

SOUTH AFRICA / JUDGMENT

Sable Hills Waterfront Estate Home Owners' Association NPC v Sable Hills Waterfront Estate CC (39635/2013) [2015] ZAGPPHC 831 (10 December 2015)

[2015] ZAGPPHC 831

COURT

North Gauteng High Court, Pretoria

BEFORE

H.J Fabricius

CASE / FILE NUMBER

39635/2013

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

Case Number: 39635/2013

DATE: 10/12/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER

JUDGES

REVISED

In the matter between:

SABLE HILLS WATERFRONT
ESTATE HOME
OWNERS'
ASSOCIATION
NPC PLAINTIFF
And
SABLE HILLS WATERFRONT
ESTATE CC DEFENDANT

JUDGMENT

Fabricsius J,

1.

The following ‘Special Case for Adjudication’ was placed before me on 3 December 2015: (This document is quoted in full, but unnecessary introductory paragraphs have been deleted as well as references to a bundle of admitted documents)

“The question of law for adjudication:

Is the Defendant, as owner and developer of the township known as Sable Hills Waterfront Estate, subsequent to the establishment of the township and for the purposes of the Plaintiff’s Articles of Association, liable to pay any levies to the Plaintiff.

If so, are such levies payable for one property only, i. e. the remaining extent, or for each of the erven as set out in the General

Plan that has not yet been transferred to third parties.

Common cause facts:

On 2 March 2006, in terms of section 40 of the Deeds Registries Act, 1937, the Defendant became the owner of the property known as Portian 133 of the farm Sable Hills 741, Registration Division JR, Gauteng Province, measuring 194, 1841 hectares.

A copy of the Certificate of Consolidated Title in terms of which the Defendant held the property concerned is included as item 3 in the Bundle.

Also on 2 March 2006, and in terms of the provisions of section 46 of the Deeds Registries Act, 1937, the property concerned was laid out into 307 erven in accordance with General Plan SG No. 6889/2005 and in respect of which a register was opened in which all registrable transactions affecting the respective erven shown on the plan has to be registered (“the township register”).

The relevant endorsement made by the Registrar of Deeds, Pretoria in terms of the provisions of section 46 (3) of the Deeds Registries Act, 1937, appears in the Bundle.

The Defendant, as owner of the property concerned, applied to the Nokeng Tsa Taemane Local Municipality to establish the township of Sable Hills Waterfront Estate in terms of the provisions of Part C of Chapter III of the Township Planning and Townships Ordinance, 1986.

On 15 March 2006, the Nokeng Tsa Taemane Local Municipality declared the township of Sable Hills Waterfront Estate an approved township in accordance with the provisions of section 103 of the Township Planning and Townships Ordinance, 1986.

It is, for purposes of this action, common cause between the parties that during the period 1 March 2012 until 3 October 2012 and according to the registrations contained in the township register

7.1 that the erven set out in Appendix “POC1” to Plaintiff’s Particulars of Claim had not been transferred to any third party;

7.2 that erven 124, 193 and 279 were transferred to third parties during May 2012;

7.3 that erf 208 and sectional title unit B341 were transferred to third parties during July 2012; and

7.4 that erf 85 was transferred to a third party during August 2012; and

It is also common cause that the erven and sectional title units referred to herein are residential property within the township.

The Plaintiff is a non-profit company whose main objective at all material times was the maintenance and upkeep and development of the township, and to act as an association for the owners of property in the township.

The Plaintiff’s amended Memorandum of Association and Articles of Association that were of force and effect during the period from 1 March 2012 until 3 October 2012, is contained in the Bundle.

In accordance with the provisions of paragraph 5.1 of its Articles of Association, the income of the Plaintiff consists mainly of the compulsory monthly levies payable by members, and is applied to the furtherance of the Plaintiff’s main objective.

In accordance with the provisions of paragraph 5.2.1 of its Articles of Association, the directors of the Plaintiff will from time to time determine the levies payable as provided for in paragraph 5.1 thereof, and all levy payments will be apportioned equally between the owners of property (i. e. between stands and units in the estate).

In accordance with the provisions of paragraph 4.1 of the Articles of Association, the members of the Plaintiff consist of the Defendant (as developer) and all other persons, including legal entities who are registered owners of residential property in the township, which includes residential erven in the township, residential erven whereon bodies corporate are situated and residential units in such bodies corporate, including owners of residential erven/residential units with real rights.

For the period from 1 March 2012 until 3 October 2012, the levy as determined by the directors of the Plaintiff that was payable by each owner of residential property within the township was the amount of R 1 750.00 per erf or unit.

The parties are ad idem that:

15.1 Should levies be payable by the Defendant to the Plaintiff for one property only, the relevant amount per month for the period 1 March 2012 to 3 October 2012 is R 1 750.00;

15.2 Should levies be payable by the Defendant to the Plaintiff for each of the erven that has not been transferred to a third party, the amount is to be calculated as follows:

15.2.1 With regard to all the erven on Appendix “POC1” to the Plaintiff’s Particulars of Claim, the capital amount is calculated as the levy amount of R 1 750.00 multiplied by 8 months, being the relevant period from March 2012 until October 2012.

15.2.2 With regard to erven 124, 193 and 279, the capital amount is calculated as the levy amount of R 1 750.00 multiplied by 3 months, being the relevant period from March 2012 until May 2012.

15.2.3 With regard to erven 208 and B341, the capital amount is calculated as the levy amount of R 1 750.00 multiplied by 5 months, being the relevant period from March 2012 until July 2012.

15.2.4 With regard to erf 85, the capital amount is calculated as the levy amount of R 1 750.00 multiplied by 6 months, being the relevant period from March 2012 until August 2012.

15.3 The remainder of the erven on Appendix “POC1” to the Particulars of Claim, the capital amount is calculated as the levy amount of R 1 750.00 multiplied by 8 months, being the relevant period from March 2012 until October 2012.

15.4 The Plaintiff is entitled to claim compound interest at the rate set by the Plaintiff in accordance with the Articles of Association, alternatively at the rate set by the Prescribed Rate of Interest Act, 1957.

Case number 78020/2015 and the remaining issues under case number 39635/13:

On 3 October 2012, the Plaintiff adopted a new Memorandum of Incorporation in terms of the Companies Act, 2008. The Plaintiff has instituted a further action against the Defendant under case number 78020/15 in this Court, in which the Plaintiff

claims payment of levies on the same basis as contained in this action, for the period after 3 October 2012. The parties are ad idem that the result of this action will apply mutatis mutandis to the action under case number 78020/15, and that the only remaining issue in the said action will be the quantification of the amount of the levies, taking into account the amount of the levies as determined by the directors of the Plaintiff from time to

time and the number of erven that remained in the relevant register from time to time.

Regarding the Plaintiff’s claim and Defendant’s counterclaim under case number 39635/13 the parties agreed that should the Plaintiff be successful in this action, then and in that event the execution of the judgment will not be held over until the finalisation of the Defendant’s counterclaim.

The contention of the parties:

The Plaintiff contends that the Defendant is the registered owner of the erven that have not yet been transferred from the township register, within the context of the Plaintiff's Articles of Association, and is thus liable to pay levies in respect of each of the erven concerned. (I underline)

The Defendant contends that it is not the registered owner of 'Property', as defined in the Articles of Association and thus not liable to pay any levies, alternatively that it is the owner of the remainder of the township, i. e. one property, and is thus only liable to pay levies in respect of one property." (I underline)

Plaintiff's argument proceeded as follows:

1.1

It is common cause that the compulsory levies determined by the directors of the Plaintiff will be apportioned equally between the owners of property (i. e. between stands and units in the estate) – Articles of Association, clause 5.2.2.

1.2

"Property" is defined as meaning "erven in the Township and units in the schemes" – Articles of Association, clause 1.6.

1.3

The expressions "stands" and "erven" have the same meaning and are used interchangeably.

1.4

It is also, to the extent that it may be relevant, common cause that the erven and sectional title units referred to in the Special Case are residential property within the township – Special Case, par. 13.

1.5

It is further common cause that the Defendant is the owner of what has been described as "the remaining extent" – Special Case, par. 2.

1.6

The essence of the dispute between the parties is whether the "remaining extent" –

1.6.1 comprises of the erven and units reflected in the General Plan concerned, that have not yet been transferred to third parties (as the Plaintiff alleges); or

1.6.2 constitutes land that is not defined as "erven in the Township and units in the schemes" in the Articles of Association, and is therefore not yet "Property" as defined in the said Articles (as the Defendant contends).

The applicable legal principles:

2.

In section 102 of the Deeds Registries Act, 1937 –

2.1

The term “erf” is defined as meaning “... every piece of land registered as an erf, lot, plot 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 recognized, approved or proclaimed as such;” and

2.2

The term “registered” is defined as meaning “... registered in a deeds registry;”

3.

“The impact of these two definitions is therefore such that every erf depicted in the General Plan is deemed to be registered upon registration of the General Plan.”

See: Heritage Hill Devco (Pty) Ltd v Heritage Hill Home Owners’ Association [2015] ZAGPPHC 310, at par. [15]

4.

Section 46 (1) of the Deeds Registries Act, 1937 provides as follows:

“If land has been subdivided into lots or erven shown on a general plan, the owner of land subdivided shall furnish a copy of the general plan to the Registrar, who shall, subject to compliance with requirements of the Section and any other law, register the plan and open a register in which all registrable transactions affecting the respective lots or erven shown on the plan shall be registered.”

5.

The substratum for registrable transactions affecting the respective erven shown on the plan is the General Plan, and that substratum comes into being once the General Plan is registered in the Deeds Registry.

See: Heritage Hill Devco, supra, par. [17]

6.

The purpose of the provisions of the said section 46 is thus to ensure the recognition of the existence of each and every individual erf depicted on the general plan and adherence to that plan in regard to all registrable transactions.

See: Heritage Hill Devco, supra, par. [19]

7.

It is also clearly to be understood from the provisions of these sections that land which existed as a farm ceases to be farmland upon proclamation of a Township and upon registration of a General Plan.

See: Heritage Hill Devco, supra, par. [20]

8.

“For the purposes of the Articles of Association it would be artificial and narrow to suggest that the individual erven which all are situated in the township only come into existence when those individual erven are sold and transferred to the first purchasers in the context of a township those individual erven have an identity similar and comparable to the identity of erven already sold and transferred. For those reasons I am inclined to conclude that the Defendant was for the purposes of the Articles of Association the registered owner of the various properties ...”

See: Heritage Hill Home Owners’ Association v Heritage Hill Devco (Pty) Ltd 2013

(3) SA 447 (GNP), par. [38], page 454.

The application of the law to the facts:

9.

In the Heritage Hill matter, the articles of association provided as follows:

“4.1 The following persons shall be members of the Association –

4.1.1 during the development period, 7 (seven) nominees of the developer who are not the registered owners of portions of the property, and

4.1.2 any person including the developer, who is the registered owner of the property ...”.

10.

In that matter, the Articles of Association empowered the directors of the home owners’ association from time to time to determine the levies payable by the members for the purpose of meeting all expenses which the home owners’ association incurred or which the directors reasonably anticipate will be incurred in the furtherance of the objects of the Respondent.

11.

In particular, the Articles of Association provided that “(m)embers shall be liable in respect of any levy determined in terms of 9.1 from time to time in equal shares, in respect of each property owned by such member”.

12.

Based on the legal principles set out above, and the provisions of the Articles of Association concerned, the Court held that as a matter of law that the developer for the purposes of attracting liability for levies imposed by the home owners' association, was in fact the registered owner of the erven in the township as set out in the General Plan, and liable for levies for each of such erven.

13.

In this instance, the relevant portions of the Articles of Association read as follows:

In accordance with the provisions of par. 5.1 of its Articles of Association, the income of the Plaintiff consists mainly of the compulsory monthly levies payable by members, and is applied to the furtherance of the Plaintiff's main objective.

13.1

In accordance with the provisions of par. 5.2.1 of its Articles of Association, the directors of the Plaintiff will from time to time determine the levies payable as provided for in paragraph 5.1 thereof, and all levy payments will be apportioned equally between the owners of property (i. e. between stands and units in the estate).

13.2

In accordance with the provisions of par. 4.1 of the Articles of Association, the members of the Plaintiff consist of the Defendant (as developer) and all other persons, including legal entities who are registered owners of residential property in the township, which includes residential erven in the township, residential erven whereon bodies corporate are situated and residential units in such bodies corporate, including owners of residential erven/residential units with real rights.

14.

The following considerations appear from these provisions of the Articles of Association, read with the abovementioned legal principles:

14.1 The Defendant is a member of the Plaintiff – clause 4.1.

14.2 All persons who are registered owners of residential property in the township, are members of the Plaintiff – clause 4.1.

14.3 The persons who are liable to pay levies to the Plaintiff, are the members of the Plaintiff – clause 5.1.

14.4 The levy payments will be apportioned equally between the owners of property (i. e. stands (erven) and units in the estate).

14.5 The Defendant is the registered owner of the erven reflected on the General Plan that have not been transferred to third parties.

14.6 It is common cause that such erven are residential property.

15.

From there, it was suggested that it is a matter of simple logic:

15.1 The Defendant falls within the group that can be described as “members of the Plaintiff who are owners of erven and units in the township”.

15.2 All persons who fall within that group are liable to pay levies to the Plaintiff.

15.3 Ergo, the Defendant is liable to pay levies to the Plaintiff.

16.

In addition, the levies are to be apportioned equally between the owners of property (i. e. between stands and units), meaning that the levy amount of R 1 750.00 per month is an amount that is calculated with reference to the number of residential erven in the township, and not the number of owners.

17.

The “remaining extent” (i. e. those erven not yet transferred to third parties) is not “a stand” (also referred to as an erf) nor is it a unit, and the levies are not apportioned to it but to its components, being the erven.

18.

In the premises, it was contended that judgment should be entered in favour of the Plaintiff, with costs.

19.

Defendant by-and-large relied on the ratio in the decisions *Florida Hills Township Ltd v Roodepoort – Maraisburg Town Council* 1961 (2) SA 386 T and *Rhynfield Townships Ltd v Benoni Town Council and Another* 1950 (4) SA 717 T.

In *Heritage Hill Home Owners’ Association v Heritage Hill Devco (Pty) Ltd*, Case number 31022/10, Kollapen J held that on the facts pertaining to them, they were clearly distinguishable for the reasons stated by him in par. 32 and 35. I agree with his reasoning, and so did the Full Bench on appeal. (Case number A541/13)

20.

The result is that Plaintiff’s argument is sound, and the reasoning of Kollapen J and the Full Bench applies to the present facts as well. There is no point in repeating it herein.

21.

The parties have agreed that should judgment be entered for the Plaintiff on the basis that the Defendant is liable, the following order should be made:

“The Defendant is directed to pay to the Plaintiff the amount of R 841 750.00, being due and payable by the Defendant as levies

for the properties contained in Appendices “POC1” and “POC2” to the Plaintiff’s Particulars of Claim, for the period 1 March 2012 to 3 October 2012, together with compound interest on the outstanding amount from time to time at a rate of 15% per annum in accordance with the Plaintiff’s Articles of Association.”

Defendant is to pay the costs of the action including costs of Senior Counsel on an Attorney and client basis.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 39635/13

Counsel for the Plaintiff: Adv S. D. Wagener SC

Instructed by: Coetzer & Vennote

Counsel for the Defendant: Adv A. B. Rossouw SC

Instructed by: Van Zyl Le Roux Inc

Date of Hearing: 3 December 2015

Date of Judgment: 10 December 2015 at 10:00

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