

SOUTH AFRICA / JUDGMENT

Prospect SA Investments 42 (Pty) Ltd v Lanarco Home Owner Association (13346/12) [2014] ZAKZPHC 39 (30 June 2014) [2014] ZAKZPHC 39

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Kruger

CASE / FILE NUMBER

13346/12

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IN

THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC

OF SOUTH AFRICA

CASE

NO:13346/12

In

the matter between:

PROSPECT
SA INVESTMENTS 42 (PTY) LTD APPLICANT
and
LANARCO
HOME OWNER ASSOCIATION
(Association
Incorporated under Section 21)
RESPONDENT

JUDGMENT

Delivered on 30 June 2014

KRUGER J

[1] The Applicant seeks a declaratory order that, as developer of the Lanarco Estate, it is not a member of the Respondent and is consequently not liable to the Respondent for the payment of levies. Allied to this, the Applicant seeks an order compelling the Respondent to furnish the necessary clearance certificates and/or consents as required by the transferring attorneys.

[2] In contrast, the Respondent, in a counter application, seeks a declaratory order that the applicant be declared liable for the

payment of all levies imposed in respect of each immovable property owned by the Respondent within the boundaries of the Lanarco

development, during the period in which the Applicant was the owner thereof.

BACKGROUND

[3] The Applicant acquired ownership of the property, described as “Remainder of Erf 137 Kingsburgh, Registration Division ET, Province of KwaZulu-Natal, in extent 12,5880 (Twelve comma five eight eight zero) hectares” on 2nd August 2004. The property was duly registered in the Applicant’s name on the 21st December 2004 under Deed of Transfer No. T68483/04.

[4] The Applicant applied for a Certificate of Registered Title in respect of Portion 4 of the said property. This certificate was duly issued under Certificate of Registered Title No. T10743/06. The property was described as “Portion 4 of Erf 137 Kingsburgh, Registration Division ET, Province of KwaZulu-Natal, in extent 12,5574 (twelve comma five five seven four) hectares.”

[5] The Applicant thereafter sought to create a private township on the said Portion 4 of Erf 137 Kingsburgh. On the 29th November 2005, the Department of Local Government and Traditional Affairs approved the layout of the proposed township subject to certain conditions. One of these conditions related to the lodgement of a general plan of the proposed private township with the Surveyor-General for approval. Thereafter, the general plan, certified by the Surveyor-General, together with the relevant Title Deed, was to be lodged with the Registrar of Deeds for registration of the private township. This was duly attended to and the Certificate of Registered Title No. T10743/06 was endorsed to the effect that the land “has been laid into erven numbered 3371-3465 in accordance with general plan S.G No. 226/2006 ...”

[6] Other important conditions of establishment of the private township are the following:

“A14 Common Property

Prior to the transfer of erven 3371-3461, erven 3462-3465, which comprises the common property, are to be transferred to a Homeowners' Association and each owner of a lot shall become a member of that association.”

“C.1(b) Home Owners' Association

Neither the lot, nor any further sub-division, nor any unit thereon as defined in the Sectional Titles Act No.95 of 1986, shall be transferred to any person until he has bound himself to become and remain a member of “Home Owners' Association” for the duration of his ownership and a clearance certificate has been issued by such Association to the effect that its Articles of Association have been complied with.”

[7] The Respondent was established in 2004 as a shelf company and on 20th March 2006 changed its name to “Lanarco Home Owner Association (Association Incorporated under Section 21).” The Directors of the Applicant were initially the sole directors of the Respondent. Various conduct rules were from time to time promulgated for the Respondent.

[8] Clauses 3 and 4 of the Articles of Association provide:

“3. MEMBERSHIP

Membership to the association shall be open to all qualified and interested parties who shall be individuals with professional or other interests in the operational areas of the association.

4. APPLICATION FOR MEMBERSHIP OF THE ASSOCIATION

Application for membership shall be made in writing, directed to the management committee of the association. Each application for membership shall be accompanied by an entrance fee as is agreed upon by the members in general meetings from time to time. In the event of the application for membership being refused, the entrance fee shall be refunded to the applicant.”

[9] The conduct rules which are, in my opinion, relevant, are the following:

“1.3.2 “ESTATE” shall mean the Lanarco Estate, a residential estate developed on Portion 4 of Erf 137 Kingsburgh;

1.3.3 “OWNER” shall mean the registered owner of any erf or sectional title unit within the estate

1.3.4 “RESIDENT” shall mean any person occupying a property, whether by lease, sub-lease, membership or shareholding in or of the owner of the property, or any other right bestowing the right to use and occupy the dwelling;

1.3.5 “PROPERTY” shall mean any erf or Sectional Title unit situated within the estate.

2. MEMBERSHIP

2.1 Owners are members of the association by virtue of ownership of a property ...”

ISSUES

THAT REQUIRE DETERMINATION

[10] The sole issue that requires determination is whether the Applicant is a member of the Respondent and accordingly is obliged to pay levies raised by the Respondent in respect of the development known as Lanarco.

[11] On the papers before me, in brief, the Applicant contends that it is not a member of the Respondent and accordingly not obliged to pay levies for the following reasons:-

- (a) It did not automatically become a member of the Respondent as the Articles of the Respondent requires a written application.
- (b) There is no contractual nexus between it and the Respondent requiring it to be a member of the Respondent;
- (c) The individual erven do not yet exist for the purposes of membership of the Respondent and
- (d) It is the registered owner of the whole of the remainder of the township and not each individual erf.

[12] The Respondent contends that in terms of the conditions of the establishment of the township as well as the Respondents conduct

rules, the Applicant is a member of the Respondent and as such is liable for the payment of levies in respect of the properties that it owns. The Respondent further contends that in as much as the Applicant's directors were also directors of the Respondent; the Applicant exercised rights of a member by attending meetings of the Respondent and voting thereat; the Applicants are estopped from denying that it is obliged to make payment of levies in respect of those immovable properties which it holds.

[13] Mr Hunt SC, who appears with Mr Combrink on behalf of the Applicant, has submitted that the matter cannot be resolved on the affidavits and has sought a referral of the application and counter-application, to evidence. The basis for this is I understand his submission, is that the essential issue in determining both the application and counter-application is whether, as a fact, the Applicant ever became a member of the Respondent.

[14] During the course of argument, the parties agreed that, if necessary, it

is the Respondent's contentions of estoppel which will require evidence as there are mutually inconsistent statements/averments

relating thereto.

DEEDS REGISTRIES ACT NO.47/1937

- [15] Before considering the merits and/or demerits of the Applicant's and Respondent's contentions, it is necessary to identify the relevant provisions of the Deeds Registries Act which are applicable. Section 102 of the Act defines "erf" as "means every piece of land registered as an erf, Lot, or stand in a Deeds Registry, and includes every defined portion, not intended to be a public place, of a piece of land laid out as a township, whether or not it has been formally recognised, approved or proclaimed as such"

"Owner" "means, in relation to-

- (a) Immovable property, ..., the person registered as the owner or holder thereof ..."

"Registered" is defined as "registered in a Deeds Registry".

- [16] Chapter iv of the Act relates to townships and settlements. Section 46(1) provides:

"If land has been sub-divided into lots or erven shown on a general plan, the owner of the land sub-divided shall furnish a copy of the general plan to the Registrar, who shall, subject to compliance with the requirements of this section and of any other law, register the plan and open a register in which all registerable transactions affecting the respective lots or erven shown on the plan shall be registered."

Section 46(3) provides:

"If the land sub-divided as shown on the general plan form the whole of any registered piece of land held by the title deed, the Registrar shall make upon the title deed and the registry duplicate thereof an endorsement indicating that the land has been laid out as a township or settlement, as the case maybe, in accordance with the plan, and that the lots or erven shown on the plan are to be registered in the relative register."

- [17] The Act further provides that if the township is laid out on only a portion of the land concerned, the owner is to obtain a Certificate of Registered Title in respect of the said portion. In this regard the provisions of Section 43 of the Act are applicable. Section 43(5)(a) provides:

"Save in the case of a transfer of a whole erf, no owner of a township or settlement in whose title deed the individual erven are not separately described, shall deal separately in any way with an individual erf in such township or settlement or any portion thereof or share therein until he has obtained a certificate of registered title of such erf in the prescribed form."

DELIBERATION

- [18] As is evident from the provisions of Sections 43(5)(a) and Section 46 of the Deeds Registries Act, a township cannot be created on a portion of land and a developer is prohibited from alienating individual lots (or erven) until a certificate of registered title in respect of the portion of land has been issued and a general plan, depicting the various lots (or erven) has been registered in the Deeds Registry. The provisions of Section 46(3)

makes it clear, in my opinion, that the description of the land held by the title deed (in casu Certificate of Registered Title No. 10743/06) is superseded or

substituted with

the land description as depicted on the general plan. This simply means that erven 3371 to 3465, as depicted on general plan SG No. 226/2006 belong to the owner of the land which was described as portion 4 of Erf 137 Kingsburgh. This, it is common cause, is the Applicant. The essential differences being that the Applicant was no longer the owner of a farmland but of various erven in a proclaimed private township. The conditions of establishment of a private township further compel the Applicant to deal with the erven in accordance with the registered general plan.

[19] It follows that if one has regard for the definitions of “erf” and “registered” as outlined earlier in this judgment, the individual erven do exist and in fact came into existence upon registration of General Plan SG No. 226/2006. The Applicant’s contentions that the individual erven do not yet exist is therefore without merit.

[20] The Applicant has averred that it is the registered owner of the remainder of the township and not each individual erf. In this

regard it appears that the Applicant is confusing the situation in casu with that of a transfer of a piece of land unregistered in the Deeds Office. This would occur when land is sub-divided and a piece thereof is sold. The procedure, as I understand it, would require the simultaneous lodgement of a surveyor’s diagram depicting the sub-divided portion which is then transferred to the new owner. It is in these situations that the original owner becomes the owner of the remaining in extent of the property. For the reasons already outlined earlier in this judgment, there can be no merit in this submission.

[21] The remaining two contentions of the Applicant can be considered together. In the Heads of Argument submitted on behalf of the Applicants, it is submitted that the original title deed as well as the certificate of registered title

contain no provisions which require that the Applicant should be a member of the Respondent. A perusal of these two title deeds indeed confirm the correctness of this submission. However the endorsement on the certificate of registered title (referred to in paragraph 5 supra) confirm that the erven form part of a registered general plan. This being so, one must have regard for the conditions relating to the approval of the private township.

[22] It will be noted that condition A14 (supra) requires (a) the transfer of the common property to a Home Owners Association and

(b) the owner of each lot or erf is to become a member of the Home Owners Association. These two conditions are to be fulfilled prior to the transfer of any of the remaining erven or lots. The language is clear and unambiguous and is couched in peremptory terms. As owner of all the remaining lots/erven, (erven/lots 3462/3465 being the common property) the Applicant, upon transfer of the common property was obliged to become a member of the Respondent.

- [23] Mr Hunt has submitted that the aforesaid conditions, at most, imposed obligations upon owners to become members of the Respondent. They could not as a matter of law actually constitute anybody a member of the Respondent, which is a company. He has submitted that in terms of the Respondent's Articles of Association, an application for membership shall be made in writing. This application is to be accompanied by payment of an entrance fee. The Applicant, it is submitted, did not make such an application nor did it pay or tender to pay an entrance fee. Accordingly he has submitted, that regardless of what the conditions of establishment might say, the Applicant could not become a member of the Respondent other than by a contractual nexus and in accordance with the Articles of Association of the Respondent.
- [24] The conditions of establishment (approval) of the township were imposed by the Minister in terms of Section 18 of the Town Planning Ordinance No. 27 of 1949 (as amended). This Ordinance has statutory force within the province of KwaZulu-Natal. Accordingly, the conditions imposed by the Administrator have the force of law – *Thompson v Port Elizabeth City Council* 1984(4) SA 765 (AD). The Applicant, therefore, notwithstanding the terms of the Respondent's Articles of Association, automatically, as owner, became a member of the Respondent. Without becoming such a member the Applicant was prohibited from establishing the township. It is common cause that the township was created and most of the individual erven depicted on the general plan have been sold. This would mean that the Applicant accepted the conditions of establishment (approval) and the Conveyancer has certified to the Registrar of Deeds that the said conditions have been complied with.
- [25] The provisions in the Articles of Association that membership be open "to all qualified and interested parties who shall be individuals with professional or other interests in the operational areas of the association" may, in my view, apply to non-property owners who wish to be associated with the Respondent. The applicant and all further property owners within the development are compelled, by virtue of the conditions of establishment of the private township, to be members of the Respondent (See Clause c(1)(b)supra).
- [26] The nexus between the Applicant and Respondent has therefore been created and established by the conditions of establishment (approval) of the private township. The conduct rules clearly define the members of the Respondent "by virtue of the ownership of a property". The definitions of "estate"; "owner"; and "property", in the conduct rules all apply to the

Applicant.

- [27] The conduct rules provide for the payment of levies in respect of all erven. I agree with the judgment of Kollapen J in *Heritage Hill Home Owners' Association v Heritage Hill Devco (Pty) Ltd* 2013(3) SA 447(GNP) where he held, at paragraph 36, that:

“... the very idea of the formation of the Plaintiff is to create a structure for the benefit of all owners of the land in the township, all of whom automatically become members on account of their ownership of land and all of whom are entitled on account of their membership to participate directly in the decision making processes of the plaintiff with regard to the imposition of levies and the use to which such revenue is to be put.”

[28] At paragraph 39 and 40 he elaborated further and held:

“[39]...when one has regard to the Articles of Association and indeed to the purposes to be achieved by the imposition of levies, then it is clear that levies are ultimately utilised for the benefit of the township. In this regard such benefits would accrue to the developer as owner of the individual erven. The developer’s ability to market such erven would in large measure be linked to the manner in which the township is administered and the manner in which different issues such as security, aesthetics, lighting, etc are dealt with. To the extent that levies ultimately impact on the ability of the plaintiff to provide such services, the defendant could hardly be said to be prejudiced if it were required to pay such levies, as such levies ultimately redound to its benefit.

[40] On the contrary, if the defendant could argue that it was exempt

from paying such levies then the consequence of such a stance would be inequitable, in that it would disproportionately place the burden for the services in the township that are to be funded from levies, on those individual property owners who have taken transfer from the developer and not the developer. Having regard to the fact that such services as are to be provided from the levies ultimately accrue to the benefit of all property owners in the township, the defendant would be in an unduly advantageous position if such a stance was sustainable.”

[29] I fully align myself with the sentiments expressed by the said learned Judge.

[30] I am accordingly of the view that the Applicant is a member of the Respondent and is consequently liable to the Respondent for the payment of levies in respect of each immovable property owned by it within the boundaries of the Lanarco Development.

[31] Given the conclusion that I have arrived at, I do not deem it necessary to refer the matter to evidence as submitted on behalf of the Applicants.

[32] In the circumstances I make the following order:

1. The Applicant’s application is dismissed with costs.
2. An order is granted in terms of prayers 1 and 2 of the Respondent’s counter application.

DATE OF CAV 20 JUNE 2014

DATE OF JUDGMENT 30 JUNE 2014

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Prepared on 12 October 2026 · Esheria