NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3087/2014

In the matter between:

LIANA PAGANELLI	**1ST APPLICANT**
ROBERTO PAGANELLI	**2ND APPLICANT**

and

HELENE BEISHEIM	**1ST RESPONDENT**
BODY CORPORATE OF SAN KELLIND	**2ND RESPONDENT**
AMAFA AKWAZULU-NATALI	**3RD RESPONDENT**

JUDGMENT

Delivered on: Tuesday, 10 March 2015

OLSEN J

[1] The applicants in this matter are a wife and husband who own a sectional title unit known as Unit 11, San Kellind. The first respondent owns Unit 12, San Kellind. The second and third respondents are the body corporate of San Kellind and Amafa, the latter being a provincial heritage conservation agency established for the province of KwaZulu-Natal. No relief is sought against the second and third respondents.

[2] The sectional title development known as San Kellind is situate on property on which the original farmhouse of the Farm Brickfield (estimated to be 100 years old) had been constructed. The establishment of the sectional title development saw the original farmhouse being divided into two, and housing Units 11 and 12, which feature in this application. It also saw the construction of a six storey building, quite separate from the farmhouse, which houses Units 1 to 10.

[3] The applicants' Unit 11 is on the ground floor of the original farmhouse. Unit 12 lies above Unit 11.

[4] The kitchen of Unit 11 spans the full length of what might be described as a wing of Unit 11. There is a window at each end of the kitchen, designed to provide natural light in the room. The applicants have found that the windows are too small as a result of which they mainly rely on artificial light in the kitchen. They accordingly decided that the existing windows should be replaced with larger ones designed in the style of the windows in the lounge of the unit which are part of the original construction of the farmhouse. That entails, of course, removing the existing windows as well as some of the surrounding masonry in order to accommodate the new larger windows.

[5] For reasons which need not be discussed in this judgment the first respondent has consistently opposed the execution of the applicants' plan to install larger windows. (It should be mentioned that the validity of the grounds of objection is disputed by the applicants.) The applicants first revealed their plans by presenting their proposal to the trustees of the second respondent in May 2012, and because of the first respondent's opposition the proposed work has not yet been done. The essence of the dispute between the parties revolves around who has the power to make the decision that the work should be done, or to sanction it: the applicants, a majority decision of the trustees, a special resolution of the trustees or body corporate or a unanimous resolution of all the members of the body corporate? Attorneys became involved, furnishing conflicting opinions.

[6] The answer to the principal question (i.e. who can give the go-ahead) turns very much on who owns each of the windows and the associated walls. In the case of the window conveniently labelled "W1", is the window and associated wall area, insofar as it lies on the outside of the median line referred to in s 5 (4) of the Sectional Titles Act, 1986, common property or common property subject to the exclusive use of the applicants? In the case of the window labelled "W2", and the associated wall area, are they wholly within Unit 11, or does the part on the outside of a median line drawn through the wall and window constitute common property? This latter debate arose because the wall into which "W2" is set divides the interior of the kitchen from a porch, and the parties could not agree on whether the boundary of Unit 11 lies along the median line of the outer wall of the porch or along the median line of the inner wall of the porch, which is the outer wall of the kitchen.

[7] In the light of the impasse which arose over these issues the applicants launched these proceedings in which they seek the decision of the court as to which regime governs each of the windows, offering three alternative orders as the possible outcomes. The decision of the court would determine where the decision making power lies, how the decision is to be made, and which legal provisions would govern the execution of the work. Obviously a finding that a unanimous resolution of the members of the body corporate is required would not suit the applicants as this would afford the first respondent a veto power which, judging from the papers, would inevitably be exercised.

[8] The papers delivered in this application paint a sorry picture of the conflict which prevailed before the application was launched. Fortunately matters took a turn for the better, but only on the day of the hearing. The parties agreed the status of the window "W2" and on the order I should make with respect to it. The applicants' case with respect to this window is conceded in substance.

[9] The parties also agreed on the status of the window "W1". The area of it (and the associated masonry to be removed to accommodate a larger window) which lies on the outside of the median line is common property, but

not common property of which the applicants have an exclusive use. The portion to the inside of that median line is of course part of Unit 11. However, the parties have not been able to agree on who has the power to make the decision as to whether the window "W1" should be replaced. That is the remaining issue to be determined in this judgment.

[10] The applicants contend that what is proposed to be done falls within the ambit of Rule 4 of the Conduct Rules which are annexure 9 to the Regulations promulgated in terms of the Sectional Titles Act, and which were first published in GNR.664 on 8 April 1988. The rule is headed "Damage, Alternations or Additions to the Common Property" and reads as follows.

> "4. (1) An owner or occupier of a section shall not mark, paint, drive nails or screws or the like into, or otherwise damage, or alter, any part of the common property without first obtaining the written consent of the trustees.
>
> (2) Notwithstanding sub-rule (1), an owner or person authorised by him, may install-
>
> (a) any locking device, safety gate, burglar guards or other safety device for the protection of his section; or
>
> (b) any screen or other device to prevent the entry of animals or insects:
>
> Provided that the trustees have first approved in writing the nature and design of the device and the manner of its installation."

[11] The applicants argue that the replacement of the window will amount to an alteration to that small portion of the common property lying to the outside of the median line notionally passing through the window and that part of the associated masonry which would be removed in order to accommodate a larger window. They argue that a purposive construction of Rule 4 illustrates that the intention behind it is primarily, if not exclusively, to regulate the conduct of a unit holder with respect to that part of the common property

which is inherently tied to the section belonging to the owner. The rule implies, the applicants argue, that such an alteration is permitted as long as it enjoys the prior written consent of the trustees. Given the provisions of the rule, a majority vote of trustees in favour of such consent would suffice.

[12] Counsel for the first respondent argues that on a proper construction of Conduct Rule 4 it does not authorise a section owner to "alter" the common property (with the consent of the trustees) otherwise than in a minor respect of the type and relative insignificance of those set out as examples in the rule; that is to say marking, painting and driving nails or screws into common property. Counsel effectively invokes the *ejusdem generis* or *noscitur a sociis* rule. Its operation was succinctly described by Innes CJ in *Director of Education, Transvaal v McCagie and Others* 1918 AD 616 at 623.

> "General words following upon and connected with specific words are more restricted in their operation than if they stood alone. *Noscuntur a sociis*; they are coloured by their context; and their meaning is cut down so as to comprehend only things of the same kind as those designated by the specific words – unless, of course, there is something to show that a wider sense was intended."

[13] I see three difficulties with the application of the rule in this case in order to cut down the meaning of the words "or alter" where they appear in Rule 4 (1).

(a) Firstly, I do not think that painting the common property which is the exterior of a unit is necessarily insignificant in any way. Re-painting the same colour may not be too bad, but painting a unit a different colour to all the others may be quite significant indeed.

(b) At the risk of indulging in excessive peering at the language, the structure of Rule 4 (1) seems to me to go against the application of the rule in the manner suggested by counsel for the first respondent. The list of forbidden activities is followed by the words "or otherwise

damage, or alter, …". The word "otherwise" qualifies the word "damage" and suggests that the word "damage" may be read in the light of the list that goes before. But a comma follows the word damage which isolates the phrase "or alter" from the list. If the comma had been left out, or if the word "otherwise" had been employed again so that the phrase read "or otherwise alter", the need to employ the *ejusdem generis* rule to cut down the meaning of the word "alter" would have been more obvious.

(c) Sub-Rule 4 (2), which expressly authorises an owner to install the devices listed there, commences with the words "notwithstanding sub-rule 1". That means that but for sub-rule 4 (2) the items listed in that rule would have fallen within the prohibition contained in sub-rule 4 (1). Bearing in mind that what sub-rule 4 (2) is speaking to is the installation of these items on common property (i.e. the exterior of a unit), I do not think that, for instance, a steel safety gate guarding a door can be regarded as an insignificant imposition on the exterior face of the unit in the same way as the driving of a nail or a screw into the exterior of the wall would be. That suggests that sub-rule 4 (1) is not intended to be confined to minor alterations; nor to minor damage; which seems logical.

[14] I conclude that what Conduct Rule 4 conveys is that aside from the exceptions stipulated in sub-rule 4 (2), an owner is not permitted to damage or alter the common property (and I think it is confined to the common property associated with an owner's section) in any way, even in such a minor way as driving a screw or nail into an exterior wall, without the permission of the trustees; which suggests that alterations may be done with the permission of the trustees. Extending the application of that rule to any part of the common property which is not associated with an owner's section makes no sense at all. The common property is under the control of the body corporate through its trustees. Management Rule 33 (annexure 8 to the regulations, which I discuss hereunder) confines what the trustees themselves can do by way of alterations to common property. It would be surprising indeed if Conduct Rule

4 was intended to convey that a single owner of a unit can alter any of the common property at all with the approval of the trustees gained by majority vote when, if the trustees themselves proposed to effect the same alteration, they would need either the unanimous consent of all owners or a special resolution of owners, depending on which part of Management Rule 33 applies.

[15] In my view, even if the first respondent is right in saying that not any alteration can be made to the common property which is the exterior of a particular section by the owner of that section under Conduct Rule 4, looking at the rule as a whole the installation of a larger window "W1" is covered by the rule. The proposed project is not substantial : its effect is no more significant than what Rule 4 (2) allows. But it is something that cannot be done without the written consent of the trustees who would have more scope to refuse permission than would be the case under Rule 4 (2).

[16] The first respondent contends that the proposed alteration with respect to window "W1" can only be carried out under Management Rule 33. Management Rule 33 appears under the heading "Improvements". Sub-rule 33 (1) appears under the heading "Luxurious Improvements". It provides that the trustees need a unanimous resolution of owners to effect or remove improvements of a luxurious nature on the common property. Sub-rule 33 (2) appears under the heading "Non-luxurious Improvements". It provides that if the trustees wish to effect or remove improvements to common property other than luxurious improvements they must follow a particular process. They must give written notice of their intention to all owners not less than 30 days before the trustees intend to proceed with the work. The notice must provide details of the costs to be incurred, how the costs are to be financed and the effect it will have on levies; and of the need and desirability and effect of the proposed work. If any owner asks for it, a special general meeting must be convened to discuss the matter. The proposal may then be approved by way of a special resolution of owners passed at the meeting.

[17] The first respondent argues that sub-rule 33 (1) applies. The argument is based solely on the proposition that anything not necessary must be classified luxurious. In my view that argument cannot be sustained.

[18] The legislation contains no definition of the word “luxurious”. One must conclude that the well-established classification of improvements recognised in our common law must be the context within which rule 33 falls to be interpreted. In our law we recognise necessary improvements, useful improvements and luxurious improvements. This classification was described as follows in *United Building Society v Smooklers' Trustees and Golombick's Trustees* 1906 TS 623 at 627.

> “The authorities classify the expenses which one man may conceivably bestow on the property of another under three heads: (1) *necessariae impensae*, that is, expenses which are necessary for the preservation of the property; (2) *utiles impensae*, that is, expenses which, although they are not necessary to preserve the property, nevertheless improve its market value; and (3) *voluptuariae impensae*, that is, expenses which neither preserve the property nor increase its market value, but merely gratify the caprice or fancy of a particular individual.”

Although the definition of the category of “useful improvements” may be criticised because it allows obviously luxurious improvements to fall within it when they increase the value of the property, the system of classification remains good law. (See, for instance, *Goudini Chrome (Pty) Limited v MCC Contracts (Pty) Limited* 1993 (1) SA 77 (A) at 84 – 85.) Against that legal background it seems clear that the non-luxurious improvements contemplated by Management Rule 33 (2) are both necessary and useful improvements. The question as to whether the traditional classification falls to be modified when considering Management Rule 33, to exclude patently luxurious improvements from what is contemplated by sub-rule 33 (2) despite the fact that they may to some extent improve the value of the common property, does not need to be decided in this case. In my view the proposed substitution of

window “W1” brings about an improvement which is arguably necessary, definitely useful, and not patently luxurious.

[19] The installation of a larger window “W1” is useful because it creates the utility of an increased level of natural light in the applicants’ kitchen, and for that reason will surely increase the value of the section. There is no dispute upon the papers as to the fact that the redesigned window “W1” will improve the visual impact of the common property which is the outer face of the section and that must, notionally in any event, improve the value of the common property. It might also be argued that as windows are a necessity, there is no reason to regard the replacement window as anything less of a necessity than is the existing one.

[20] The objection made by the applicants to a conclusion that Management Rule 33 applies is that it deals only with improvements which the trustees wish to effect. I agree with the argument made by counsel for the first respondent that there is nothing wrong with the notion of the trustees deciding that they wish to effect the alteration to window “W1” because that is requested of them by the applicants, whose consent to such an improvement is in any event necessary because it involves an alteration to their section (i.e. that part of window “W1” and the associated wall which lies on the inside of the median line).

[21] In the circumstances I conclude that the proposed replacement of window “W1” can be effected either

(a) by the applicants with the permission of the trustees under Conduct Rule 4; or

(b) by the trustees with the consent of the applicants under Management Rule 33 (2).

Of course in the latter case the work would be undertaken at the expense of the applicants but under the control of the trustees, as otherwise their

permission would not be secured. The notice contemplated by Management Rule 33 (2) would record that the replacement of window "W1" would have no effect upon levies paid by the owners.

[22] The applicants' notice of motion conveyed that they would seek no order of costs except against any respondent opposing the application. The second and third respondents played no part in these proceedings. The first respondent's opposition was aimed at achieving an outcome which required a unanimous resolution of all owners (which obviously could not be achieved without the first respondent's co-operation) before either of the windows could be replaced. (I say that notwithstanding the last minute concession made with regard to window "W2" on the day the application was argued.) The first respondent has not succeeded in achieving her desired outcome. Although the applicants are not going to be granted all the relief they originally sought (the omitted relief is not discussed in this judgment because of concessions made on the day of argument), the applicants have achieved substantial success. Costs ordinarily follow that result. I have given consideration to the question as to whether it would be proper to diminish the prejudice of that outcome to the first respondent either wholly (by ordering each party to pay their own costs) or partially. I have decided against that course primarily because on these papers it is clear that the applicants' proposal enjoyed the support of the trustees and of the overwhelming majority of owners at the outset, and that the windows would have long since been installed in accordance with law, and without the burden of this costly litigation, but for the intransigent attitude adopted by the first respondent. The more reasonable stance adopted by the first respondent on the day of the hearing came too late and did not go far enough.

I accordingly make the following orders which reflect my understanding of what counsel have agreed should be done if I should reach the conclusions which I have.

A. (1) It is declared that the portion of the window and

surrounding wall forming part of Unit 11, San Kellind, depicted as "W1" on the extract from Sectional Plan 16 of 1997 which is annexure "X" to this judgment and order, which lies on the outside of the median line, forms part of the common property of San Kellind.

(2) It is declared that the alterations to the said window "W1" proposed by the applicants may be undertaken

(a) by the applicants with the prior written consent of the trustees as contemplated by Conduct Rule 4 applicable to San Kellind, and with due regard to the provisions of Management Rules 68 (1) (iii) and (iv); or

(b) by the trustees of the second respondent, with the consent of the applicants, under Rule 33 (2) of the Management Rules of San Kellind.

B. (1) It is declared that the window depicted as "W2" on the extract from Section Plan 16 of 1997 which is annexure "X" to this judgment and order forms part of Unit 11, San Kellind.

(2) It is declared that any proposed alteration to window "W2" may be undertaken at the instance of the applicants, but with due regard to the provisions of Management Rules 68 (1) (iii) and (iv).

C. The declaratory orders set out in paragraphs A and B above affect only the internal decision-making processes of San Kellind with respect to the applicants' desire to alter windows "W1" and "W2", and do not affect the applicants' responsibility, nor that of the second respondent, to comply with all other applicable laws with respect to the proposed alterations to those windows.

D. The first respondent is ordered to pay the applicants' costs.

OLSEN J

Date of Hearing:	MONDAY, 02 MARCH 2015
Date of Judgment:	TUESDAY, 10 MARCH 2015
For the Applicants:	MR P J COMBRINCK
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