

SOUTH AFRICA / JUDGMENT

Ruckstuhl and Another v Wakenshaw Estate Home Owners Association (6969/2016) [2020] ZAKZDHC 25; 2021 (1) SA 269 (KZD) (13 July 2020)

[2020] ZAKZDHC 25

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Olsen

CASE / FILE NUMBER

6969/2016

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION: DURBAN

CASE

NO: 6969/2016

In

the matter between:

GARY
RUCKSTUHL
FIRST PLAINTIFF
TRAUTE
CHRISTINE VAN NIEKERK
SECOND PLAINTIFF
and
WAKENSHAW
ESTATE HOME OWNERS ASSOCIATION
DEFENDANT

ORDER

The

following order is granted: -

1.

The first and second plaintiffs'
(hereinafter "the plaintiffs") claim in convention is
dismissed with costs, the plaintiffs'
liability for such costs being

joint and several.

2.

The Registrar of Deeds,

Pietermaritzburg, is authorised to rectify the schedule of conditions applicable under s 11(3)(b) of the Sectional Titles Act, No 95 of 1986 to the sectional title scheme known as Wakenshaw Manor by adding thereto the conditions set out hereunder if the Registrar of Deeds is

of the opinion that such rectifications are necessary or desirable, and to do so without the written consent of all persons interested in

the rectification. The additional conditions are the following.

"Omnibus Servitude for

Services

The "Home Owners

Association" reserves in perpetuity the right, without being required to pay compensation therefor to

erect, lay, maintain, use

and remove standards, lines, cables, pipes and the like under, on or over the said land for the purpose

of conveying electric current,

water drainage, sewerage and the like and the owner agrees not to obstruct or interfere with any

such standards, lines, cables, pipes

and the like to erect any building or other permanent structure

within 1,00 meter of any such

standards, lines, cables, pipes and the

like without the prior express consent of the "Home Owners

Association" provided

that any damage done during the process of

erecting, laying, maintaining, using or removing such standards, lines, cables, pipes

and the like shall be made good by the "Home

Owners Association". The owner also agrees that the "Home

Owners Association"

by itself, or others, may enter upon the

said property at all reasonable times for the purpose of enforcing

the rights reserved

and the obligations accepted in this clause.

"Home

Owners Association" shall mean its orders or assigns.

"Home Owners

Association"

Neither the lot, nor any

further subdivision, 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 the "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."

3. It

is declared that each of the owners of sectional title units in the
sectional title development known as Wakenshaw Manor are
liable, and
since acquiring ownership of their respective units have been liable,
as members of the Wakenshaw Estate Homeowners
Association to pay
levies due to that association raised by the association from time to
time.

4.

The costs of the
claim-in-reconvention shall be paid by the plaintiffs, their
liability for such costs being joint and several.

JUDGMENT

OLSEN J

- [1] This action concerns established housing developments on property which, before it was subdivided, was described as the Remainder of Portion 405 (of 11) of Lot 56 No. 931. It was 6,4525 hectares in extent. (I will call it the parent property.) The parent property was considerably longer than it was wide. Its length was on a more or less south to north axis, the southern boundary being the one over which vehicular access to the property might be gained.
- [2] In 2003 the then owner of the parent property submitted an application for permission to lay out a private township then to comprise four subdivisions. This was granted in
2004. The four portions were delineated by boundaries across the width of the parent property. The most southern portion became Rem of Ptn 405 (of 11). The one to the north of that was Ptn 725 (of 405) and the next two, in order proceeding in a northerly direction, were Ptns 726 and 727, both of 405. These subdivisions were created to permit a phased housing development. It was a condition of the subdivision that a right of way servitude would traverse the Remainder and Ptns 725 and 726 in order to ensure access to Ptns 725, 726 and 727.
- [3] Ptn 727 was the first to be developed. The developer decided on cluster housing which required the subdivision of the portion into separate housing plots which could be sold under freehold title. This would suit the cash flow requirements of the developer. (The development on Ptn 727 was accordingly named "Clusters".) The intention with regard to the Remainder and Ptns 725 and 726 was that they would become sectional title developments. That is what happened. (The development of Ptn 725 was originally to include an hotel, but that did not eventuate.)

- [4] The development (ie construction of buildings on land for sale either on freehold title on Clusters or on the other subdivisions under sectional title) took place between 2005 and 2008. The development on Ptn 726 was called "Wakenshaw Estate"; Ptn 725 was called "Ihlathi Lodge"; and the Remainder was called "Wakenshaw Manor". Bodies Corporate were established for the sectional title developments on these three properties.
- [5] The intention was that the four developments would be treated as one for certain purposes. From the evidence before me there is no doubt that it was for that reason that the defendant in this case, the Wakenshaw Estate Home Owners Association, was created. According to its constitution it is a "common law corporate body" having perpetual succession and the capacity to be sued in its own name. Its objects are of the type commonly found when such associations are established to attend to the shared needs of the owners of property in so-called gated estates. It had to provide and maintain a secure environment by way of gate controlled access to the estate, the provision of perimeter fencing and the appointment of security staff. It had to attend to roads and verges, street lighting, areas of conservation significance, and ensure that good standards of conduct were maintained by its members and occupiers of housing on the estate. For these purposes it would raise levies and, if necessary, would impose

finances and penalties. Its members would be the owners of erven and, at the outset, obviously the developer. Clause

5.3 read as follows.

'When a member becomes the registered owner of an Erf he shall ipso facto become a member of the association and when he ceases to be the owner of an Erf, he shall ipso facto cease to be a member of the association.'

No registered owner of an Erf would be entitled to resign as a member of the association.

- [6] Of significance to one of the disputes raised in this case is the fact that the word "Erf" was defined in clause 1 of the constitution to mean "an Erf in the township, a sectional title unit in the township or a mini subdivision of an Erf in the township". That covered all forms of title to be available on the parent property.
- [7] The first and second plaintiffs are owners of sectional title units in Wakenshaw Manor. There were originally four plaintiffs, but the third and fourth of them have not pursued the case.
- [8] The plaintiffs instituted action against the defendant for an order declaring that the plaintiffs are not members of the defendant, not subject to the defendant's constitution, and not liable to the defendant for any claims made against them under the defendant's constitution. (Alternative relief was sought declaring that any oral or tacit agreements the plaintiffs had concluded to become members of the defendant were invalid or lawfully cancelled. The alternative claims were not supported by evidence tendered on behalf of the plaintiffs. With respect it appears to me that their decision not to pursue those claims was the correct one.)

In pleading the case the plaintiffs pointed out that the conditions under which they held their sectional titles, filed with the Registrar of Deeds in terms of s11(3)(b) of the Sectional Titles Act, 95 of 1986, did not contain conditions rendering the plaintiffs members of or liable to the defendant.

- [9] It is apparent from evidence led by the defendant that this action was the culmination of dissatisfaction that had arisen amongst some people, but especially the plaintiffs, as to the conduct of the defendant. It is apparent from the minutes of a meeting of the defendant held in 2015 that an attorney engaged by the body corporate of Wakenshaw Manor had identified shortcomings (which the defendant classifies as errors) in the constitution of the defendant and in the section 11(3)(b) certificate recording the conditions upon which title to some sectional title units are held. The plaintiffs claim that these shortcomings justify the grant of the declaratory relief they seek.
- [10] It is apparent that having thus been alerted, the defendant, or perhaps the defendant and the plaintiffs, launched a thorough investigation into the documents generated by or in connection with the development of the parent property. (This investigation generated reams of documents, some of which were unnecessarily placed before the court.) The defendant delivered a plea asserting that its constitution as well as the s11(3)(b) certificate relating to Wakenshaw Manor fall to be rectified. A counterclaim to the same effect was delivered. A conveyancer (who had emigrated, and was accordingly not called) was responsible for producing the s11(3)(b) certificate. He has not been heard. Nevertheless, on the evidence before me the conveyancer's standard of work was below the required one.
- [11] The investigation into the s11(3)(b) certificate relating to Wakenshaw Manor revealed also that the registration of the right of way servitude over the Remainder had

been omitted. That was an additional subject dealt with in the defendant's claim-in-reconvention. The plaintiffs accepted

that the certificate clearly had to be rectified to correct the omission of the right of way servitude, and an order was made by

consent dealing with that aspect of the case.

- [12] The defendant joined all affected parties to its claim-in-reconvention and I was given the assurance by counsel that all of them, including the Registrar of Deeds, had due notice. The Registrar of Deeds delivered a report abiding the decision of this court.

THE DEFENDANT'S CONSTITUTION

- [13] In their particulars of claim the plaintiffs pleaded that membership of the defendant is (and was) confined to persons who are registered owners of erven or sectional title units in the estate, and that Wakenshaw Manor was not part of the estate as defined in the defendant's constitution.

[14] The definition of the word "estate" where it appears in clause 1 of the constitution of the defendant reads as follows.

'1.1.13 "Estate" means the township shown on General Plan 2004/445A consisting of Erven 739 to 754 Balitoville.'

The estate, according to this definition, is comprised of Clusters only. The defendant's case is that the incorrect layout plan is referred to in clause 1.1.13 which must be rectified to read as follows.

'Estate- means the township shown on Township Layout Plan number 2003/7248 consisting of the remainder of Portion 405 and subdivision 725, subdivision 726 and subdivision 727 including subdivisions 739 to 754 Balitoville shown on Township Layout Plan number 2004/445A'.

[15] The developer in this matter was the Wakenshaw Trust. The defendant called a Mr Richard Chapman, a builder, who was a trustee of the developer at the material time and who project managed the entire development. His evidence was that notwithstanding the initial subdivision of the parent property into four parts, the intention was that there would be a single gated estate. It was discussions with the municipality and the water authority, which were to service the estate, which generated the decision that there had to be a single joint homeowners association covering the entire parent property.

[16] It will be recalled that Clusters was the first of the four subdivisions to be developed. A Mr Richie, a property administrator, was entrusted with the duty of drawing up the defendant's constitution as well as the constitution of the homeowners association exclusively for Clusters. It was regarded as necessary for Clusters to have its own homeowners association (in addition to the defendant) because it was not a sectional title development and accordingly did not have a body corporate. According to Mr Chapman the two constitutions were prepared by Mr Richie and they were both signed at the inaugural meetings of the defendant and the Wakenshaw Clusters Homeowners Association on 26 April 2005. The signed versions of the two constitutions have gone missing. According to Mr Jamieson, who was employed by Wakefields Property Management, that firm bought Mr Richie's practice, and got with it Mr Richie's

computer on which the unsigned texts of the two constitutions were found. Those were the documents relied upon by the parties as

containing the provisions which govern in particular the defendant homeowners association.

[17] The constitutions of the defendant and Clusters are almost exactly the same. Clearly the drafter was intent on streamlining his work. It looks like the constitution for Clusters was drafted first, as the definition of the estate which is common to the two constitutions is the correct definition for Clusters. It appears that the drafter, when turning his hand to the defendant's constitution, did little or nothing more than change the title. The result is that the whole of the parent property was not included in the definition of the estate for which the defendant would become responsible. (Furthermore, the objects of the Clusters association are the same as the defendant's, a situation which is at best confusing.)

- [18] Counsel were correctly in agreement that the defendant's constitution is at least a contract between the members of the defendant. Counsel for the plaintiffs argues that the requisites for the claim of rectification cannot be met in this case because there could not have been any common mistake when the terms of the defendant's constitution were fixed because, at the time the constitution came into being, only the Wakenshaw Trust was or became a member of the defendant. In my view there is no merit in this argument.
- [19] The evidence is overwhelming that every owner of an erf in Clusters or a sectional title unit in the rest of what was the parent property regarded herself as becoming a member of the defendant upon acquiring ownership of an erf or a unit. Problems connected substantially if not wholly with the performance of the managing agent only surfaced in about 2012 and reached a crescendo in 2015 when deficits in the documentation were first noted. On the evidence before me, until then all owners thought that they had become members, and that they were subject to the constitution and conduct rules of the defendant, even though they may not have seen the former document at the time when they became owners of property on the estate. The owners behaved consistently with their belief that each owner was a member of the defendant. On each occasion of the acquisition of ownership within the estate there was an error with regard to the defendant's constitution common to the new owner, the existing owners and the defendant itself, which lay in the miss-description of the estate in the defendant's constitution. It would have been perfectly obvious to any newcomer, as it was to those already members of the defendant, that a single homeowners association responsible for the maintenance and like issues requiring attention for the whole of the parent property was necessary. Besides other considerations, the 1.6 kilometre long boundary fence and the single entrance gate services the basic security needs of the entire parent property; refuse collection is centralised for the entire parent property; and there is a single water supply to the entire parent property.
- [20] In my view the case for the rectification of the constitution has been well established and that relief must be granted.
- [21] Mr Combrinck SC, appearing for the defendant, has argued that the initial mistake was one common to the first trustees of the defendant and the developer (in its capacity as owner at the time of all the subdivisions of the parent property), and that the error, common to those two parties, would on its own justify the rectification claimed by the defendant. Rectification is relief which is necessary to determine rights and obligations in the context of enforcement. The underlying principle of rectification was put thus in *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) at para 16.

'To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they

intended to record is to enforce what was not agreed and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result'.

[22] At this time the issue of enforcement arises not between the original contracting parties (ie the developer and the first trustees of the defendant) but between the defendant and the current owners of erven or units. The original error is perpetuated, but the common intention it offends is the one shared between current members and the defendant. I accordingly prefer to reason along the lines stated earlier, without deciding the question as to whether the original error which unwittingly contradicted the original common intention of, or antecedent agreement between, the developer and the defendant's first trustees justifies the rectification sought by the defendant.

RECTIFICATION OF THE SECTION 11(3)(b) CERTIFICATE

- [23] In further elucidation of their claim to be entitled to an order declaring that they are not, and are not required to be, members of the defendant, the plaintiffs plead that the schedule of conditions under which title is held to sectional title units in Wakenshaw Manor, issued under s11(3)(b) of the Sectional Titles Act, 1986, do not render the plaintiffs members of the defendant.
- [24] In its claim-in-reconvention the defendant seeks rectification of the certificate relating to the units in Wakenshaw Manor by the addition of two further conditions as conditions E and F. Condition E is the matter of the right of way servitude mentioned earlier, which has been resolved, the plaintiffs admitting that rectification of the certificate in that regard is necessary. Condition F has two parts, the one granting what is called an "Omnibus servitude for services" in favour of the defendant, and the other (the more contentious part) providing as follows.

'HOME OWNERS ASSOCIATION

Neither the lot, nor any further subdivision, 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 the "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.'

- [25] The condition relating to the Home Owners Association is not a model piece of drafting, but its message is clear, and it has already been employed with regard to the sectional title units on Ihlati Lodge and Wakenshaw Estate.
- [26] After clusters had been developed, Portion 726, Wakenshaw Estate, followed. The certificate relating to units on Wakenshaw Estates did not contain the conditions now sought to be endorsed on the certificate relating to Wakenshaw Manor. Ihlati Lodge was the third of the four subdivisions to be developed. The certificate in respect of the units in that development contained the now the disputed conditions.
- [27] In 2016, after these problems with the documentation were discovered, the owners of units in Wakenshaw Estate recognised the error in their certificate, and by notarial deed their certificate was rectified. (I will revert to this rectification at the end of this judgment.) The

same cannot be done for Wakenshaw Manor as the plaintiffs will not agree to it. (It appears from the evidence of Mr Jamieson that there are more members of Wakenshaw Manor besides the plaintiffs who resist the defendant at some or other level, but none of them has entered an appearance to defend the claim-in-reconvention .)

[28] In its claim-in-reconvention the defendant pleads that rectification of the s 11(3)(b) certificate relating to Wakenshaw Manor falls to be granted under the common law and additionally under s 4(1)(b) of the Deeds Registries Act, 47 of 1937.

[29] There is no need to repeat what has already been said about the common intention of all owners with regard to compulsory membership of the defendant. The following should be added.

(a) As mentioned earlier, in terms of clause 5.3 of the defendant's constitution, when becoming a registered owner, a person automatically becomes a member of the defendant; and ceases to be such automatically when ceasing to be an owner.

(b) Clause 6.13 of the constitution reads as follows.

'No transfer of an Erf shall be registered unless a certificate has been issued by the association that all levies due to it in respect of the Erf have been paid.'

(c) The conduct rules speak in similar vein. Rule 11.7 reads as follows.

'No property may be transferred without a certificate by the Association confirming that all levies and other amounts owing by the member to the Association have been paid in full.'

[30] In its relevant parts 4(1)(b) of the Deeds Registries Act reads as follows.

'(1) Each registrar shall have the power-

(a) ...

(b) whenever it is in his opinion necessary or desirable to rectify in any deed or other document, registered or filed in his registry, an error in the name or the description of any person or property mentioned therein, or in the conditions affecting any such property to rectify the error: Provided that-

(i) every person appearing from the deed or other document to be interested in the rectification has consented thereto in writing;

(ii) if any such person refuse to consent thereto the rectification may be made on the authority of an order of Court;

(iii) ...

(iv) no such rectification shall be made if it would have the effect of transferring any right.'

[31] A Mr Hugh Edwards, an experienced conveyancer, was called by the defendant to deal with and explain various deeds and processes relevant to the current dispute. He identified Resolution 12 - 2017 of the Registrars' Conference Resolutions, 2017 as relevant to the proposed rectification of the s 11(3)(b) schedule of conditions applicable to Wakenshaw Manor. The resolution is recorded as follows.

'Error in a Section 11(3)(b) Schedule of Conditions

May an error in a section 11(3)(b) Schedule of Conditions be amended in terms of s 4(1)(b) of Act 47 of 1937 if it will not have the effect of transferring a real right?

Resolution:

Yes. Section 4(1)(b)(i) of Act No. 47 of 1937 finds application.'

The Registrar of Deeds has not in the present case contended that his office lacks a power to rectify the certificate in question.

Nevertheless it should be observed that

- (a) the existence and ambit of the power must be determined by the provisions of the Act; and
- (b) it is not clear why the resolution records that s 4(1)(b)(i) finds application without recording also that subsection (ii) would in need also find application.

[32] In terms of s 4(1)(b) the registrar may rectify an error in the conditions affecting a sectional title unit which are set out in a s 11(3)(b) certificate when the registrar is of the opinion that it is "necessary or desirable" to do so. In the present case there is no evidence of any application having been made to the registrar, presumably because the plaintiffs would obviously not agree to the rectification in writing. This gives rise to a minor conundrum. The registrar's power to rectify the certificate exists only if it is the registrar's opinion that it is necessary or desirable to do so. We do not have that opinion. I do not think that the section can be read to oblige the registrar to furnish what would be an academic opinion on the subject of necessity

or desirability of rectification when it is clear that the affected parties, or some of them, will not consent to the exercise of the power. I do not think that s 4(1)(b)(ii) of the Act can be read to convey any more than that the court may authorise the registrar to disregard the refusal of consent by any affected party. But, equally, I do not think that it would be appropriate for a court to authorise the registrar to dispense with the consent of any necessary party to a rectification which in the courts view of matters is neither necessary nor desirable. I accordingly approach this matter along the following lines.

- (i) The court must consider the question as to whether the proposed rectification is necessary or desirable and refuse to grant its authority under s 4(1)(b)(ii) if it finds that the rectification is neither necessary nor desirable.

(ii) The court's authority to dispense with the written consent of all necessary parties should, if it is to be granted, be expressed to be conditional upon the registrar forming the opinion that the proposed rectification is necessary or desirable.

This approach leaves the operative opinion on necessity and desirability where the Act places it, that is in the hands of the registrar. A refusal by the registrar to effect the rectification despite the court's authority to dispense with the written consent of all

affected parties would be justiciable in the ordinary course.

- [33] The first part of the proposed condition F is the Omnibus servitude for services. It reserves to the defendant the right to "erect, lay, maintain, use and remove standards, lines, cables, pipes and the like under, on or over the said land for the purpose of conveying electric current, water drainage, sewerage and the like" without paying compensation for the exercise of that right. In turn the owner agrees not to obstruct such activities without the express consent of the defendant. The defendant would be obliged to rectify any damage done when exercising its powers and rights. The defendant is given the right to enter upon property at reasonable times to carry out these activities.
- [34] The Omnibus servitude for services reflects in part the objects of the defendant set out in clause 3 of the constitution; and in part the reality that certain services necessary for the use and enjoyment of all of the homes on the parent property are provided on a communal basis. That seems to have been the foundation for the insistence of the municipality and the water authority on the creation of a single communal property owners association for the entire parent property.
- [35] It seems to me that the defendant is in many ways the like of a municipal service provider. Rights of access and the like for the performance of duties relating to the provision of services and associated works are traditionally either the subject of laws or of registered servitudes. In my view a registered servitude is required in this case. It is desirable, if not necessary, that provision is made for it in the s 11(3)(b) certificate relating to Wakenshaw Manor. One would hope that a situation would never arise where a single owner obstructs the performance of work necessary for the benefit of other owners, but it is desirable and perhaps necessary for the benefit of all owners that none of them should have the right to do so. Rights of access to property by the defendant may well be regarded as implicit in the defendant's constitution and conduct rules, but an express provision in the s 11(3)(b) certificate is preferable and provides the requisite security. The question as to what work must actually be performed is left by the defendant's constitution to its elected trustees.
- [36] The essential effect of the second part of the proposed condition F is that no Erf or unit can be transferred to any person unless
- (a) the proposed owner agrees to become and remain a member of the defendant; and

- (b) a clearance certificate has been issued to the effect that the provisions of the defendant's articles of association have been complied with.

I think that for the term "articles of association" one must read the constitution of the defendant; and the principal element of the compliance spoken of in the provision must be the payment of levies, a subject already dealt with in the constitution and the conduct rules of the defendant.

[37] It seems to me that the registration of the condition which is the second part of the proposed Condition F addresses two legitimate concerns of the community which occupies the parent property.

- (a) Firstly it will bring about that no one might become an owner without advance notice of the intended consequence that the person becomes a member of the defendant.
- (b) Secondly it will prevent, or certainly should prevent, the inadvertent transfer of ownership of any Erf (as defined in the defendant's constitution) without unpaid levies or other charges being accounted for.

In my view both these outcomes are desirable, given the communal structure of the developments on the parent property which involves

each property owner playing his or her part in the provision and maintenance of shared facilities and services.

[38] A condition such as the one under discussion here was called an "embargo provision" by the court in *Willow Waters Homeowners Association (Pty) Limited v Koka NO and Others* 2015

- (5) SA 304 (SCA). The court held (at para 24) that the effect of such an embargo is similar to the ones protecting municipalities in terms

of the Local Government : Municipal Systems Act 32 of 2000, and bodies corporate in terms of s 15B(3)(a)(i)(aa) of the Sectional Titles Act. The court continued as follows.

'[27] It must be borne in mind that homeowners' associations are obliged to provide services to all of their members. And so, similarly to municipalities and bodies corporate which enjoy the statutory protection afforded by the embargoes, they extend credit to all

homeowners and their estates without the benefit of requiring security therefore. As was contended by the amici curiae, there is no material difference between homeowners' associations and bodies corporate in terms of their objects, activities and status. There is simply no basis to deprive the association of the protection afforded by the embargo which has an identical purpose and effect to that provided to bodies corporate (and municipalities) by a law of general application.'

[39] It seems to me that these observations clarify and support the proposition that the rectification of the certificates relating to Wakenshaw Manor is desirable if not necessary. It is certainly undesirable, focusing upon the peculiarities of the communities which now reside on the parent property, that some of them are bound to the provisions under

discussion by their title deeds, but not others. Given that the benefits provided by the defendant are shared by all, it is unacceptable that the obligations to the defendant should not be shared by all on equivalent terms.

[40] I did not understand the argument of counsel for the plaintiffs to raise any serious challenge to the foregoing analysis of the situation regarding the proposed amendments to the certificate setting out the conditions applicable to Wakenshaw Manor. However, counsel argued, as the type of "error" liable to be rectified is not defined in s 4(1) of the Deeds Registries Act, the common law of rectification of contracts must apply. As the conveyancer responsible for drafting the certificate was not called, we cannot be certain why he first omitted the relevant provisions when dealing with Wakenshaw Estate, then inserted them when dealing with Ihlati Lodge and then again omitted them when dealing with Wakenshaw Manor. Neither is there any evidence that any of the owners of the units in Wakenshaw Manor shared a common intention with the defendant, prior to acquiring ownership, that the conditions of title reflected in the relevant s 11(3)(b) certificate should be regarded as including those now sought to be introduced. The arguments of counsel for the plaintiffs seem to me to have some merit, but only if one accepts the proposition that rectification of a registered certificate can only take place if the common law requirements for rectification of a contract are satisfied.

[41] In *Ex Parle Kachholi Anjuman Islam* 1945 WLD 215 the court considered an application to amend a title deed in circumstances where all the three affected parties agreed that for

want of a note on the deed to the effect that the transferee would hold for another, the deed erroneously conveyed that the transferee

would hold in its own right. The Registrar objected, arguing that the errors contemplated by s 4(1) (b) of the Deed Registries Act were errors made by the registrar; and as the registrar had made no error, the application should be refused. Price J held that an error is not likely to be made by the registrar, in which case it would have been made by the conveyancer. He continued (at 217):

"So primarily the error referred to in the section is an error not made by the registrar's office but made by the conveyancer who was lodging the deed for registration or by some other person."

The order was granted on the footing that the error was that of the conveyancer. Given what was done in other deeds relating to the subdivided parent property in this case, whilst we do not know with certainty why the conveyancer responsible for the development did what he did, the probabilities are that the failure to insert the now disputed conditions in the s 11(3)(b) certificate was a conveyancer's error. It is equally probable that the intention of the developer at the time material to the registration of the certificate for Wakenshaw Manor was that the conditions now in issue should be contained in the certificate, as had been done in the case of Ihlati Lodge.

[42] *Bester NO and Others v Schmidt Bou Ontwikkelings CC* 2013 (1) SA 125 (A) involved the subdivision of a parent property, one portion of which would be transferred to a purchaser, and the other retained by the original owner, Schmidt. For reasons not uncovered, Schmidt's

conveyancer secured the unwitting signature of his client to a power of attorney to transfer both properties to the buyer, and that was done without Schmidt knowing. Subsequently the buyer took wrongful advantage of the error, which was then revealed to Schmidt and resulted in an action for the rectification of the deed to reflect Schmidt as the owner of the property erroneously transferred to the buyer. Two observations by Brand JA appear relevant to the present case.

- (a) The learned judge observed that the rectification of the deed was sanctioned by s 4(1)(b) of the Act, but he pointed out, with reference to *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 283, that the right also flowed from the policy of our registration laws that the true contract under which land is held must be reflected on the register. In my view it is probable that the true contract under which sectional title units are held on the parent property are those reflected in the s 11(3)(b) certificate of *lhlati Lodge*, and not the current certificate relating to *Wakenshaw Manor*. Given the communal arrangements necessary for the enjoyment of the homes on the parent property, the enquiry cannot be limited to a blinkered examination only of the position occupied by the individual owners of units in *Wakenshaw Manor*, who in all probability would not have appreciated or anticipated a potential conflict between the communal arrangements reflected in the defendant's constitution and conduct rules, and the conditions of title applicable to the units they were buying.

- (b) In paragraph 12 of the judgment the learned judge said this.

'In the end, I therefore believe that there is no difference in the present context between rectification of a contract, on the one hand, and rectification of a deed of transfer, on the other.' (My emphasis.)

- [43] In my view, whilst an antecedent agreement or a common intention might reveal an error in a deed, neither constitute a prerequisite for a finding that there is an error in a deed which it is desirable to correct. Rectification of an error in a contract is a right which the court must enforce when the requirements for the existence of the right have been established. The requirements for rectification in terms of s 4(1) of the Deeds Registries Act are different. Rectification may take place when it is considered necessary or desirable to do it. It is done under statutory authority. The statute says nothing about the qualities of the error which is susceptible to rectification. Counsel for the plaintiff may well be correct in arguing that the error here is a unilateral one. But the statute does not expressly deny the remedy of rectification of such an error; and one should hesitate to imply an intention to deny the remedy in such a case when the test for the grant of the remedy is whether in the opinion of the Registrar of Deeds it is desirable or necessary to rectify the deed.

[44] I accept , confining the enquiry to deeds to immovable property, that in the case of a title deed to free standing property it would be difficult to contend for the existence of an error in the deed, and its rectification contrary to the wishes of the owner, in the absence of an antecedent agreement or a common intention that the deed should have contained something, or should not have contained something, when it was registered. But it seems to me that when we are talking

about deeds to property which is to be occupied and enjoyed in terms of peculiar communal arrangements such as are found in so-called

"gated estates", the position is different.

[45] I accordingly conclude that the Registrar of Deeds should be authorised to proceed with the claimed rectification to the s 11(3)(b) certificate relating to Wakenshaw Manor on condition that the Registrar shares the view that the rectification is desirable, or

regards it as necessary.

[46] However I am compelled to mention two matters which may affect the registrar's approach to a request for the rectification of the certificate relating to Wakenshaw Manor. I have taken cognisance of the expense of this litigation, and the fact that it is all about the plaintiffs and their relationship with the defendant. The immediate parties to this litigation deserve answers to the questions they have posed. I have decided to provide them, despite the fact that I have misgivings about the following two circumstances or factors which suggest that more should be done than the amendment of the certificate relating to Wakenshaw Manor in order to ensure that the owners of all homes constructed on the parent property are treated equally.

- (a) The evidence before me reveals that the title deeds to Clusters reflect the conditions sought to be recorded in the s 11(3)(b) certificate relating to Wakenshaw Manor, but as far as I can see from the sample deed provided to the court, the conditions relate to the Clusters Home Owners Association, and not to the defendant.
- (b) The rectification of the certificate relating to Wakenshaw Estate appears to have been confined to the embargo provision and compulsory membership of the defendant, as set out under the heading "Home Owners Association" in the rectification sought by the defendant with regard to Wakenshaw Manor. The "Omnibus Servitude for Services" was not inserted at the same time.

The following order is made.

1. The first and second plaintiffs' (hereinafter "the plaintiffs") claim in convention is dismissed with costs, the plaintiffs'

liability for such costs being joint and several.

2. The Registrar of Deeds, Pietermaritzburg, is authorised to rectify the schedule of conditions applicable under s 11(3)(b) of the Sectional Titles Act, No 95 of 1986 to the sectional title scheme known as Wakenshaw Manor by adding thereto the conditions set out hereunder if the Registrar of Deeds is of the opinion that such rectifications are necessary or desirable, and to do so without the written consent of all persons interested in the rectification. The additional conditions are the following.
3. It is declared that each of the owners of sectional title units in the sectional title development known as Wakenshaw Manor are liable, and since acquiring ownership of their respective units have been liable, as members of the Wakenshaw Estate Homeowners Association to pay levies due to that association raised by the association from time to time.
4. The costs of the claim-in-reconvention shall be paid by the plaintiffs, their liability for such costs being joint and several.

Date of Hearing:

Monday to Thursday, 10, 11, 12 & 13 February 2020

Date of Judgment : This judgment was handed down electronically by circulation to the parties' representatives by email, and by release to SAFLII. The time and date for hand down is deemed to be 09h30 on the 13th day of July 2020.

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Prepared on 10 October 2026 · Esheria