5 km of treed river frontage on the Umlalazi River. The river is tidal and the estate is seven kilometres from the river mouth. The estate has its own slipway for launching boats and has good seasonal river fishing and birding.

Approval to develop 48 holiday chalets [in terms of Plan P.T.B. 21044 (1)] dated 27th February 1990 was obtained from the administrator in 1992.

The development is intended to be eco-friendly and the architectural design simple, with accent on the commonality of the hip roof, roof and wall colours and squared 'cottage' type building design.

The Architectural style is to conform to existing new structures and must comply with the Building Design Code in all aspects".

[18] The emphasis is upon conformity of design and appearance, which includes colour by specific reference to "wall colours". In Clause 9, the exterior paint colour is specified as "Micatex Kalahari (no face brick allowed)". In addition, in Clause 2.2, the colour of the concrete roof tiles is specified "grey to match existing". In addition it is provided that "rainwater goods" (which I assume includes gutters and downpipes) is to

"match wall colour". Facias have "to match wall colour" and exposed roof timbers "must be stained".

[19] It is therefore clear that the clause in question appears in the context of the building design code, in which a primary purpose is to ensure conformity in the external colours applied to units, whether it be the colour of the roof, the walls, rainwater goods, facias as well as exposed roof timbers. The only other significant external features of a dwelling, the colour of which could conceivably have an effect on the overall outward appearance of the dwelling, would be windows and external doors, which leads me to the meaning of the clause around which the dispute revolves.

[20] The meaning of the word "hardwood" and whether it not only defines the material from which external doors and windows are to be constructed, but also defines a particular colour to which external doors and windows must conform, has to be determined in the context of the other provisions in the building design code to which I have referred, as well as the provisions of the particular clause in which it appears. What is immediately apparent is that apart from specifying the nature of the materials which must be used to construct jetties, the only material specified (apart from the clause in question) in the construction of dwellings is "concrete" roof tiles. This is to be contrasted with the number of provisions dealing with the external colour of various parts of the dwellings, which I have referred to.

[21] What is clear is that the clause provides for the type of materials from which external doors and windows may be constructed, namely hardwood and aluminium. It is equally clear that "bronze aluminium" must refer to the colour of aluminium that is permitted, and not some type of amalgam of bronze and aluminium. I regard the statement by the respondent that it is unclear whether the term "bronze aluminium" refers to the bronze alloy containing copper and aluminium, or whether it refers to aluminium which through some finishing process has obtained a bronze colour, as spurious and an attempt to obfuscate the issue. I regard the explanation by the applicant why bronze aluminium was permitted as far more plausible. Because the development is situated near the sea, and because of the resultant wear and tear on wood, it was provided that aluminium could be used, but only if the aluminium was bronze in colour, which would blend in with the wooden finish required in other instances. I am therefore satisfied that the meaning of the term "bronze aluminium" is that the material which must be used is aluminium, which has been coloured bronze.

[22] The meaning of the word "hardwood" must consequently be determined not only in the context that one of the main purposes of the building design code is to ensure uniformity in the external colours of units in the complex, but also in the context that it is specified that an alternative material, i.e. aluminium, from which external doors and windows may be constructed, has to be bronze in colour.

[23] As regards the colour and nature of different types of hardwood, the respondent filed an affidavit by one Stretton, an architect, in which he opined that hardwoods generally turn grey in the presence of ultra violet radiation and commented on the need for various hardwoods to be sealed, to prevent deterioration, and that it was inadvisable to use unpainted (including unvarnished) wooden window frames or doors. In addition, he expressed the view that he did not regard Clause 3 of the building design code as requiring that hardwood be painted either "bronze or brown in colour". He also opined that he did not see that as a reasonable requirement, in the absence of specification of the particular shades required, as brown and bronze could not be said to be the same colour. The purpose of this evidence was to support the respondent's contention that the use of the word "hardwood" permitted the painting of window frames and external doors a grey colour.

[24] As pointed out by Harms D P in the case of

K P M G v Seccurefin Ltd.
2009 (4) SA 399 (SCA)

an expert witness called in aid of interpreting a document, is entitled to explain the meaning of technical terms, but cannot express any views on what the document means. Consequently, this witness's views on what the clause means can be ignored.

[25] That window frames and external doors constructed of aluminium have to be bronze in colour, taken together with the clear purpose of the building design code being to ensure uniformity in the external colours of dwellings, I regard as of decisive importance in determining whether the word "hardwood" determines not only the nature of the material to be used, but also its colour. A conclusion that the term "hardwood" has no bearing upon the colour of the window frames and external doors, would lead to an insensible result, namely that they could be painted whatever colour the individual shareblock owner chose. This would undermine the purpose of the building design code, which as I have said, is to ensure uniformity in the external colouration of individual units. This can only achieved if "hardwood" window frames and external doors are of a similar colour to bronze aluminium window frames and external doors. I accordingly construe the word "hardwood" to mean not only the type of material to be used, but also its colour, namely a dark colour which is in conformity with the colour "bronze aluminium" which is clearly depicted on a number of photographs included in the papers. I am fortified in the conclusion I have reached by an examination of the photographs included in the papers, which with a few exceptions, indicate that the majority of shareblock owners, understand that the provisions of the building design code, mean that window frames and external doors, should be dark in colour.

[26] I likewise reject the argument of the respondent, based on the premise that hardwood turns grey when exposed to sunlight, if left untreated, as a justification for painting the window frames and external doors grey. The object of the provision could never have

been to provide for a colour, which would be achieved by weathering, which would vary in shade during this process, and which would be inconsistent with the colour of bronze aluminium frames in the development.

[27] A great deal of the argument of Mr. Smithers S C was directed at showing that the applicant had acted unreasonably in approving the respondent's plans, subject to the building design code and likewise had acted unreasonably, in seeking to enforce the terms of the building design code against the respondent, when there were a number of examples of other dwellings, not being in accordance with the code.

[28] In the absence of any counter-application by the respondent, to review the decision of the building committee, on the ground of unreasonableness (assuming such a cause of action was available to the respondent) the argument of Mr. Smithers S C, was based upon the provisions of Clause 3.3 of the use agreement that approval of plans "shall not be unreasonably withheld". As I understood the argument, it was that by making the approval of the plans subject to such a condition, with the concomitant problems of what the meaning was of Clause 3 of the building design code, the building committee had unreasonably withheld an unconditional approval of the respondent's plans. In doing so, they had breached their obligations in terms of the use agreement.

[29] In the light of the conclusion I have reached as to the meaning of Clause 3 of the building design code, I do not regard the conduct of the building committee in conditionally approving the respondent's plans as unreasonable.

[30] As regards the selective enforcement of the provisions of the building design code, the applicant conceded in reply that there were some instances where the complaint of the respondent was justified, but that steps had been taken and were still being taken, to rectify these omissions on the part of the applicant. Photographs were put up in reply to support this assertion. Mr. Smithers S C however submitted that in the light of the decision in

Plascon Evans Paints Ltd. v van Riebeeck Paints (Pty) Ltd. 1984 (3) SA 623 (A)

I could not have regard to what was put up in reply. I disagree. There was no dispute of fact that the applicant had failed to effectively enforce the building design code against other shareblock owners. What was however significant, was that steps had been taken to rectify the situation, in which regard there was no dispute on the papers, as the respondent never sought leave to file a further affidavit to deal with this. In any event, if due regard is had to the fact that the relationship arising out of the agreement between the applicant and individual shareblock owners is contractual, a failure to enforce a breach by the applicant, against another shareblock owner, can have no bearing upon its election to enforce such a breach against the respondent.

[31] As regards the costs involved in rectifying the situation, the respondent estimates this to be in the region of R100,000,00. No expert evidence or quotations by contractors were put up to support this assertion, which is simply the respondent's estimate. In any event, the cost of rectifying the colour of the window frames and external doors cannot preclude the grant of the relief which the applicant seeks.

[32] In my view, it would be impermissible to grant an order in the form sought, specifying that the hardwood be "unpainted", because this could conceivably preclude painting the window frames and external doors with a preservative or sealer. By specifying that the hardwood be "dark" a more accurate expression is given to the meaning intended in the building design code. For same reason I find it unnecessary to include a description of the "hardwood" as "natural" as sought in the order prayed.

I grant an order in the following terms:

1. The respondent is hereby interdicted and restrained from installing windows and external doors (including garage doors) in the construction of any buildings on Site 2, Umlalazi River Resort, Mtunzini, unless the said windows and doors are made of and

finished in either bronze aluminium or dark hardwood.

2. The respondent is interdicted from installing windows and external doors in the aforementioned buildings until such time as the respondent has obtained the applicant's approval of the respondent's specifications relating to the type and finish of the windows and external doors to be utilised.

3. The respondent is ordered and directed to remove, replace or rectify any windows or external doors already installed in the aforesaid buildings, where they are not made of, and finished in, bronze aluminium, or dark hardwood.

4. The respondent is ordered to pay the costs of this application.

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K. Swain J

Appearances:

For the Applicants	**:**	M/s L. Mills
Instructed by:	:	Johnston & Partners Durban
For the Respondent	**:**	Mr. M.D.C. Smithers S C
Instructed by	**:**	JH Nicholson Stiller & Geshen Durban

Date of Hearing **:** 17 April 2012

Date of Filing of Judgment : 25 April 2012