

SOUTH AFRICA / JUDGMENT

Residents of Vallei Uitsig v Vallei Uitsig Homeowners Association and others (4388/2021) [2023] ZAMPMBHC 61 (16 November 2023) [2023] ZAMPMBHC 61

COURT

Mbombela High Court, Mpumalanga

BEFORE

N Mazibuko

CASE / FILE NUMBER

4388/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MBOMBELA

Case no: 4388/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

16.11.23

In the matter between:

THE
RESIDENTS OF VALLEI UITSIG
Applicants
And
VALLEI UITSIG
HOMEOWNERS ASSOCIATION
1st
Respondent
NELESCO NPC 564 (PTY) LTD
2nd Respondent
MBOMBELA LOCAL MUNICIPALITY
3rd Respondent
THE REGISTRAR OF DEEDS,
MPUMALANGA
4th Respondent

JUDGMENT

Mazibuko AJ

Introduction

1. The applicant brings an interlocutory application to file further affidavits. In the main application, the applicants sought relief for a declaratory order compelling the first respondent to comply with its duty to provide certain amenities to the applicants. Alternatively, pending the process of removing the applicants from the homeowners association, that it be declared that the applicants are not obliged to pay the monthly levy contribution to the first respondent.
2. The applicants are members of the Vallei Uitsig Homeowners Association ('the HOA') by virtue of being immovable property or homeowners in Vallei Uitsig and automatically become members thereof. Vallei Uitsig is a residential estate situated in erf 2354, Extension 49, White River, Mpumalanga, an estate comprising stands numbered 4 to 13 at Mount Anderson Street, 15 to 22 at Mount Crane Nest Street, 23 to 30 at Boondocks Street and 34 to 44 at Mount Bongani Street. The applicants are the registered owners of 4 to 13 and 34 to 44 properties.
3. The first respondent is HOA for Vallei Uitsig, registered as a non-profit entity and governed by a registered memorandum of Association and by governing rules adopted and amended from time to time.
4. The second respondent is Nelesco Npc 564 (Pty) Ltd, a company duly registered and incorporated in terms of the Company laws. The third respondent is the Mbombela Local Municipality. The fourth respondent is the Registrar of Deeds cited per the requirements of section 4 (1) and (2) of the Deeds Registry Act, 47

of 1937. There is no relief sought from the third respondent

Issue

5. The determination to be made is whether the applicants have an interest in the relief sought, which entitled them to lodge the application, and whether the applicants' application for filing further affidavits has merits.

Discussion

6. The first respondent filed a notice to abide by the court order regarding the application for filing further affidavits. However, they raised a point in limine, in that the applicants lack locus standi.

7. Regarding filing further affidavits, Rule 6(5)(e) clearly states that the Court has the discretion whether to allow further affidavits. The Court could only exercise its discretion only when an application to file further affidavits had been launched. I intend to deal with the filing of further affidavits' applications later in this

judgment.

Locus standi

8. The respondent argued that the applicants represent 43% of the total homeowners subscribed to the first respondent. Thus, they do not have the necessary locus standi to make the application under the guise of the total of the homeowners. Their application cannot be called a class application. It has no constitution of its own. The litigious process is lacking as it constitutes irregular relief sought in that, upon success by the respondents, the cost orders obtained would not be enforceable against the applicants as no such entity exists.
9. It was argued on behalf of the respondents that in the absence of all the homeowners being joined to the current application and the applicants holding a mandate of all of the homeowners, the applicants do not have locus standi to act in the matter and the application should therefore, fail on this point alone.
10. Through their counsel, the applicants argued that they have a direct interest in the matter. They relied on the resolution dated 04 October 2021, recorded as 'Resolution by the residents of Valle Uitsig to appoint a representative.' During that meeting, a resolution was taken to pursue the application against the respondents per the main application.
11. 'Locus standi in iudicio is an access mechanism controlled by the court itself.' See *Watt v Sea Plant Products Bpk* [1998] 4 All SA 109 (C) at 113H 'Generally, the requirements for locus standi are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one'. See *Four Wheel Drive CC v Leshni Rattan NO* [2018] ZASCA 124 para 7 'Standing is thus not just a procedural question; it is also a question of substance, concerning as it does the sufficiency of a litigant's interest in the proceeding'. See *Wessels en Andere v Sinodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk*, OVS 1978 (3) SA 716 (A) at 725H; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 11 (A) at 388B-E.
12. 'The sufficiency of the interest depends on the particular facts in any given situation.' See *Jacobs en 'n Ander v Waks en Andere*

[1991] ZASCA 152; 1992 (1) SA 521 (A) at 534D); Gross and Others v Pentz [1996] ZASCA 78; 1996 (4) SA 617 (A) 632 B-D. 6 Muller v De Wet NO & Others 2001(2) SA 489 (W). 7 Kuter v SA Pharmacy Board 1953 (2) SA 307 (T) at 313; Letseng Diamonds Limited v JCI Limited and Others [2007] ZAGPHC 119 para 13.

13. 'Where locus standi is challenged, it must be dealt with on the assumption that all allegations of fact relied upon by the party whose locus standi is attacked are true.' See Kuter v SA Pharmacy Board 1953 (2) SA 307 (T) at 313; Letseng Diamonds Limited v JCI Limited and Others [2007] ZAGPHC 119 para 13.

14. In terms of the applicants' main application, their notice of motion reads:

'PART A:

1. It is declared:

1.1 That a perimeter wall with adequate security measures, to be determined by the Aesthetics or relevant Committee, is the responsibility of the First Respondent;

1.2 That the applicants are entitled to such perimeter wall and its attendant security measures without the imposition of a special levy;

1.3 The applicants are entitled to withhold payment of their lives until such as time is their rights to a perimeter wall and its attendant

security

measures have been realized; alternatively

1.4 That a special resolution be taken at the annual general meeting of the

Vallei Uitsig Homeowners Association to set out the rules and guidelines to be adopted, which permit members to opt out of the Association;

1.5 Further to 1.4 above, that the title deeds of the homeowners be amended to replace close C (a) which provides:

1.5.1 Every owner of the erf or any sub-division thereof, or any person who has an interest therein, shall become and shall remain a Member of the Home Owners Association and be subject to its constitution and rules until he ceases to be an owner as aforesaid. Neither the erf, nor any subdivision thereof or any interest therein, shall be transferred to any person who has not bound himself to the satisfaction of such Association to become a member of the Home Owners Association.

With

1.5.1 Every owner of the erf or any sub-division thereof, or any person

who has an interest therein, shall become a Member of the Home Owners Association and be subject to its constitution and rules until they opt out of the Association in accordance with the rules and guidelines adopted by special resolution X of the Association. Neither the erf, nor any sub-division thereof or any interest therein, shall be transferred to any person who has not bound himself

to the satisfaction of such Association to become a member of the Home Owners Association.

1.6 Further, that the clause C(a) of the Title Deed is unconstitutional and in contravention of Section 18 of the Constitution, the right to freedom of Association.

1.7 Costs of this application if opposed.

1.8 . Further and or alternative relief.

PART B.

2.1. That the Second Respondent furnish the applicant with all the

documents that it lodged with the Third and Fourth Respondents in opening and registering the township known as White River Ext. 49, Mpumalanga; and

2.2 That the Third and Fourth Respondents furnish the applicants with all the records of decisions made in opening and registering the above-mentioned Township' (sic).

15. It was conceded on behalf of the applicants that there is no association or organization called 'the residents of Vallei Uitsig' and that not the total of the residents are before the Court.
16. The applicants named themselves residents of Vallei Uitsig. They held a meeting and took a resolution to approach this honourable Court regarding a number of complaints they have against the first respondent of which they are members. They averred that they are property owners of stands 15 to 22 on Mount Anderson Street and 34 to 44 on Bongani Street, respectively.
17. It is common cause between the parties that the dispute between the said property or homeowners with the HOA has been going on for a long time. The main dispute revolves around the fact that the applicants bought properties in an estate that ordinarily will have adequate security amenities, such as a perimeter wall or fencing and access control. The applicants averred that to their properties situated at Mount Anderson and Mount Bongani streets, there are no perimeter walls and/or fencing, with its attendant security measures and access control.
18. Further, only portion 2 of the estate enjoys a perimeter wall with access control, security and fully serviced common areas, meaning the residents in this portion of the estate enjoy the full benefits and amenities of the village and/or gated community. The applicants and the HOA struggled to resolve their differences. The applicants stated that they were compelled to approach the Court for relief in order to relieve the burden unduly placed on

them as HOA members to perform the duties and functions that ought to be the responsibility of the HOA whilst the HOA continued to demand levies.

19. On the other hand, the respondents argued that in the absence of all the homeowners being joined to the current application and the applicants holding a mandate of all of the homeowners, the applicants do not have locus standi to act in the matter and the application should on this point alone fail. Further, the portion of the homeowners portraying to reflect the applicant is indebted to the respondent in the amount of about R706 709.56. They further referred to sections 7 and 10 of Annexure A of the purchase and sale agreement, which reads:'
- '7. ... The perimeter of the village will be fenced with approved and effective security fencing; and
10. ... The cost of all necessary security, administration, maintenance, repairs and the carrying out of improvements with reference to the Association, the open spaces and natural surroundings of the property shall be financed out of levies imposed by the directors from time to time in accordance with the provisions of the articles of association".
20. the respondents argue that the applicants must pay their levies to enjoy the security and amenities they complain about. The applicants contended that they bought their properties in an estate that was supposed to be fenced before they were called upon to make payments towards the levies to, among others, maintain and repair the security infrastructure.
21. The applicants argued that they have a direct interest in the matter as they reside in sections 1 and 2, which are sections without the necessary security measures in the form of a barrier wall safeguarding the Uitsig estate, as averred in their affidavit. The other sections are unaffected and are not part of the application.
22. Certain sections of the estate are not fenced and have no security access control to the estate. This is besides the fact that the home or property owners are all members of the same HOA. Therefore, the members of the HOA are benefitting and affected differently. In my view, it cannot be expected that the HOA members who have access to the benefits of being owners in the estate would be part of this application when they are not affected as the streets Anderson and Bongani residents. There is a basis upon which to find that this matter is one of those cases where the public interest yelps out for a court to get into the merits of the matter whilst considering whether or not the applicants have the necessary locus standi. Substantive issues aerated in the application arise for consideration in the interest of justice.
23. The applicants have established that they have a direct interest in the issues to be determined. I do not believe that there needs to be a registered organisation or association to approach the Court in seeking relief under the present circumstances. The resolution was signed by the property or homeowners of the specific streets directly affected by the absence of fencing and security access control to the estate.

24. I do not find that the application was launched mala fide in an attempt to serve their own interest. As homeowners and /or property owners, I find that the applicants approached the Court for relief as they have a direct interest in the matter. Further, substantive matters of direct interest to the applicants were ventilated in the application, which matters cry out for consideration in the interest of justice. The applicants were successful in making out a case for their standing. The point in limine of lack of locus standi is not justified; it stands to fail.

Filing of further affidavits

25. The respondents did not oppose the application for filing of further affidavits instead, they filed a notice to abide by the Court's decision.
26. Rule 6(5)(e) clearly states that the Court has a discretion whether to allow further affidavits. The Court could only exercise its discretion when an application to file additional affidavits had been launched.
27. In the unreported matter of Ndlebe v Budget Insurance Limited (7457/2017) [2019] ZAGPJT 320 (22 February 2019) (Ndlebe), para 7, it was held:

"It is trite that there are normally three sets of affidavits in motion proceedings. However, the Court has a wide discretion to allow the filing of further affidavits. It is upon the litigant who seeks to file a further affidavit to provide an explanation to the satisfaction of the Court that it was not malicious in its endeavour to file the further affidavit and that the other party will not be prejudiced thereby."

28. The applicants, through their counsel, submitted that in its answering affidavit, the HOA raised issues in paragraphs 31.2, 33.1 and 62.3, which were weighty and material to the issues in the applicants' main application, which could be regarded as dispositive of those issues in the applicants' favour. Further, such evidence came to light after the HOA filed its answering affidavit. Such evidence is crucial to matters the HOA raised, and its omission would be prejudicial to the applicants. Some of the HOA's assertions contained in their answering affidavit are false.
29. Part of the new evidence by the HOA in paragraph 16 is in direct contrast with what they stated in paragraph 33 of their answering affidavit regarding the construction of the wall around portion 2. The applicants discovered new evidence that:

'Ikotwe Construction constructed all the residential dwellings in portion 2 of the estate under the project name of Vallei Uitsig Ontwikkeling (VUO), White River. In terms of the Deed of Transfer, VUO are registered owners of the whole of portion 2 of erf 2354 Extension 49 Township. The facilities managed by the HOA in respect of portion 2 were transferred from the developer, Ikotwe Construction.'

Therefore, it cannot be correct that the erection of the wall around portion 2 and the attendant security measures, such as an entrance gate and electric fence, is a result of the payment of levies, it was argued.

30. In *Hano Trading v JR 209 Investments* 2013(1) SA 161, it was held:

"[Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the Court. A court, as arbiter, has the sole discretion in this regard where there is a good reason for doing so.

31. The litigant who wishes to file a further affidavit must formally apply for leave to do so. Otherwise, such an affidavit falls to be regarded as *pro non scripto*. It is trite that the applicant must stand and fall by his founding affidavit. The party who seeks to file further affidavit must do so by obtaining leave from the Court. The Court has sole discretion whether to allow any additional affidavit or not.
32. In *Mostert and Others v FirstRand Bank t/a RMB Private Bank and Another* 2018 (4) SA 443 (SCA) para 13, the Supreme Court of Appeal had the following to say: 'It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence. As a respondent has the right to know what case he or she has to meet and to respond thereto, the general rule is that an applicant will not be permitted to make or supplement his or her case in the replying affidavit. This is not, however, an absolute rule. A court may, in the exercise of its discretion in exceptional cases, allow new matter in a replying affidavit. See the oft-quoted dictum in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd* (1) 1978 (1) SA 173 (W) at 177G – 178A and the judgment of the Supreme Court of Appeal in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA) para 26.
33. In the exercise of the discretion, a court should, in particular, have regard to (i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the Court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs'.
34. Considering the decided matters mentioned above regarding the filing of further affidavits, I am of the view that disallowing the filing of additional affidavits will be prejudicial to the applicants since the first respondent raised new matters that might call for a new approach in respect of the main application as the affidavits in motion proceedings constitute both the pleadings and the evidence. Consequently, it is justified to grant the application for filing of further affidavits.

35. It is trite that the costs should follow the result. The applicants are members of the first respondent. In essence, they will practically bear the costs awarded against the first respondent, the HOA, though it might not be the whole. The respondent did not oppose the application for the filing of further affidavits. However, they raised a point in limine. Ordinarily, the costs would be awarded in favour of the applicants regarding the point in limine and order that the applicants solely bear the costs of the application to file further affidavits as they had no opposition from

the first respondent. I could find no reason to differ from such an approach as I think it is appropriate.

36. In the circumstances, the following order is made:

Order

1. The point in limine of lack of locus standi is dismissed with costs on a party and party scale.
2. The application to file further affidavits is granted, and I make no order in respect of costs.

N. MAZIBUKO

Acting Judge of the High Court of South Africa

Mpumalanga Division, Mbombela

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 16 November 2023.

Date of hearing: 05 October 2023

Date of Judgment: 16 November 2023

Appearances:

Counsel for the applicant: Mr N Tshabalala

Attorneys for the applicant: Macbeth Attorneys

Counsel for the respondent: Mr H.F. Fourie

Attorneys for the respondent: Michael van Rensburg Attorneys

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