

SOUTH AFRICA / JUDGMENT

Kungwini Estates (Pty) Ltd v Kepoa Property Owners Association (NPC) and Others (30121/2011) [2015] ZAGPPHC 8 (23 January 2015)

[2015] ZAGPPHC 8

COURT

North Gauteng High Court, Pretoria

BEFORE

Tlhapi V.V

CASE / FILE NUMBER

30121/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE NUMBER:

30121/2011

DATE: 23 JANUARY

2015

In the matter

between:

KUNGWINI ESTATES

(PTY)

LTD.....APPLICANT

and

KEPOA PROPERTY

OWNERS ASSOCIATION (NPC).....FIRST

RESPONDENT

KUNGWINI

HOMEOWNER'S

ASSOCIATION.....SECOND

RESPONDENT

THE REGISTRAR OF

DEEDS.....THIRD

RESPONDENT

MUNCIPAL MANAGER: TSHWANE
METROPOLITAN
MUNICIPALITY.....FOURTH
RESPONDENT
KUNGWINI ERF 10
HOMEOWNERS ASSOCIATION.....FIFTH
RESPONDENT
DAMSIG ERF 7
HOMEOWNER'S
ASSOCOATION.....SIXTH
RESPONDENT
KUNGWINI RANCH
HOMEOWENER'S ASSOCIATION.....SEVENTH
RESPONDENT
KUNGWINI BAY
HOMEOWNER'S
ASSOCIATION.....EIGHTH
RESPONDENT
KUNGWINI PARK
HOMEOWNER'S
ASSOCIATION.....NINTH
RESPONDENT

JUDGMENT

TLHAPI J

[1] This is an application in which the following order is sought:

"1. That the Court Order granted on the 24 June 2011 under case number 30121/2011 be amended by replacing the reference to "Erf 21" and the detail thereof with a reference "the remaining extent of Erf 21 measuring 2.2798 ha in extent"

2. That the third respondent be ordered to effect transfer of the remaining extent of Erf 21 to the first respondent at the applicant's exclusive cost.
3. That the applicant be ordered to pay the costs of this application in so far as it is not opposed."

This application was opposed by the second respondent which also launched a counter application in which the following order is sought:

"1. That the Court Order dated 24 June 2011 issued under the above case number be amended to read as follows:

‘The First Respondent, Kungwini Estates (Pty) Ltd, is ordered to transfer Portion 1 of Erf 21 and the Remainder of Erf 21 (which properties previously comprised Erf 21) in the township Kungwini Country Estate to KEPOA Property Owners Association (NPC) and pay all costs and taxes reasonably associated with the transfer of the aforementioned immovable properties.’”

2. The Applicant is ordered to pay costs of this application,”

This application was opposed by Kungwini Estates (Pty) Ltd.

[2] The applicant was the developer of several residential estates situated on the banks of the Bronhortspruit Dam, known as the Kungwini Country Estates, (“the estate”). It is also the registered owner of Erf 21 which is central to this application and which erf constituted the communal entrance shared by the residential estates (2nd, 5th, 6th 7th 8th and 9th respondents).

[3] The establishment of the testate during 1998 was approved by the fourth respondent (successor in title to the KUNGWININ Local Municipality) subject to the following conditions published in Government Notice 6031 and 6032 dated 22 September 1999 :

Condition 2.6

“Die eienaar van Erf 21 moet voile verantwoordelikheid vir the funksionering en behoorlike instandhouding van Erf 21, en die noodsaaklike dienste wat daarin vervat is, neem. Die plaaslike bestuursal nie verantwoordelikheid aanvaar vir die wanfunksionering van die oppervlakte van die toegangspad erf/of die stormwaterdreineringsstelsel [sic] en /of enige noodsaaklike dienste nie”

Condition 2.7

“Die erf moet deur 'n regspersoon wat deur die dorpseienaar genomineer staan te word besit word”

[4] In pursuance of the above conditions the second respondent, after thirteen years launched an application under case number 30121/2011 to compel the applicant to effect transfer of Erf 21 to a section 21 company to be established. This application was not opposed by the applicant, who was the first respondent at the time, nor was it opposed by the third to ninth respondent herein. On 24 June 2011 Fabricius J granted an order compelling such transfer.

[5] Mr Johann Walters (“Walters”) who deposed to the founding affidavit averred that in complying with the court order it was informed by its attorneys that while gathering the approved Surveyor General’s diagrams , and having initially drawn up transfer documents in respect of Erf 21, it was informed and also realized that the communal entrance road was no longer known as Erf 21 but as the remainder of Erf 21. In order to give effect to the court order it instructed its attorney to proceed with the drawing up of transfer documents in respect of the latter. A release of the remainder of Erf 21 from a bond registered in favour of Standard Bank was secured and it obtained from the fourth respondent and settled a tax clearance certificate applicable to the remainder of Erf 21. They were later informed that the third respondent had declined to effect registration and issued the following note:

“In terms of order of court (doc 4 in No. 7 of the batch) the whole should be transferred (e.g 2, 5566 Ha). Withdraw this Deed and

Application or have the said order amended”

- [6] Walters contended that although the applicant was not opposed to transferring the communal entrance road and the servitude registered thereon to the first respondent, there was a mistake committed by both the applicant in the main application (the second respondent herein) and the applicant in not referring to the specific property as the “Remaining Extent of Erf 21,” because that ‘was the common intention of the parties’. The second respondent had relied on the original Conditions of Establishment of 1999 ‘applicable to the original township established in terms of section 103 of the Town Planning and Township Ordinance of 1986 (“the Ordinance”). Subsequent to the original conditions the applicant had during 2006 to 2008 caused to be effected to Erf 21 certain changes to the land use. Therefore as at date of the order transfer of Erf 21 to the first respondent as it was previously known was ‘virtually impossible’..
- [7] In order to give effect to its intention to develop a shopping centre on a consolidated piece of land and at the entrance of the estate the applicant launched applications with the Kungwini Local Authority for subdivision, consolidation, road closure and servitude deregistration.
- [8] It applied to the Kungwini Local Authority in terms of section 92 of the Ordinance in 2005, for approval for the subdivision of Erf 21 into two portions, being Portion 1 of Erf 21 (extent: 2708 sq metres) and the Remainder of Erf 21 (22798 sq metres) and for road closure and servitude deregistration applicable to Erf 21. In 2006 it applied for the consolidation of Portion 1 of Erf 21 with Portion 66 of Erf 4 of which applicant was the registered owner. Both applications were approved and the latter became known as Erf 85.
- [9] It was contended that Portion 1 of Erf 21 fell outside the main entrance and the access road to the estates. Furthermore that in approving the applications, the Local Authority, was satisfied that the land use changes applied for did not adversely affect the original conditions of establishment. As it was entitled to do in terms of section 92 (3) of the Ordinance, it amended the original conditions of establishment to accommodate the changes and as contained in a letter from the Local Authority dated 9 May 2006, annexure “W11” and the conditions stated therein were the following:

“The approval granted shall be subject to the following condition:

1. The applicant has to arrange for the provision of civil services with the Director Service Delivery;
2. That the applicant has to supply two copies of the diagram within three months after approval by the Surveyor General to the Local Municipality as stipulated in regulation 37 of the Ordinance of Town Planning and Townships, 1986 (15 of 1986);
3. That a certified copy of the new title deed be submitted to Kungwini Local Municipality;

4.....

5.....”

On 5 April 2007 the Surveyor General approved the land use changes by issuing the relevant diagrams annexure “W13” to the application as indicated in the map by the Surveyor General and annexed as “A5” to the main application.. The changes were not registered against the title because the applicant contended that it was practice that registration would occur ‘when ownership of a subdivided or consolidated portion is transferred to different persons or entities. The applicant proceeded to install bulk electricity and instructed architects to draw up ‘concept plans and architectural drawings for the proposed shopping centre.

On 9 May 2009 an application again to the Local Authority for there zoning of the consolidated portion of land to include business rights was approved.

[10] Ms Daleen Van Dyk (“ Van Dyk”) deposed to the answering affidavit. The applicant established the first respondent in order for it to take transfer of Erf 21 on behalf of every single owner of property in the Estate. The purpose of the counter application was prompted by the revelations in the founding affidavit in which the alleged changes to the land use in respect of Erf 21 came to the knowledge of the second respond for the first time. While admitting that the original Erf 21 had been subdivided, she contended that the variation of the existing Court Order as prayed for in the counter application would result in compliance with the original Condition of Township Establishment.

She denied that there was an error on the part of the second respondent. The applicant had failed to give notice to the second respondent of its intention to apply to the Local Authority for land use changes, amending the original Conditions of Township Establishment. She contended that transfer of the entire property previously known as Erf 21 was demanded because the original Conditions of Township

Establishment which conditions were still ‘applicable and have not been recalled or amended’. It was contended that the applicant was misleading the court in not disclosing that Portion 1 of Erf 21 not only included the piece of land next to the communal gate, but also the portion of land from which boats were launched into the Bronkhorstspuit Dam. This became evident when it attempted to effect registration of only the Remainder of Erf 21. This attempt was thwarted by the third respondent when it realized that such intended registration was not in accordance with the wording of the Court Order compelling transfer of Erf 21.

[11] No changes had been effected on records obtained from searches with the third respondent and the applicant had failed to provide proof that it had applied for land use changes with the Local Authority in terms of Section 99 of the Ordinance. In response to a request in terms of Rule 35 (12) for disclosure of documents relating to such changes the applicant informed them that after diligent search and enquiries such records could not be obtained and that it relied on annexure “W11”.

- [12] In reply the applicant contended that the second respondent could not rely on the contents of the founding affidavit in the main application without referring in its answering affidavit to those averments specifically relied upon. Furthermore that it did not seek to review or set aside the decisions of the relevant local authority by virtue of which Erf 21 was subdivided, consolidated and again subdivided and the right of way servitude cancelled and the approval of the street closure and rezoning of the property for commercial purposes.

It did not oppose the main application because it wished to transfer the ownership of the communal access road to an entity representative of the owners of the estate. The error by the applicant and second respondent consisted in that both did not realize that when the main application was launched the communal access road was no longer situated on Erf 21 as it originally existed but that it was located on the Remainder of Erf 21. The area marked in green in the diagrams relied upon in the main application relate to communal access road located not on the full extent of Erf 21 but on the Remainder of Erf 21. Furthermore Portion 1 of Erf 21, which initially formed part of Erf 21 did not exist since the subdivision and consolidation applications of 2005 and 2006.

- [13] In as far as notice was not been given to the second respondent the applicant averred that at the time of consolidation it was the majority shareholder in the second respondent and that the Local Authority in granting the approval had satisfied itself that the applicant had complied with the 'necessary statutory prescriptions, including those relating to public participation' required in terms of the Ordinance. Approval as reflected in the diagrams of the Surveyor General and marked "W13" was proof that proper applications for land change use preceded such approval.

- [14] In her reply to the counter application Ms Van Dyk contended that the second respondent had always maintained, as now admitted by the applicant that only one township, the Kungwinin Country Estate was created and that separate townships were never created. The applicant having failed to produce any evidence that the amendment of the conditions took place, the matter fell to be adjudicated in terms of the original Conditions of Establishment published in 1999.

Furthermore, from a diagram obtained from the attorneys of the applicant and annexed as "R4" it was evident that Portion 1 of Erf 21 consisted of three further pieces of land one of which included land from which boats were launched from the Dam and that in as far as this was not disclosed the applicant had attempted to mislead the court.

- [15] It was my view after hearing argument in the matter that the third respondent even though not opposing the application could have assisted the court by filing a report on what transpired when it declined to register the remaining extent of Erf 21, as presented by the applicant. I therefore called for such report and the following was mentioned:

"3. I respectfully wish to draw the attention of the Honourable Court to the following:

3.1 I received copies of documents drafted for an application for a Certificate of Registered title in terms section 43 of the Deeds Registries Act, no.47 of 1937, in respect of Portion 1 of Erf 21 Kungwini Country Estate,.....

3.2 From Annexure “W18” I draw the conclusion that a batch of deeds was lodged, where an application was made by the owner of Erf 21 for a subdivision of the erf by way of Certificate of title, with a simultaneous transfer of the Remaining extent of the erf to the first respondent. I did not receive the whole batch, with all documents, especially the note sheet upon which this office would have raised the offending note.

3.3 The conditions of establishment of the township Kungwini Country Estate was published in the Provincial Gazette no. 79 dated September 1999. It is the duty of the Registrar to ensure compliance with the conditions of establishment. Condition numbered 1.7 of the said conditions of establishment prescribes that the whole of erf 21 has to be transferred to the second respondent and not the remainder thereof. The problem can be resolved if the Municipality of Kungwini publish and amended conditions of establishment that provided for the subdivision of erf 21, and the transfer of the remainder of erf 21 to the Home Owners Association”

[16] The crisp issue to be determined was whether the court order of the 24 June 2011 can be amended as sought by the applicant by the substitution of “Erf 21” with “the remaining extent of Erf 21...”, on the basis of an alleged mistake on the part of the applicant and second respondent, or, alternatively as sought by the second respondent in the counter application, an order compelling the applicant to transfer “ Portion 1 of Erf 21” and ‘the remaining extent of Erf 21” to the first respondent..

There is therefore an understanding by both parties that transfer of Erf 21 as existed during 1999 and as provided for in the original Conditions of Establishment (as ordered by Fabricius J on 24 June 2011) cannot be effected.

[17] The several applications of changes to land use, that of subdivision, consolidation, deregistration of the servitude and closure of road, which were approved by the Local Authority changed the description of the land as it was originally known during 1999. That this process was engaged cannot be disputed by the second respondent because such fact is evident from the diagrams emanating from the office of the Surveyor General which diagrams were annexed to the papers.

[18] The third respondent’s report did not assist me because it was not a report on the process engaged by the third respondent’s

official when the offending note was issued. The third respondent acknowledges the fact that he was not given the necessary batch of documents that resulted in the offending note being issued. My understanding of the process of registration or transfer of immovable

property is that an examiner in the third respondent’s office would also have access to the records of the Surveyor General for examination and verification.

[19] The purpose of the exercise is to satisfy himself that the property sought to be transferred, in particular the description thereof accords with the records of the Surveyor General. In my view the note was raised because the description in the batch presented for registration to the third respondent and the Surveyor General differed with the court order. The third respondent could therefore

not give effect to the order and the original conditions of establishment that the whole of Erf 21 be transferred. Hence the suggestions in the note 'that the application for transfer of only the remaining extent of Erf 21 be withdrawn or that the court order be amended' and in the report that the Local Authority be approached to 'publish an amended conditions of establishment 'for the subdivision of Erf 21 and the transfer of the remaining extent of Erf 21.'

[20] It was argued for the applicant that when the applications for changes to land use were considered and approved by the Local Authority that such process entailed administrative action and that the said authority had satisfied itself that the formalities prescribed had been complied with. The approvals had the effect of changing the character of Erf 21 and, also of amending the original conditions of establishment. The second respondent had not approached the court to have such action reviewed or set aside.

It was argued for the second respondent that the applications were done in a secretive manner without giving notification or co-operation of any of the Homeowner's Associations. Furthermore that the changes to land use would deprive all the residents of the estate 'from having unfettered and unrestricted use and right to launch their boats into the dam because the newly created Portion 1 Erf 21 included the piece of land next to the communal gate, and, that portion of land from which boats were launched into the dam, which is also where the applicant wishes to establish a shopping complex. Erf 21 was comprised of Portion 1 of Erf 21 and the Remainder of Erf 21 and amendment of the court order of the 24 June 2011 would give effect to the original Conditions of Establishment.

[21] It is important to note that although the applicant failed to comply with the demand for disclosure of documents in terms of Rule 35 (12), annexure "W11" was of significance because it indicated that approval was given by the Local Authority and that changes were effected to the description of Erf 21 and also to the description of Portion 1 of Erf 21 where it was consolidated with Portion 66 of Erf 4 to form Erf 85. It is unfortunate that the Surveyor General's office was not called upon to give input on the correct explanation of the diagrams emanating from that office and annexed to the papers. It does however appear from the diagrams dated 5 April 2007 that the Surveyor General had approved the subdivision of Erf 21 into Portion 1 of Erf 21 together with the cancellation of the servitude and, the Remainder of Erf 21 with retention of the servitude.

- [22] In the founding papers applicant averred that annexure “W13” on pages 126 to 131 of the papers was proof of the incorporation of all the changes (ABCDEFGHIJ KLM) and this is clearly seen on the diagram on page 131 of the papers. According to the diagram approved by the Surveyor General what now exists is the Remainder of Erf 21 Servitude and Erf 85 (Portion 1 of Erf 21 consolidated with Portion 66 of Erf 4)
- [23] Although the second respondent was not made aware or notified of any intention by the applicant to amend the original Conditions of Establishment, the above mentioned processes are confirmation that the applications for changes to the use of land were approved by the Local Authority and the Surveyor General even though such changes were not as yet registered against the title to the land. In my view this explains why the third respondent did not have proof of such changes and also why the second respondent would not have been made aware when it conducted deeds searches with the third respondent because the applicant had not fully complied with the condition that a copy of the new title deed be filed with the Local Authority (condition 3 “W11”). In my view the approvals in principle had the effect of amending the original Conditions of Establishment.
- [24] The approvals remain in place and cannot be disregarded even where the conduct of the applicant or the local authority was viewed by the second respondent to have been contrary to the original Conditions of Establishment, *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA) 242 A-C:

“Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside. ”

- [25] At establishment of the estate the communal access road had been registered against the whole of Erf 21. This is evident from the

subsequent applications by the applicant for road closure and cancellation of servitude on the land later to be known as Portion 1 of Erf 21.

Erf 21 was the land which according to the 1999 Conditions of Establishment had to be transferred to a separate entity for the benefit of the residents of the estate. The main application was launched to compel such transfer of Erf 21. As I see it, the purpose of attaching “A5” to the main application (“W13” in this application) was meant to give the court an understanding of the ‘layout of Kungwini Country Estate’ as averred, and it was not annexed under the mistaken belief that what was described therein as the Remainder of Erf 21 Servitude, was what was sought to be transferred. The changes to the use of land over the years and the envisaged future developments were in my view drastic, to such a degree that the applicant cannot now claim that there was a mistake or that it was ignorant of the changes to the original conditions of establishment when it

was served with the main application and when it decided not to oppose such application. This is evident from the fact that the applicant decided to proceed with an attempt to register the Remainder of Erf 21 Servitude, without first informing the second respondent that it had encountered a problem when implementing the court order, that is, even before the offending note was issued by the third respondent.

[26] I am therefore not persuaded that on the facts of this case the applicant has made out a case that it together with the second

respondent were ad idem regarding the alleged mistake or; that there were grounds upon which the order of the 24 June 2011 might be rescinded or varied. The second respondent has never sought that only the Remainder of Erf 21 Servitude be transferred to it. Also in the light of the Oudekraal decision the second respondent is not entitled to a variation of the order of the 24 June 2011 until such time that the approvals are set aside because Portion 1 of Erf 21 and the Remainder of Erf 21 Servitude are not an equivalent to the proper description of the land sought to be transferred in terms of the original Conditions of Establishment. As I see it both applications must therefore fail.

[27] In the result the following order is given:

1. The application is dismissed and each party is to pay its own costs;
2. The counter application is dismissed and each party is to pay its own costs.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON :25 MARCH 2014

JUDGMENT RESERVED ON :25 MARCH 2014

ATTORNEYS FOR THE APPLICANTS : E.W SERFONTEIN & ASS.

ATTORNEYS FOR THE RESPONDENTS: STUART VAN DER MERWE I INC

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