

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 2022/004567

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED YES/NO
DATE: 10/03/2023

In the matter between:

RETIEF SWART N.O.

First Applicant

CHRISTO BERNARD SWART N.O.

Second Applicant

LOUISA SOPHIA SWART N.O.

Third Applicant

LOUISA SOPHIA SWART

Fourth Applicant

and

**NORTHCLIFF RIDGE HOMEOWNERS ASSOCIATION
(REGISTRATION No. 2000/001418/08)**

First Respondent

INGRID ANITA CLAASSENS

Second Respondent

JUDGMENT

STRYDOM J

Introduction

[1] This matter concerns the refusal of the Northcliff Ridge Homeowners Association (HOA) to issue a clearance certificate to the Applicants so as to enable the transfer of an immovable property – Unit 10 – in the development known as Villa del Monte in Northcliff, Johannesburg (Unit 10) to the purchasers thereof.

[2] Two of the applicants are executors of the deceased estate of the late Christo Bernard Swart who, jointly with his wife, the fourth applicant (the Swarts) are the registered owners of Unit 10.

[3] In the notice of motion, the applicants seek relief in the following terms:

“1. That the first respondent be directed to forthwith:-

1.1 issue a clearance certificate in favour of the applicants in respect of Unit 10, Villa del Monte, Solution Close, Northcliff Ext 25 (Portion 10 of Erf [...], Northcliff Ext 25 Township, Registration Division IQ, the Province of Gauteng) as contemplated by Rule 7 of the first respondent's Community Rules, Regulations and Guidelines, and

1.2 to the extent necessary, accredit Mr Desigan Padayachee as an estate agent as contemplated by Rule 7 of the first respondent's rules.”

[4] Costs are sought on an attorney and client scale against the respondents.

[5] The second respondent abides by the decision of this court and no cost order is sought against her.

[6] The relief sought pertaining to the accreditation of the agent has become moot as the necessary accreditation was granted to the agent, Mr Padayachee. The only decision which remains for this court to decide is whether the HOA is entitled to refuse to issue a clearance certificate which, at this stage, is the only bar preventing the transfer of Unit 10 into the names of the purchasers, Mr and Mrs Teffo (the Teffos).

Title Deed Conditions

[7] The title deed in respect of Unit 10, when it was transferred to the Swarts, contains the following two restrictive conditions:-

“(1) Every owner of the erf, or of any subdivision or consolidation thereof shall automatically become and shall remain a Member of the Association and be subject to its constitution until he/she/it ceased to be owner as aforesaid. Neither the erf nor any subdivision thereof nor any unit thereon shall be transferred to any person who has not bound himself / herself / itself to the satisfaction of such Association to become a member of the Association.”

(condition 1)

and;

“(2) The owner of the property shall not be entitled to transfer the property without a clearance certificate from the Association that all amounts owing by such owner to the Association have been paid.”

(condition 2).

[8] The purpose of the first condition is clear. It is to ensure that all owners (present or future) become members of the HOA; remain members thereof; and remain bound by the HOA's constitution and Rules.

[9] Condition 2 seeks to protect the HOA against owners who still owe the HOA money when they sell their property. They will be prevented from transferring the property to purchasers whilst they still are indebted to the HOA.

[10] The dispute in this matter concerns the HOA's refusal to issue a clearance certificate despite the applicants having fully paid up their financial obligations towards it.

[11] It is the case on behalf of the applicants that the title deed conditions have been met. First, the purchasers bound themselves to become members of the HOA and be subject to its constitution and rules. This acceptance is evidenced in a signed addendum to the sale agreement between the applicants, as the sellers, and the purchaser. Second, the applicants have paid all outstanding monies to the HOA. The HOA however contends that it is entitled to refuse to issue a clearance certificate as it alleges that the applicants are not in compliance with the first respondent's articles of association (now the MOI) and rules.

[12] The first alleged breach is that the applicants refuse to insert in the title deed further title deed conditions which the HOA insists should, in terms of amended rules, be inserted. This refusal, according to the HOA, amounts to a breach, and on this basis alone, so the argument went, the HOA could refuse to issue a clearance certificate. The second ground for refusal relates to Unit 10 being built in contravention of the Site Development Plan (SDP). Despite approved building plans and an occupation certificate being provided by the applicants to the HOA, it is averred by the HOA that the approved building plans of the immovable property and the certificate of occupancy were obtained fraudulently. Further, it is alleged that there is a contravention of the rules in regard to a parking bay.

[13] The second issue relates to breaches which allegedly took place shortly after Unit 10 was purchased by the Swarts in 2002, and during 2007 when the building plan was approved by the City of Johannesburg and a certificate of occupancy was issued. The certificate of occupancy was accepted at that time by the property managing agents of the HOA on its behalf. The HOA now contends that their agent acted outside the scope of his authority by doing so.

[14] The HOA further contended that there are factual disputes and because of this, the applicants should not have approached this court by way of motion proceedings. Thus, the application should be dismissed on this ground alone.

[15] On behalf of applicants, it was submitted that they have complied with the requirements of the MOI and the Rules, which entitled them to being furnished with a clearance certificate from the HOA.

Point In limine

[16] A point *in limine* was raised concerning the alleged non-joinder of the purchaser and the City of Johannesburg. It was argued that the Teffos have a direct and substantial interest in the outcome of this application as should the clearance certificate not be issued by the HOA they will not be able to take transfer of Unit 10. In an email attached to the replying affidavit on behalf of the applicants, Mr Teffo confirmed that he and his wife do not wish to be joined in the proceedings. Despite this statement only appearing in a replying affidavit, the court is satisfied that when the matter was heard the court was not dealing with a non-joinder. The Teffos clearly waived their rights to be joined and thereby abided in the decision of court.¹ Moreover, it was not necessary to join them as their right to the transfer of Unit 10 derived from the right to obtain a clearance certificate in which they have no legal interest. The right vested with the applicants and not with the Teffos. Put differently, they would not have been in a position to claim for an order that the HOA issue a clearance certificate enabling them to take transfer of Unit 10.²

[17] Further, in my view, it was not necessary to join the City of Johannesburg merely because the HOA is alleging that the plans were fraudulently approved by the City. The fraud relied upon by the HOA was denied by the applicants and it could not have been expected of the applicants to have joined the City in anticipation that such allegations would be made.

¹ See in this regard *re BOE Trust Ltd and Others* NNO 2013 (3) SA 236 (SCA) at 242 A-C.

² See in this regard *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 WLD where the court distinguished between joinder of necessity and joinder of convenience.

Factual dispute

[18] This brings the court to the argument raised by the HOA that a factual dispute arose between the parties of which the applicants were aware before the application was brought and, in any event, has now manifested itself on the papers, rendering it impossible to decide the matter on affidavit. This alleged dispute relates to whether Unit 10 was sold by the second respondent as a partly built dwelling (the shell), built by Mr Hendrik Claassens, or by an entity controlled by him, or whether an empty stand was bought by the Swarts upon which they built their house from scratch. It became common cause that the plans were only approved in 2007 after the interior of the house was complete. The Applicant blames Mr Hendrik Claassens for this as his development or building entity built the shell on a stand belonging to his wife, the second respondent. The building plans should have been approved by them. In contradiction to this allegation, Mr Hendrik Claassens and the HOA persist in their stance that the Swarts bought the vacant stand and built their unit without approved building plans.

[19] In my view, the court must first determine whether the matter can be decided on the facts as stated by the respondent together with the facts as stated by the applicants which facts were not placed in dispute by the respondent. Bald and unsubstantiated denials of fact by the HOA do not create a true factual dispute. Denials and statements of facts which are farfetched and untenable can also be ignored. In certain circumstances, the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.³ The court will further take a robust approach in considering the opposed motion especially as this case requires an urgent outcome. In *Soffiantini v Mould*⁴ it was found as follows:

“It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung

³ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁴ *Soffiantini v Mould* 1965 (4) SA 150 (E).

and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”

[20] The case of the applicants that they bought an already constructed shell from the second respondent which they later finished was pertinently stated. In answer to this evidence Mr Claassens, the deponent to the affidavit filed on behalf of the HOA, stated that “to the best of my recollection there was a sale of vacant land.” This answer already casts doubt as it is stated to be subject to the memory of Mr Claassens. It is common cause that the seller of the property was Mrs Claassens the second respondent. The court would have expected of her to have stated under oath that she sold a vacant stand to the Swarts. This she did not do and she did not depose to a confirmatory affidavit to challenge the allegations on behalf of the applicants.

[21] It is indeed so that the title deed of the property when it was transferred into the name of the Swarts indicated that the purchase price was R300 000, which according to Mr Claassens would have been the price of a vacant stand, but this fact is countered by the unsigned offer to purchase document which indicated a selling price of R1 500 000. This document was confirmed to be the offer to purchase which was later signed. Neither party had a signed copy available at this stage.

[22] In my view, the affidavit of the estate agent, Ms Rosz, who was responsible for selling the property to the Swarts on behalf of the second respondent, settles this dispute convincingly in favour of the Swarts. She kept her records and even photographs of the structure which was sold to the Swarts. In these photos, the already-built structure of Unit 10 is clearly depicted. She is independent and her evidence is clear. She was the agent acting on behalf of the second respondent. The Swarts bought a shell already constructed by the developer, Mr Claassens, through his entity. She attached contemporaneous correspondence exchanged between the late Mr Swart and Mr Claassens and on a reading of this correspondence it becomes abundantly clear that further work and finishes were done on the existing structure.

[23] Having regard to all the evidence, the court concludes that the denial that an existing shell was bought by the Swarts is bald and unsubstantiated. Moreover, the version of the HOA in this regard is untenable and stands to be rejected on the papers as it stands. The version of the applicants that they bought a shell and only afterwards realized that no plans existed for the structure is accepted. The duty would have rested on the party who constructed the shell to have the building plans approved and to have built according to the SDP. Ironically, the fact that the approved building plans are in conflict with the SPD is only now being raised and used against the applicants to prevent them from obtaining a clearance certificate from the HOA to enable the transfer of Unit 10.

[24] Further factual disputes pointed out by the HOA relate to issues pertaining to the alleged fraudulent approval of the plans, the fraudulent issuance of an occupation certificate, and the issue relating to parking bays for Unit 10. It further became contentious which set of rules of the HOA was the applicable rules when the applicants applied to obtain a clearance certificate. This latter issue will be dealt with later in this judgment.

[25] A mere allegation of fraud in an affidavit does not prove fraud. The allegation must be based on fact. A party that alleges fraud and who wants to place reliance on the allegation must prove it clearly and distinctly. Fraud is not easily inferred. The HOA did not ask this court to refer this matter to evidence for purposes of leading oral evidence on this aspect.

[26] The evidence before this court evinces that building plans were approved by the City of Johannesburg on 2 October 2007 and an occupation certificate was issued. To conclude that it was fraudulently obtained is based on speculation. The mere fact that the permissible sizes of Unit 10 as per the SPD differs from the actual size of the unit as mentioned on the approved plans does not mean that the approval of the plans was obtained fraudulently. The only conclusion cannot be that it was approved as a result of fraud.

[27] On 10 May 2007 the managing agent of the HOA, AVS Property Management Services (Pty) Ltd (AVS) in a letter addressed to Mr Swart, stated as follows and I quote:

“Due to the fact that no approval plans have been issued as yet for the a.m. (a reference to Unit 10) property, the Home Owners Association does not have any objections that this can be approved as built.” (my underlining)

[28] The HOA alleges that AVS was only appointed to attend to bookkeeping and levy collection and had no further powers. Again it is stated that Mr Swart obtained this letter fraudulently to have the plans approved. This statement is bald and unsubstantiated. It is not supported by any evidence. This letter rather supports the version of the applicants that the Swarts had to obtain plans after Unit 10 was built by or on behalf of Mr Claassens. This conclusion is further supported by the fact that the Swarts bought the property from second respondent and not directly from the developer. This was never explained by the HOA and the second respondent did not depose to an affidavit. The allegation of fraud in this regard can be rejected on the papers as far-fetched and untenable.

[29] The court is satisfied that the matter can be decided on the papers as it stands and will now proceed to do so.

[30] It is the applicant's case that the only requirement for the clearance certificate to be issued was that what was stated in the title deed when Unit 10 was bought i.e. that the new owner bound him/her/it to become and remain a member of the association and be subject to the constitution and, further, that all outstanding amounts had to be paid by the applicants to the HOA. There is no dispute that the outstanding amount was paid.

[31] Does this now mean that the HOA must issue the clearance certificate or can other outstanding issues be raised? It should be mentioned that the emails sent by Mr Cruywagen, the attorney of the HOA and also a director thereof, initially indicated that once outstanding payments were made and the approved plans and occupation certificate were provided to the HOA a clearance certificate would be provided. This

stance changed when Mr Claassens, according to him, realized that the SDP differed from the approved plans. It was stated that this fact was only ascertained when the plans were received. This statement, in my view, is highly improbable considering the accepted evidence that the Swarts bought an existing structure which was built by Mr Claassens or an entity controlled by him. Clearly, the managing agent for a reason wrote to the Swarts that the HOA had no objection that “this can be approved as built”. The version of Mr Claassens that he initially was unaware of the fact that Unit 10 was built without building plans, whilst the managing agent was aware of this, is untenable and stands to be rejected.

[32] The context in which this court’s decision should be made is important. The late Mr Swart and the fourth applicant took transfer of this property during the year 2002. It is common cause that the building plans for the property was only approved by the City of Johannesburg in 2007. A certificate of occupancy was issued and the Swarts stayed in the unit without any issue or intervention from the HOA. They parked vehicles close to the property. Now 20 years after the transfer the HOA avers that the applicants are in breach of their obligations towards the HOA as far as approved building plans and parking bays are concerned.

[33] The MOI or Articles of Association and the Rules of the Northcliff Ridge Home Owners Association (the rules) must now be considered.

[34] Starting with the MOI, Clause 9 provides under the heading “RESTRICTION ON SALE AND TRANSFER OF ANY ERF OR UNIT” as follows:

“9.2 No member shall transfer an Erf or Unit in the Estate unless –

9.2.1 the company, under the hand of a director has certified in writing that the member has fulfilled all his financial and other obligations to the company in respect of the period up to and including the date specified in such notice, and; the company is in possession of a certificate of occupancy (if in occupation) and an approved plan;” (my underlining)

and further,

“9.3 As a precondition to the transfer of any Erf, no member / registered owner shall transfer any Erf in the Estate unless the proposed transferee has agreed in writing to become a member of the company and to be bound to the satisfaction of the company to this MOI and any rules promulgated in terms thereof and such written agreement has been lodged with the company.”

[35] The terms contained in clause 9.3 do not create a dispute in this matter as the applicants who sold their property to the Teffos inserted in the amended sale agreement the preconditions as stated in the MOI. The amended agreement, which was provided to the HOA, in fact, went beyond what was required in the MOI. It inserted the condition that the title deed should include further restrictions as required in clauses 7.6 to 7.7.5 of the rules upon which the HOA placed reliance on.

[36] Clause 9.2.1 of the MOI, with reference to the words “other obligations” and the prescript that the HOA must be in possession of the approved plan and occupancy certificate, goes beyond the only requirement contained in the title deed, which requires payment of outstanding amounts before a clearance certificate would be issued. It places a further obligation on the owner of a unit who wants to transfer the unit to satisfy the HOA that he/she or it fulfilled “other obligations”, which would include compliance with the rules, over and above payment of outstanding debt. Also to provide an occupancy certificate and approved plans.

[37] According to the respondents, the applicable rules of the HOA at the time when the applicants wanted to sell Unit 10 were the rules attached to the answering affidavit marked “AA2”. Clauses 7.6 – 7.7.5 deal with what a written sale agreement must contain and what should be contained in a deed of transfer. As stated, the addendum to the sale agreement between the applicants and the Teffos contained these further conditions but the proposed deed of transfer provided to the HOA only contained the original conditions.

[38] The relevant clauses of these rules should be quoted:

“7.4 A clearance certificate must be obtained from NRHOA at a fee determined from time to time by the directors prior to any transfer of ownership of a property in THE NORTHCLIFF. If the owner concerned owes NRHOA any amount or if the owner or occupant/s of a property is/are in breach of the rules the directors will refuse to issue a clearance certificate.

7.5....

A SALE/LEASE AGREEMENT MUST CONTAIN THE FOLLOWING CLAUSES
AND MUST BE IN WRITING
SALE

7.6 The Purchasers shall bind him/her/it that the Purchaser shall on registration of transfer of the property into the Purchaser's name, automatically become a member of NRHOA and shall be bound by the Memorandum of Incorporation and Articles of Association of the Northcliff Ridge Homeowners Association (REG: 2000/2000/001418/08) and its conduct rules.

7.7 The agreement of sale must contain the following conditions of title that must be inserted in the Deed of Transfer in terms of which the Purchaser receives title to the property : (my underlining)

7.7.1 Every owner of an erf, or any subdivision thereof, or any interest therein, shall become and shall remain a member of Northcliff Ridge Homeowners Association (REG: 2000/2000/001418/08) (NRHOA) and be subject to its memorandum of incorporation (MOI), articles of association (AOA) and rules for as long as the owner's ownership of the erf or an interest therein endures.

7.7.2 Neither the erf, nor any subdivision thereof, or any interest therein, shall be transferred to a purchaser who has not bound himself, herself or itself, to the satisfaction of the directors to become a member of the NRHOA.

7.7.3 The owner of the erf, or any subdivision thereof, or any interest therein, shall not be entitled to transfer the erf or any subdivision thereof or any interest therein without a clearance certificate from NRHOA that the provisions of the

MOI, AOA and rules of NRHOA have been complied with and that no amount is owing by the transferor to NRHOA. (my underlining)

7.7.4 The term 'NRHOA' in the aforesaid conditions of title shall mean the Northcliff Ridge Homeowners (Incorporated Association not for gain).

7.7.5 If the Registrar of Deeds requires the amendment of such conditions, in any manner in order to effect registration of transfer, the Purchaser hereby agrees to such amendment."

[39] The applicants complied with the requirement that the sale agreement contained the terms as required but were not amenable to cause an amendment of the title deed conditions to include these broader conditions. In my view, this is where the true dispute lies between the parties, as the approved plans and occupation certificate were provided to the HOA. The court already dealt with the allegation that these documents were obtained fraudulently.

[40] It was the case of the applicants that no provision in the Deeds Registry Act provided for the amendment of conditions by way of agreement between seller and buyer. The HOA could not unilaterally insist that this broadened restriction should be inserted in the title deed.

[41] On the papers before court, it was disputed which set of rules should apply. Reference was made to three sets of rules, with some rules which are not the same. The rules the applicants referred to was attached to the founding affidavit as "FA11". The respondent stated that these rules were only draft rules. Whether these rules were in draft form and not adopted need not to be decided by the court in light of the finding of the court herein below.

[42] The respondent referred to rules dated 22 November 2019 attached to the answering affidavit as "AA2". The relevant portion of these rules were quoted hereinabove. These rules contained further powers of the HOA to refuse to issue a clearance certificate should the owner of a property be in breach of the rules. In addition, an obligation is placed on the seller of a unit to insert certain information in the sale agreement and to effect an amendment of the title deed to incorporate these wider powers of the HOA to refuse to issue a clearance certificate. Then there is a

third set of rules attached to the applicant's replying affidavit. These unsigned and undated rules were sent to Mr Cruywagen, the attorney acting for the HOA, by Mr Claassens on 24 August 2021. Mr Cruywagen then sent it to attorney Wanda Louw who was involved in the transfer of another unit in the complex, Unit 11. Ultimately the applicants received a copy of the rules. These rules were used to transfer Unit 11 and differ from "AA2" in a material aspect relating to what the title deed must contain. Clause 7 thereof does not contain a provision similar to that which appears in clause 7.7 of "AA2". This clause decrees what must be contained in the title deed. This would mean that the title deed will have to be varied. The rules which Mr Claassens himself have described as the final rules were sent to Mr Cruywagen.

[43] There is serious doubt as to the veracity of the HOA's version that the rules of 22 November 2019 were the rules that prevailed when the applicants asked for a clearance certificate. In light of the emails from both Mr Claassens and Mr Cruywagen describing the rules of 24 August 2021 as the final rules or "the newly approved rules of the NRHOA effective from today", the version proffered in the answering affidavit that the relevant rules were as contained "AA2" should be rejected as untenable. In the court's view, the rules sent of 24 August 2021 must be accepted as the rules applicable to the transfer of Unit 10. Hereinafter the reference to "Rules" will be a reference to the Rules of the HOA dated 24 August 2021.

[44] These Rules do not place an obligation on the applicants to vary the title deed of Unit 10. The refusal to do this by the applicants should not be a bar against the provision of a clearance certificate by the HOA as the applicants are not in breach of the Rules.

The amendment of title deed conditions

[45] The court asked the parties to provide further heads of argument, *inter alia*, on the question of whether the rules of a HOA can require amendments to an existing title deed before a clearance certificate is issued, allowing for a transfer to take place. Such further heads of argument were provided by on behalf of the applicants but not on behalf of the HOA.

[46] This question has become moot as the court found that no such rule is contained in the Rules of the HOA. Amendments to title deed conditions occur either by way of agreement, court order, or by way of statute. In this instance neither apply.

[47] It is trite that the relationship between HOA and owners is regulated by the law of contract. When a HOA places restrictions on homeowner's and the restrictions are properly adopted, in compliance with the MOI of such HOA, then an owner would be bound by the restrictions.⁵ In the case of the Swarts they are contractually bound by the Rules. The Rules, however, do not require the applicants to insert further restrictions on the title deed of Unit 10. There is no evidence of any other agreement entered between the HOA and the applicants evidencing an agreement to amend the title deed.

[48] The conditions concerning what should be stated in the sale agreement between the applicants and the Teffos have been met; the conditions that approved building plans and an occupation certificate should be provided to the HOA was met; lastly, the requirements contained in the title deed, the Rules and MOI were also met by the applicants and the HOA should be ordered to issue a clearance certificate which would allow for the transfer of Unit 10 to the Teffos. Importantly, the unit owner has paid all outstanding amounts owing to the HOA.

Costs

[49] Applicants sought costs on a punitive scale. It was submitted that the conduct of the HOA is shameful and is worthy of censure by the court. Mr Claassens' allegations that the plans were fraudulently approved was based on one fact that the plans were in conflict with the SDP. No further evidence was forthcoming to substantiate the allegation of fraud. The same applies to the occupation certificate. The HOA failed to refer the court to the Rules of 24 August 2021, in terms of which the transfer Unit 11 took place. No evidence was provided that the rules dated 22 November 2019 were lawfully adopted. The court is of the view that a punitive cost

⁵ See *Moubt Edgcombe Country Club Estate Management Association II (RF) v Singh and Others* 2019 (4) SA 471 (SCA).

order is warranted in this matter. Mr Claassens maintained that the Swarts bought a vacant stand and steadfastly denied that he, or an entity controlled by him, had anything to do with the building of the dwelling. This evidence was refuted by the evidence of the agent, Ms Rozs, who sold the property on behalf of the second respondent to the Swarts. The HOA failed to place before court relevant facts.

[50] The following order is made:

50.1 That the first respondent is directed to forthwith issue a clearance certificate in favour of the applicants in respect of Unit 10, Villa Del Monte, Solution Close, Northcliff Extension 25 (Portion 10 of Erf [...], Northcliff Extension 25 Township, Registration Division I.Q. The Province of Gauteng; and

50.2 That the first respondent is directed to pay the costs of this application on the attorney client scale.

RÉAN. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHANNESBURG

Counsel for the Applicants:	Adv. JW Steyn
Instructed by:	Bento Incorporated

Counsel for the Respondent:	Adv. E. Coleman
Instructed by:	McCARTHY CRUYWAGEN

Date of hearing:	31 January 2023
Date of Judgment:	10 March 2023