

SOUTH AFRICA / JUDGMENT

Dayken Properties CC and Another v Dania Investments (Pty) Limited and Others (AR260/2016) [2018] ZAKZDHC 41 (24 August 2018)

[2018] ZAKZDHC 41

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Olsen, Jappie, D Pillay

CASE / FILE NUMBER

AR260/2016

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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

APPEAL CASE NO.: AR260/2016

CASE NO.: 2718/2013

In the matter between:

DAYKEN PROPERTIES CC FIRST APPELLANT

(Applicant a quo)

THE BODY CORPORATE OF THE BEND SECOND APPELLANT

(Second Respondent a quo)

and

DANIA INVESTMENTS (PTY) LIMITED FIRST RESPONDENT

THE KWAZULU-NATAL DEPARTMENT OF

CO-OPERATIVE GOVERNANCE & TRADITIONAL

AFFAIRS THIRD RESPONDENT

THE DEVELOPMENT TRIBUNAL:

KWAZULU-NATAL FOURTH RESPONDENT

THE KWAZULU-NATAL DEPARTMENT

OF AGRICULTURE AND ENVIRONMENTAL

AFFAIRS FIFTH RESPONDENT

EZEMVELO KZN WILDLIFE SIXTH RESPONDENT

THE KZN CRANE FOUNDATION SEVENTH RESPONDENT

THE uMNGENI MUNICIPALITY EIGHTH RESPONDENT

MPOFANA MUNICIPALITY NINTH RESPONDENT

BRADLEY JOHN PRICE TENTH RESPONDENT

J U D G M E N T

Delivered on: Friday, 24 August, 2018

Olsen J (Jappie JP et D PILLAY J concurring)

- [1] Two appeals serve before us. They arise out of motion proceedings in this court. The learned judge a quo had to decide an application and a counter-application. He refused the first and granted the second. With the leave of the court a quo the first appellant (the applicant in the court below) appeals against the refusal of the application and the grant of the counter-application. The second appellant (which was the second respondent in the court below) appeals principally against the grant of the counter-application, but also against the dismissal of the application. The second appellant does so with the leave of the Supreme Court of Appeal.
- [2] It is convenient in this judgment to refer to the parties as they were in the original motion proceedings, save where a more convenient label is available. I propose to commence by identifying the parties, and in the course of that to introduce some of the background facts necessary in order to explain the role of each litigant.

The Applicant

- [3] The applicant is Dayken Properties CC. It owns Section No. 13 in the sectional title scheme known as “The Bend”.
- [4] The applicant bought Section No. 13 from the first respondent. The first respondent was in a position to sell the unit to the applicant because it was the “developer” of the sectional title scheme.

The First Respondent

- [5] The first respondent is Dania Investments (Pty) Limited. In 2000 it was the owner of, or in control of the owners of, some seven portions of agricultural land situate in the vicinity of a stretch of the Mooi River in the KwaZulu-Natal Midlands.
- [6] The first respondent wished to develop its land to accommodate its hotel and resort, as well as a large number of residential units to be held on sectional title. (Thirty-one such residential units were ultimately approved.) In 2000 the first respondent brought an application before the KwaZulu-Natal Development Tribunal for permission to develop the land in this fashion. The application generated a number of objections, and a number of hearings were held by the tribunal before it issued its judgment, sanctioning the development, on 16 May 2001. The Development Tribunal decided that four of the properties (Rem of the farm Middlefield No. 7547, Portion 3 (of 1) of Middlefield No. 7547, Portion 20 (of 1) of the farm Solitude No. 7333 and Portion 1 of the farm Defence No. 8115) would not become part of the sectional title development itself. (I will refer to these properties as the excluded properties.) The remainder of the land would comprise the sectional title development. As to the excluded properties, they were to be notarially tied to the consolidated property comprising the sectional title scheme, and subjected to an inalienable right in favour of the owners of sections to traverse the four excluded properties. Existing farming operations on those properties would have to be phased out so as progressively to develop them as a nature reserve. The crux of the applicant's case against the first respondent is the contention that the first respondent (which I shall call the developer) has failed in its duty to establish the nature reserve.
- [7] The developer is the only party against which the applicant sought relief. The other parties cited by the applicant were joined upon the basis that they had an interest in the proceedings.

The Second Respondent

- [8] The second respondent is The Body Corporate established in terms of the Sectional Titles Act No. 95 of 1986 with respect to the sectional title scheme approved by the KwaZulu-Natal Development Tribunal.
- [9] The second respondent (which I shall call the body corporate) delivered no answer to the applicant's claim in the main

application. Neither did it deliver a notice to abide the decision of the court.

- [10] When delivering its answer in the main application the developer launched a counter-application for orders declaring that the body corporate had certain responsibilities with respect to the maintenance of the excluded properties, and directing the body

corporate to raise levies to fulfil those responsibilities. The body corporate did not notify an intention to oppose the counter-application. Indeed, it played no part at all in the proceedings in the court a quo. (The applicant did notify its intention to oppose the developer's counter-application. A question arose in the appeal as to whether it had locus standi to do so, seeing that

the relief was claimed solely against the second respondent. I think the answer to that lies in the fact that the notice of counter-application cites the applicant as the first respondent in the counter-application.)

The Third and Fourth Respondents

[11] The third respondent is the KwaZulu-Natal Department of Co-Operative Governance and Traditional Affairs which, according to the founding affidavit, was cited as the department responsible for the operations of the fourth respondent. The fourth respondent is The KwaZulu-Natal Development Tribunal (which I shall call the tribunal).

[12] The third respondent delivered notices abiding the court's decision with respect to both the main application and the counter-application.

[13] However the deputy manager: legal services of the third respondent delivered an affidavit drawing the attention of the court a quo to the following facts.

(a) On 18 June 2010 the Constitutional Court handed down a judgment

confirming a decision of the Supreme Court of Appeal that Chapters V and VI of the Development Facilitation Act were constitutionally invalid. The constitutional invalidity of the relevant provisions (which were engaged by the developer with respect to The Bend) was suspended for a period of 24 months without affecting the validity of earlier decisions made by the tribunal.

(b) Subsequently the tribunal was dissolved with effect from 18 June 2012.

The proceedings in the court a quo were instituted in March 2013. It accordingly appears that the citation of the tribunal was incompetent, and the citation of the third respondent unnecessary.

The Fifth and Sixth Respondents

[14] The fifth respondent is The KwaZulu-Natal Department of Agriculture and Environmental Affairs. (I shall call it the department.)

The sixth respondent is cited as Ezemvelo KwaZulu-Natal Wildlife. (I will call it Ezemvelo.) It is a provincial conservation

authority falling under the department, and is referred to in the tribunal judgment as the KwaZulu-Natal Nature Conservation Services.

Ezemvelo delivered a notice to abide the court's decision on the application. Both the department and Ezemvelo delivered

notices to abide the court's decision on the counter-application.

[15] Neither of these two respondents took any part in the proceedings. However their joinder is not insignificant as in terms of the conditions of establishment upon the basis of which the development was approved by the tribunal, the progressive development of the excluded properties as a nature reserve was to be undertaken ‘in consultation with, and to the satisfaction of the Department of Agriculture and Environmental Affairs and the KwaZulu-Natal Nature Conservation Services.’

The Seventh Respondent

[16] The seventh respondent was cited as The KZN Crane Foundation. It was cited because the judgment of the tribunal required it to be consulted in respect of its interest in the planned nature reserve. However, it appears that the organisation may not exist and it took no part in the proceedings.

The Eighth and Ninth Respondents

[17] The eighth respondent is the uMngeni Municipality. It was cited as the municipality within the area of which the development is located. A dispute arose on the papers as to whether it was in fact the correct municipality to be cited. In the result the Mpofana Municipality was joined later on as the ninth respondent.

The Tenth Respondent

[18] The tenth respondent is a Mr Bradley John Price. He also was joined late in the proceedings. However the developer had delivered an affidavit by Mr Price with its answering papers.

[19] Mr Price was joined because he holds a lease granted by the developer over Portion 1 of the farm Defence, one of the four excluded

properties. The lease was in operation at the time the application was launched, and we were advised from the Bar that it is likely to come to an end in September 2019.

[20] In his affidavit Mr Price described his activities on the farm Defence. They bear some relevance to the dispute which arose on the papers as to what progress the developer had made in discharging its obligations with respect to the ultimate development of a nature reserve.

The Application

[21] The applicant originally sought an order in the following terms.

‘1.

“That [the developer] is directed to immediately terminate the use of the properties described below for stock farming or for any agricultural purpose, the properties being:

[The notice of motion then listed the excluded properties.]

2.

That [the developer] is directed to progressively develop the properties listed in paragraph 1 above as a nature reserve.

3.

That the development of the aforesaid nature reserve must be in accordance with a plan which must be approved by the [tribunal], and which must be

- (a) in writing;
- (b) prepared in consultation with the [body corporate] and the [KZN Crane Foundation];
- (c) disclosed to the applicant within not less than four months of the date of this order;
- (d) presented to [Ezemvelo] for approval within not less than six months from the date of this order.’

[22] The grounds for this relief were set out in the founding affidavit attested to by a Mr D R Scates, apparently the principal of the applicant. Copies of the tribunal’s original judgment as well as three amendments to it sanctioned by the tribunal were annexed to the founding affidavit.

[23] The judgment of the tribunal is by no means a model of clarity. Nevertheless the parties agreed that, given the legislative structure which authorised the imposition of conditions of establishment by the tribunal, such conditions have the force of law. (We were referred in this regard to Prospect SA Investments 42 (Pty) Ltd v Lanarco Home Owner Association (13346/12)

[2014] ZAKZPHC 39 (30 June

2014) and Thompson v Port Elizabeth City Council 1989

(4) SA 731 (A) at 770.)

[24] According to paragraph 8 of the conditions of establishment the “development” that was approved consisted of both the sectional title scheme (incorporating the properties on which it was to be established) and the excluded properties. However it is not always clear that when the words “the development” appear in the judgment, the reference is intended to be to all of the properties.

[25] The provisions of the conditions of establishment of the development relied upon principally by the applicant are the following.

‘B

- 2. [The excluded properties] will not form part of the sectional title holding but will be notarially tied to “The Bend”

in order that they may continue, temporarily, to be used for agricultural purposes to be progressively developed as a nature reserve, allowing for the phasing out of existing farming operations and having regard to the alleged eight year life of the pine timber

plantation, in consultation with, and to the satisfaction of the Department of Agriculture and Environmental Affairs and the KwaZulu-Natal Nature Conservation Services. The South African Crane Foundation shall be consulted in respect of its interests in this regard.’

’11

(2) Nature Reserve

The right of access and the use of the reserve will be inalienable. The reserve will be managed so as to ensure that the abundant

wildlife is protected.

A policy of re-establishing the indigenous flora will be followed. From the date of the establishment of the development, the developer will adhere to a list of plants defined by [Ezemvelo]. Flora not on this list will be banned from the development, except in the areas surrounding the hotel and staff housing, where gardens presently exist. Flora previously indigenous to this area will be reintroduced gradually under the auspices of [Ezemvelo].’

[26] The applicant also sought to rely on contractual rights in pursuit of the relief set out in its notice of motion. Unfortunately, and apparently in error, the incorrect contract was annexed to the founding affidavit. The correct one was put up by the developer in answer. Nothing really turns on the error. The clause in the incorrect contract relied upon in the applicant’s

founding affidavit is one which would have allowed the applicant (and other members of the sectional title scheme) the right of access to and of traversing the excluded properties. The same right is afforded in the correct contract. The right of sectional title owners to access and traverse the excluded properties is not in dispute in these proceedings. As these undisputed rights are recorded in the conditions of establishment of the development, nothing more need be said about the contractual rights of the applicant and the developer inter se.

[27] Against the background set out immediately above Mr Scates stated in the founding affidavit that he had personally inspected the excluded properties and established that they are being used for the purpose of crop farming and cattle pasture. He continued as follows.

‘No steps for the phasing out of agriculture, the reintroduction of indigenous plant species or the establishment of a nature reserve are evident’.

He asserted that the developer refused to comply with its obligation to phase out farming on the excluded properties and to progressively

establish a nature reserve thereon.

[28] One of the excluded properties is the farm Defence. Mr Scates referred to the fact that, after an earlier farming lease had terminated during 2011, the developer had in 2012 entered into a fresh lease of the farm Defence with Mr Price. Mr Scates

alleged that there is what he called an 'inherent conflict' between continuing farming operations and the establishment of the nature reserve. Whilst conceding that the tribunal had not expressed a time limit within which farming operations should cease, and within which the establishment of a nature reserve should be achieved, Mr Scates contended that the reference in the tribunal judgment to the eight year life of an existing pine timber plantation implied that the tribunal intended that all (other) agricultural activities should have ceased by the end of eight years.

[29] The principal features of the developer's answer to the case that it was called upon to meet are the following.

- (a) The developer denied the allegation made by Mr Scates that nothing had been done in furtherance of the establishment of a nature reserve upon the excluded properties. This denial was supported by a long list of work undertaken by the developer (not all of which was undertaken upon the excluded properties).
- (b) In any event what had been done had been done in consultation with the Department and Ezemvelo, and to their satisfaction, as a result of which progress was in accordance with the DFA judgment.
- (c) Despite extensive efforts made by Mr Price at the behest of the developer to eliminate tree plantations and infestations of undesirable alien plant species on the farm Defence, the Department and Ezemvelo had expressed a view that the farm was in fact suitable for agriculture and unsuitable for the establishment of a nature reserve.
- (d) The developer disputed the applicant's contention that, properly interpreted, the judgment of the tribunal laid down that the nature reserve had to be established or all agricultural activity had to end within eight years.

[30] The developer's answer to the statement in the founding affidavit that nothing had been done with regard to the establishment

of a nature reserve generated substantial disputes of fact. Nothing said in reply on behalf of the applicant served to alter that state of affairs. The applicant in its founding papers sought to justify its approach to the court for the mandatory interdicts it sought upon the basis that the developer had done nothing to further its obligations with regard to the establishment of a nature reserve. That case was undoubtedly answered. If the applicant had approached the court on the basis that some work had been done in furtherance of that obligation, but not enough, that would have generated a very different and, judging from the papers before us, a most complex enquiry which inevitably could not have been dealt with on paper.

- [31] Concerning the applicant's contention that upon a proper construction of the tribunal judgment, and especially paragraph 2 of the conditions of establishment quoted earlier, all agricultural activities had to cease within eight years, the learned Judge a quo drew attention to s 16(b)(vii) of the Development Facilitation Act, No. 67 of 1995, which was to the effect that the tribunal had the power to 'determine any time period within which any act in relation to land development is to be performed by a person'. It is proper to assume that the tribunal was aware of that power and, in my view, equally proper to draw the conclusion from the tribunal's failure to stipulate a time period for the cessation of agriculture and the establishment of a nature reserve, that it was not intended to fix one. This is especially so as the provision in question (quoted earlier) can also be interpreted to convey that the Department and Ezemvelo could not require of the developer to cut down the pine plantation earlier than after eight years, despite the fact that its eradication was of some importance in restoring the natural condition of the area.
- [32] The same paragraph 2 of the conditions of establishment is to the effect that the phasing out of existing farming operations and the progressive development of a nature reserve must take place 'in consultation with' and 'to the satisfaction of' the Department and Ezemvelo. The establish meaning of the term 'in consultation with' is that the concurrence of the person to be consulted must be obtained. Brand J described the distinction in *Unlawful Occupiers, School Site v City of Johannesburg* 2005

(4) SA 199 (SCA) at para 13.

'Support for this argument was sought in those cases where a distinction has been drawn between 'in consultation with' and 'after consultation with'. According to these authorities, a decision 'in consultation with' another functionary requires the concurrence of that functionary while a decision 'after consultation with' another functionary requires no more than that the decision must be taken in good faith, after consulting and giving serious consideration to the views of the other functionary (see eg *Premier, Western Cape v President of the Republic of South Africa* [1999] ZACC 2; 1999

(3) SA 657 (CC) (1999

(4) BCLR 382) para [85] n 94 and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 9; 1999

(4) SA 147 (CC) (1999

(7) BCLR 725) para [63]).'

There is no allegation in the founding papers that anything done by the developer was done otherwise than in consultation with the Department and Ezemvelo. Neither is there any allegation that consultation with those bodies generated requirements which the developer had not met. There is no allegation that what had been done up to the time of the launch of the application was otherwise than to the satisfaction of the Department and Ezemvelo. Undoubtedly the tribunal judgment had the effect of appointing the Department and Ezemvelo as arbiters with

respect to the performance of the developer's obligations relating to the excluded properties. It is unsurprising that the tribunal would have regarded that as necessary, not only to avoid disputes, but also because the expertise required for the task resided in those provincial departments. In my view the applicant had no enforceable right to approach the court for relief, even basing its case upon inadequate performance on the part of the developer, without alleging that the appointed decision makers (the Department and Ezemvelo) were not satisfied with what the developer had done. No relief was sought against the Department and Ezemvelo, based on an allegation that they had failed in the performance of their obligations flowing from the conditions of establishment, or otherwise.

[33] I have already mentioned that the developer's answering affidavit stood also as its founding affidavit in its proposed

counter-application against the body corporate. Confronted with the contents of the developer's answering affidavit, in reply the applicant took what it apparently regarded as something of a conciliatory position, involving amended relief on the application; and conceding the counter-application subject to an amendment to the terms of the order sought by the developer in its notice of counter-application. The applicant proposed that each party should pay its own costs. The amended order had been put to the developer in advance of delivery of the replying affidavit, and rejected. Nevertheless in the replying affidavit the applicant pursued a prayer for the grant of the amended order. There is no need to reproduce it in its entirety. Concerning the application, what the applicant now sought was a mandatory interdict directing the first respondent forthwith to terminate the use of three of the excluded properties for any agricultural purpose save for the grazing of a Nguni herd; an order that the first respondent turn the farm Defence (the fourth of the excluded properties) to eragrostis grassland on the termination of the lease over that farm held by Mr Price; and an order recording that the applicant and the developer agree that, excluding the farm Defence, the properties already 'substantially qualify as nature reserves' as a result of which the developer is not required to take any further steps to develop them as such.

[34] I do not propose to go into the question as to whether anything said in the applicant's replying affidavit might have supported the grant of this amended form of relief. As the learned Judge a quo observed, this new proposed order constituted something of a climb-down from the case on the facts which the developer was called upon to meet, and the other cited parties were called upon to consider. I would add to that observation the fact that a recordal by this court that the applicant and the developer had agreed that nothing more needed to be done to develop three of the excluded properties as a nature reserve is quite meaningless and could not be granted. The question as to whether those properties qualify or qualified in their then condition to attain the status of a nature reserve would be one to be decided in terms of the legislation governing the attainment of that status. The applicant's view as to whether the properties had the requisite qualities to attain the status of a nature reserve is of no significance or relevance with regard to the question as to whether

such a status had actually been achieved. Mr Scates seemed quite unembarrassed by the conflict between what he had stated in the founding affidavit and the new proposal he put forward in reply.

[35] We were informed by counsel for the applicant that when the matter was argued before the court a quo a third form of relief was sought. The only record of it before us is a single page on which that proposed order is set out in manuscript. That order did not feature in the judgment of the court a quo. One assumes that the learned Judge overlooked the fact that the applicant had shifted its ground again. The fact that it was overlooked makes no difference. Before us it was argued that this third version of the relief sought by the applicant should be granted, although counsel's heads of argument proposed an alternative which, at the end of his oral argument, counsel said was the correct order.

[36] The order which we are told the court a quo was asked to make is to the effect that the developer is directed to 'proceed without delay with the process of securing the proclamation' of the excluded properties as a nature reserve. As pointed out by counsel for the developer, the questions as to what the requirements are for such a proclamation, and as to whether circumstances existed which would render it at least possible to commence such a process at this time, had not been canvassed in the papers at all. It strikes me that when one stands back from the affidavits put before the court a quo one sees that in fact the parties are common cause that the properties are not yet ready for proclamation as a nature reserve.

On the papers the applicant's case was (initially in any event) that nothing had been done to achieve the progressive development of the properties as a nature reserve. On the first respondent's part, its case was that the progressive realisation was still underway.

[37] Perhaps recognising this difficulty, in argument before us counsel for the applicant opted for an alternative introduction to the manuscript order which would have the first respondent directed to progressively develop the properties as a nature reserve. This, as counsel conceded, is something of a regression to the relief originally sought in the notice of motion. The difficulty with that, as I have already mentioned, is that the applicant had no entitlement to such a mandatory interdict unless it could establish default on the part of the respondent with regard to its lawful obligations. Such default was not established.

[38] Finally, concerning the application, mention should be made of an alternative argument put forward by counsel for the applicant, that perhaps an order compelling the first respondent progressively to develop the farm Defence as a nature reserve should be granted.

This argument stems from the developer having stated in its papers that the department and Ezemvelo had expressed the view that the farm Defence is not suitable for conversion to a nature reserve, and ought to be maintained for agricultural use. Counsel argues that none of the developer, the department and Ezemvelo has the power to alter the condition of establishment which requires the farm Defence to be converted to a nature reserve in a progressive fashion. As I understood the argument counsel suggests that what has occurred is a repudiation of the

obligation imposed by the conditions of establishment to develop the farm Defence as a nature reserve.

[39] The respondent did not contend that it had achieved a release from the obligation imposed by the conditions of establishment to convert the farm Defence. What was stated was that the department and Ezemvelo had expressed the view that converting Defence was the wrong course. Clearly a decision must still be made, perhaps after more reflection, on the question as to whether steps should be taken in accordance with the appropriate legislative instruments to amend the conditions of establishment insofar as they apply to the farm Defence. How that might be done, and how it might ultimately affect any contractual rights of owners of sectional units, are not matters before this court. In my view it would have been inappropriate for the court a quo, and equally inappropriate for this court, to make an order directing the conversion of the farm Defence to a nature reserve because

- (a) that would interfere with or at worst obstruct any efforts to correct the position if the department and Ezemvelo are correct in their concern that the farm Defence should remain agricultural;
- (b) on the papers considerable efforts have been made by Mr Price to ensure that invasive alien species are removed from the farm Defence, steps which on the papers before us are ones which would be taken in any event if it were to be converted to a nature reserve; and
- (c) I remain unpersuaded that there is any room for this court to interfere with the administration of the development of the excluded properties when no case has been made to the effect that the responsible authorities are dissatisfied with what has been done; or to the effect that relief should be granted against the responsible authorities (i.e. the department and Ezemvelo) because they are not performing their duties with regard to the development of the farm Defence.

[40] I conclude that there is no merit in the appeal against the dismissal of the application by the court a quo.

The Counter-Application

[41] In its notice of counter-application the developer sought an order declaring that the responsibilities and duties of the body corporate with regard to the excluded properties (that is to say all four of them) include the maintenance of boundary fences, roads and firebreaks, the combatting of illegal and undesirable alien plant species and the stocking of the land with game animals and indigenous plant species. It also sought an order that the body corporate should include in the amounts determined for levies sums sufficient to discharge those responsibilities and duties. The counter-application was granted.

[42] In support of this relief the developer sought to rely on both the conditions of establishment imposed by the tribunal and the rules governing the sectional title development which it (the developer) was obliged to draw up in terms of the provisions of the then applicable s 35 of the Sectional Titles Act in order to open the sectional title register.

[43] The provisions of the rules relied on are contained in Rules 17 and

18. Rule 17 proclaims that ‘it is acknowledged’ that levies payable to the body corporate shall be used inter alia

‘for the upkeep of the roads, the upkeep of the property generally, the perimeter fencing, for the provision of security, the stocking of fish (particularly trout) and game, indigenous trees, generally the maintenance of the upkeep of the flora and fauna on the Common Property and other functions which it is obliged to carry out for the benefit of the members of the body corporate.’

[44] Rule 18 states inter alia that the body corporate shall be responsible for the employment of staff for the upkeep of

‘the road, the perimeter fence, the upkeep of the fauna and flora which exists on the property and to maintain satisfactory population levels in this regard.’

[45] The developer complained that levies were not being collected for the performance of this work which was not being performed by the body corporate.

[46] These conduct rules might appear on the face of it to be somewhat innocuous, but for the fact that Rule 1.2 reads as follows.

‘These rules shall apply not only to the sectional title development known as The Bend, but also all of the additional property over which the sectional title owners of The Bend have access and being that property which is notarially tied to The Bend. All such land to which these rules are applicable are hereinafter referred to as “the Common Property or the property”.’

[47] When these rules were introduced s 37 of the Sectional Titles Act required the body corporate to establish a fund sufficient for a number of purposes, which included ‘the repair, upkeep, control, management and administration of the Common Property ...’. Sub-section 37(1)(a) listed other matters (such as the costs of rates and taxes, gas, water and so on) which the fund must also meet. The list ended with levies

‘for the discharge of any duty or fulfilment of any other obligation of the body corporate’.

Counsel for the developer argued that the last mentioned provision rendered lawful the taking on by the body corporate of an obligation in effect to maintain the excluded properties. Of course, this obligation did not spring from the Sectional Titles Act, but from the developer’s own imagination.

[48] Assuming, contrary to what was argued on behalf of the body corporate, that the rules mentioned above are lawful, the questions

remain as to the identity of the beneficiary of performance of the obligation and, indeed, the origin and existence of the obligation.

On this latter score counsel for the developer relied on the provisions of the conditions of establishment of the entire development. In particular counsel referred to condition 15, relying only on the second part of the condition (which I highlight below). Condition 15 reads as follows

‘15 Body Corporate

The developer undertakes to set up a Body Corporate immediately development rights have been granted. Each owner of a portion

of the development shall become a member of this Corporation. The Body Corporate shall constitute the controlling body of the development, subject to the conditions of establishment. They shall have the right to appoint a management company [the word company was subsequently altered to “committee”] to implement the management of the development.

The Body Corporate shall determine the financial requirements of the development in order to ensure the sustainability of the whole

development in order to comply with the conditions of establishment. This will be met by funds generated by means of a proportional levy. It is understood that the hotel will be a member of this body and will pay a proportionate amount to the levy fund.’

[49] In my view it is clear that the so-called ‘Body Corporate’ referred to in condition 15 is not the body corporate of the sectional title development. That body corporate is established by statute. What the tribunal required was the establishment of another body corporate to oversee the entire property. Where the condition provides that each owner of a portion of the development must be a member of this corporation, that meant not only sectional title owners but also the developer in its capacity as the owner (either directly or through its subsidiaries) of the excluded properties. It is clear that when the tribunal then spoke about a proportional levy, this would have to be established having regard also to the fact that the developer owned the excluded properties.

[50] What the counter-application proposes is a declaration that in fact the duties with regard to excluded properties lie with the body corporate of the Sectional Title Scheme. That is not what was laid down in the conditions of establishment. In argument counsel for the developer was constrained to concede (reluctantly) that this might be the proper construction of the conditions of establishment.

[51] In my view there is another obstacle in the way of the outcome sought by the developer. In the conditions of establishment the obligations with regard to the conversion of the excluded properties to a nature reserve are placed on the developer. Given that farming operations were only to be phased out, I have difficulty with the proposition that the

conditions of establishment as a whole must be read to convey that any maintenance obligations with regard to the excluded property which may rest on the body corporate (i.e. the second respondent) could arise before the conversion is achieved by the developer. The notion that overall control of maintenance, and the obligation to pay for maintenance, should rest on another body (be it the sectional body corporate or the body corporate contemplated in condition 15) whilst the developer's agricultural activities are still underway strikes me as quite unworkable and un-businesslike, and as a scenario which could not have been contemplated by the tribunal.

[52] I have already mentioned that on the papers in this matter it is not the contention of the developer that it has finally achieved the conversion of the properties. The 'progressive development' of the properties as a nature reserve is still

underway.

[53] It is apparent from the judgment of the court a quo that the learned Judge granted the counter-application given that there was no opposition from the body corporate, and only arguments against the grant of it by the applicant. It is unsurprising that the arguments advanced by the applicant against the counter-application were regarded as unpersuasive by the learned Judge, given that in its replying affidavit in the main application, which served as its answering affidavit in the counter-application, the applicant in effect consented to the order set out in the counter-application

subject to the condition that the body corporate (that is to say the body corporate of the sectional title scheme) becomes the manager also of the excluded properties. (Where the applicant might have obtained the authority to make this offer, which was prejudicial to the body corporate, is not apparent on the papers which served before the court a quo.) The Judge a quo was not given the benefit of the arguments which were advanced before us.

[54] A further argument advanced before us was apparently also not advanced in the court a quo. With reference to Rule 24 of the Uniform Rules of Court, and the judgment of Page J in *Soundprops 1160 CC v Karlshavn Farm Partnership 1996*

(3) SA 1026 N, the appellants point out that the counter-application was an irregular proceeding from the outset. Rule 24 permits a counter-application by one respondent against another with the leave of the court as long as the counter-application is also for relief against the original applicant, whether jointly, jointly and severally, separately or in the alternative to the claim for relief against the other respondent. Here there was no claim made against the applicant for any relief at all. Its citation in the counter-application was merely nominal. As pointed out in *Soundprops*, if the developer in this case felt that it could bring itself within the ambit of Rule 13, then that might have been a course to follow. Otherwise the developer's right was to institute separate proceedings against the body corporate, and, if appropriate, to ask that the two applications then be consolidated for the purpose of hearing. It seems apparent that the provisions of Rule 30 were not employed by any party in order to address this irregularity.

[55] Mention should also be made of the fact that a counterclaim, or a counter-application, constitutes a separate and distinct legal proceeding. (See *Doyle v Doyle* 1981 (3) SA 1094 (D) at 1096D-E, referring inter alia to *Fripp v Gibbon & Co* 1913 AD 354 at 360.) As the body corporate had not joined in or participated in the main application it was presumably necessary to serve the counter-application on the body corporate through the sheriff in order lawfully to institute proceedings against the body corporate. Given its separate legal personality, and the fact that the applicant was only one member of it amongst many, such service upon the body corporate would have been no mere formality. It would have alerted the trustees properly to their duty to look to

the interests and views of the entire membership of the body corporate before determining its response to the claim against it.

There is no sign in the record that the counter-application was properly served.

[56] It is not necessary for us to base our decision on these procedural issues, important as they may be. In my view the counter-application

ought to have failed in any event for want of merit, because

- (a) the conditions of establishment did not in fact place the duty of the maintenance of property beyond the common property on the sectional title body corporate; and
- (b) even if the conditions of establishment are read to have laid down that the body corporate of the sectional title scheme should bear the costs of maintaining the excluded properties, the time for the performance of that obligation had not arisen.

In the result the following order is made.

1.

- (a) The appeal against the refusal of the application is dismissed.
- (b) The first and second appellants (the applicant and the second respondent in the court a quo) are directed to pay the costs of the appeal.

2.

- (a) The appeal against the grant of the counter-application is upheld. The order of the court a quo is set aside and replaced with the following order.

“The counter-application is dismissed with costs.”

- (b) The respondent in the appeal against the grant of the counter-application (i.e. the first respondent in the main application in the court a quo) is ordered to pay the costs of the appeal.

OLSEN J

JAPPIE JP

D PILLAY J

Date of Hearing: FRIDAY, 03 AUGUST 2018

Date of Judgment: FRIDAY, 24 AUGUST 2018

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