



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)**

CASE NUMBER: 6088/2008

In the matter between:

MOOIKLOOF GARDENS HOME OWNERS ASSOCIATION

**21/1/2011
APPLICANT**

and

FRANBERT CONSTRUCTION (PTY) LTD

FIRST RESPONDENT

**PRETORIUS, THOMAS FREDERIK N.O.
(in his capacity as executor of the estate
of the late FRANK PETER SEBASTIAN DE VILLIERS)**

SECOND RESPONDENT

VAN DER MERWE DU TOIT INC

THIRD RESPONDENT

**VAN RENSBURG, E J (NARDUS) T/A
C A YOUNG WAARDASIES**

FOURTH RESPONDENT

**THE CITY MANAGER,
CITY OF TSHWANE METROPOLITAN MUNICIPALITY**

FIFTH RESPONDENT

THE REGISTRAR OF DEEDS

SIXTH RESPONDENT

CORAM EBERSOHN AJ

JUDGMENT HANDED DOWN ON 21st JANUARY 2011

JUDGMENT

EBERSOHN AJ.

[1] The applicant is a company registered in terms of the provisions of section 21 of the Companies Act, 1973, in compliance with the officially proclaimed establishment terms and

conditions of Pretorius Park X 25 ("the Township"), a security township, which was proclaimed in the Provincial Gazette Extraordinary No. 486 on 4 November 2004 ("the Proclaimed Township Preconditions") which was attached to the record as annexure JJH 05 on page 156 bundle B. The applicant brought the application both in terms of its actual locus standi in iudicio as the Home Owners Association of the Township as well as being the representative of the owners of erven in the Township, jointly and individually, in a class action, against the first respondent as the developer of the Township, the late second respondent in his capacity as The responsible director of the first respondent and the third respondent being the attorneys of the first and second respondent who did the transfer of a certain erf 1594, which belonged to the applicant, to the first respondent. The attack by the respondents on the locus standi in iudicio of the applicant was misplaced and fails.

[2] The first respondent is a private company and was the developer of the Township.

[3] The late second respondent was a director of the first respondent and he was the managing director of the applicant from the 29th June 2005, it being the date it came into being, until the applicant's annual general meeting on 6 November 2006 when the election of a new board of directors took place. The second respondent died after the matter was argued and before judgment was given and was substituted by order of the court on the 17th January 2011, by the executor of his estate one Thomas Frederik Pretorius in terms of the provisions of Uniform Rule 15. In this judgment reference will still be made to the second respondent in person and not his executor.

[4] The third respondent is Van der Merwe Du Toit Inc., the firm of attorneys who attended to the transfer of the said erf 1504 back into the name of the first respondent.

[5] The fourth respondent is a sworn appraiser who trades as C.A. Young Waardasies. No relief was sought against him unless he opposed the application.

[6] The fifth respondent is the City Manager of the Tshwane Metropolitan Municipality and no relief was sought against him unless he opposed the application.

[7] The sixth respondent is the Registrar of Deeds who was formally joined in the application.

[8] Copies of the founding papers were also served on attorneys M.C. van den Berg Inc. and the owners of erven in the Township.

[9] The 22 prayers set out in the draft order "X" attached to the notice of motion can more practically and conveniently be classified under five main headings and the relief asked for

under the five main headings will first be dealt with and thereafter the prayers will be dealt with separately.

[10] The applicant, **firstly**, claimed an order for the surrender by the first respondent, being the developer of the Township, to the applicant of the title deeds of erven 1593/12, 1641/17 and 1663 in the Township (title deed numbers T054067/06, T1641/17 and T1663 respectively) being the title deeds of the common property in the Township and which were registered in applicant's name in 2006. All the erven in the Township are freehold erven.

[11] The applicant, **secondly**, claimed an order setting aside the re-transfer of applicant's fourth common property, erf 1594, from the applicant to the first respondent which transfer was registered on the 22nd May 2007 and ancillary orders regarding the management of the applicant. The first respondent initially caused the said erf 1594 to be registered in the name of the applicant in compliance with the terms and conditions of the Proclamation, but, however, purporting to act on behalf of the applicant, and whilst acting also on behalf of the first respondent, the second respondent fraudulently signed a deed of sale in terms whereof the applicant "sold" erf 1594 back to the first respondent for the sum of R0.00 and he fraudulently also signed the necessary power of attorney to have the erf transferred into the name of the first respondent which transfer was duly registered.

[12] The applicant, **thirdly**, asked for an order declaring certain consents and contractual addenda, which purchasers of erven in the Township signed, providing that the first respondent "retains" erf 1594, to be invalid.

[13] The applicant, **fourthly**, asked for an order amending the title deeds of erven in the Township to provide for improved and better circumscribed compulsory membership of all the erf owners in the Township, of the applicant.

[14] The applicant, **fifthly**, asked for an order deleting a limitation registered against the title deeds of erven in the Township in favour of the first respondent and which in any case no longer applied, but presented problems to owners of erven in the Township when they tried to transfer their erven after it was sold by them to third parties.

[15] The first, second and third respondents opposed the application except for the relief set out under headings one and five referred to in paragraphs [10] and [14] *supra*. It was conceded by them that the applicant was entitled to the relevant title deeds and indicated that the first respondent was to let go of the limitation clause in favour of the first respondent referred to in paragraph [14] *supra*. The court was given to understand, during the hearing of the matter, that the title deeds were in fact already delivered to the applicant.

[16] The following quoted conditions contained in the Schedule to the Proclaimed Township Preconditions as published in the Gazette, referred to *supra*, are relevant:

a) **"1.14 THE DEVELOPER'S OBLIGATIONS**

1.14.1 ASSOCIATION AND STATUTES

The developer must register a Section 21 Company (home owners association) in terms of the provisions of the Companies Act, 973, (Act 61 of 1973). All the owners of units in the township must become members of the Section 21 Company. A copy of the registered Deed of Association (CM4) and the Company's Statutes must be submitted to the City of Tshwane Metropolitan Municipality.

The Association and Statutes must clearly state that the main objective of the home owners' association is the maintenance of the internal engineering services of the development (i.e. water, sewerage, electricity, and the road and stormwater sewers). The developer is deemed to be a member of the Section 21 Company, with all the rights and obligations of an ordinary member, until the last erf has been transferred."

b) **"1.15 TRANSFER OF LAND TO THE SECTION 21 COMPANY (HOME OWNERS' ASSOCIATION)**

Erven 1594 and 1663 shall be transferred to the home owners' association (Section 21 Company) by and at the expense of the township owner."

c) **"2.1 THE ERVEN MENTIONED BELOW SHALL BE SUBJECT TO THE CONDITIONS AS INDICATED, LAID DOWN BY THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY IN TERMS OF THE PROVISIONS OF THE TOWN-PLANNING AND TOWNSHIPS ORDINANCE, 1986 (ORDINANCE 15 OF 1986):**

2.1.1

2.1.2

2.1.3 ERVEN 1593, 1595 TO 1662 INCLUSIVE:

Upon transfer, the owner of each erf must automatically become a member of the Section 21 Company and remain a member until he or she ceases to be the registered owner of that erf, which condition must be included in the title deed of the portion.

Transfer of the erf to a third party is allowed only with the consent of the Municipality and then only if the development of the dwelling-unit has been completed to the satisfaction of the

Municipality in accordance with the approved site development plan."

[17] A zoning certificate with regard to erf 1594 was issued on the 23rd February 2007 by the General Manager: City Planning of the Municipality. The following relevant portions appear therein:

- "1. **USE SONE: SPECIAL**
- 2. **APPLICABLE ANNEXURE B**
B 7203
- 3. **PURPOSES FOR WHICH BUILDINGS MAY BE ERECTED OR USED OR LAND-USED:**
Uses only as in Annexure B.
- 4.
- 5.
- 6.
- 7.
- 8.
- 9.
- 10.
- 11. **ATTACHED DOCUMENTS:**
 - * **Schedule 1: None**
 - * **Annexure : B 7203."**

[18] Annexure B 7203, referred to in paragraph [17] *supra*, as issued by the Municipality, with regard to erf 1594, indicated that the zoning of the erf was "SPECIAL" and was subject to the following conditions:

"The erf shall be used only for Private Open Space and Communal purposes (i.e. club-house and recreational facilities), subject to the following conditions"

and 6 standard conditions relating to all buildings in the proclaimed township, were then also stated therein.

[19] It is common cause that erf 1594 was transferred by the first respondent to the applicant in terms of the stated Township conditions on the 18th May 2006 under deed of transfer no. T54036/2006.

[20] As already stated the second respondent, however, caused the said erf to be transferred

back into the name of the first respondent for a purchase consideration of R0,00 on the 22nd May 2007.

[21] The history of the re-transfer of erf 1594 to the first respondent is not complicated. The second respondent was at the relevant time a director of the first respondent and was also the managing director of the applicant since its initial registration. He, fraudulently and in clear breach of his fiduciary duty, instructed the third respondent to draft the deed of sale and he then signed the deed of sale on behalf of the applicant as "seller" and the first respondent as "purchaser". In terms of the deed of sale erf 1594 was "sold" by the applicant to the first respondent for R0,00. The R0,00 was based on a "valuation" done by the fourth respondent.

[22] The second respondent returned the signed deed of sale to the third respondent together with an "extract" from a "resolution" authorising the sale of the erf to the first respondent and the second respondent to sign all documents necessary to pass transfer of the erf into the name of the first respondent. The third respondent thereupon drafted the deed of transfer.

[23] At that point in time the third respondent was the attorneys of the applicant then being managed by the first and second respondent.

[24] Erf 1594 was thereafter registered in the name of the first respondent. The applicant maintained in this court that it was dispossessed of this prescribed endowment property under the prescribed township proclamation when the Township was proclaimed as such on 4 December 2004, through the unauthorized and fraudulent deeds and actions of the first and second respondents. The third respondent, so went the argument on behalf of the applicant, in the process executed a totally *ab initio* void re-transfer of erf 1594 back to the first respondent. The applicant maintained:

- (a) that it was common cause or undisputed or indisputable so that no resolution by applicant's members or its Board of Directors was ever passed and recorded that authorized the re-transfer or any underlying transaction;
- (b) the "power of attorney to pass transfer" was assumed but false, based on an assumed but false (non-existent) resolution by an assumed but false (never held) member's meeting; and
- (c) that the third respondent, being aware of the dispute between the applicant on the one hand and the first and second respondents on the other hand, and notwithstanding the clear and patent serious conflicts of interests, not only failed to withdraw from both applicant and first respondent it "acted for" in this matter, even after they became

aware thereof that the matter was in dispute, but it effected the unauthorized re-transfer based on the assumed but false mandate against the interests of the applicant as its one (purported) client, and in favour of the interests of first respondent, as its other client, it being trite that anything thus done or effected being void *ab initio* (founding papers item 7.6.10, record p.A79), furthermore without ever having had sight of the alleged minutes of the meeting where the "resolution" was allegedly adopted and which is now common cause was never held and that no such a resolution was ever adopted.

(d) The applicant's said arguments cannot be faulted.

[25] Upon a reading of the papers the conduct of the third respondent was distressing and may have been unprofessional and the necessary order will be made in this regard.

[26] This court also considered the conduct of the valuator who *mirabile* valued the erf at R0,00. His valuation is not understood and clearly assisted the first and second respondents to fraudulently, as against the applicant and the Receiver of Revenue, to acquire transfer of erf 1594 and to avoid paying transfer duty. The necessary order will also be made in this regard.

[27] It was also argued on behalf of the applicant that if the first and/or second respondents and/or the then attorneys of the applicant, who at that stage were, however, apparently reporting to the second respondent and not to the applicant, complied with their obligations towards the applicant they would immediately, after registering erven 1594, 1593/12, 1641/17 and 1663 into the applicant's name, delivered the title deeds thereof to the applicant and the second respondent would not have been able to fraudulently cause erf 1594 to be transferred back into the name of the first respondent.

[28] It is necessary to refer to another aspect of the documentation regarding the transfer. The second and third unnumbered paragraphs of the preamble to the deed of sale read as follows:

"AND WHEREAS the parties hereto agreed that the intention was that this property needed to remain in the name of the PURCHASER after proclamation, for purposes of rezoning and further development thereof;

AND WHEREAS the parties now wish to rectify this situation by Selling the property back to the PURCHASER;".

[29] Despite the clear wording of the "deed of sale" in the deed of transfer relating to erf 1594 in the name of the first respondent the *causa* for the transfer is stated by the conveyancer as being "an agreement in terms whereof the property mentioned herein be re-transferred

back" to the first respondent and not a **"sale"** as indicated in the deed of sale.

[30] Another ground was also relied upon by the applicant for the relief claimed as is set out in paragraph [11]^{supra} and that was that in terms of section 228 of the Companies Act, No. 61 of 1973, a company has no power to dispose of its undertakings or any of its assets otherwise than in furtherance of its objects (**Ridge Securities Ltd. v IRC** [1964] 1 ALL ER 275 (Ch) at 287-288). **Henochsberg on the Companies Act**, dealt with this on p. 441 of issue 27 and it is there stated:

"A disposal which is not in furtherance of the company's objects is ultra vires and void even if purportedly effected by the directors with the approval of the shareholders, subject, of course, to the operation of section 36."

[31] It is clear that section 36 of the Companies Act could not be invoked by the first and second respondents as a defence against the applicant's attack.

[32] With regard to the allegations made on behalf of the applicant that there never was any resolution adopted either by the board of directors of the applicant or by the members of the applicant at a general meeting of the applicant, Mr. Raath, who appeared for the first and second respondents, valiantly tried to persuade this court that upon a construction of several documents it could be said that a resolution was adopted at a meeting, although the resolution did not appear from the minutes of that meeting. It was stated in some of the supporting affidavits filed on behalf of the applicant that the second respondent approached some of the new directors of the applicant and tried to persuade them to fraudulently "remember" that the transfer of erf 1594 was in fact discussed at a meeting and that the minutes inadvertently did not reflect it. They all refused this approach by the second respondent.

[33] It is common cause that when instructing the attorneys to draft the power of attorney to register the transfer of erf 1594 into the name of the first respondent, the second respondent verbally confirmed to them that a resolution was in fact adopted by the applicant to register the transfer of erf 1595 into the name of the first respondent and that the second respondent never handed such a "resolution" to the said attorneys.

[34] It is clear that such a resolution was never adopted. The third respondent should have insisted on being provided with the original minutes of the meeting where the resolution was allegedly adopted the moment they were informed that the resolution was challenged by the applicant, but apparently elected to rather aid and abet the first and second respondents. How it came about that the attorneys also managed to persuade the Registrar of Deeds to by-pass the Proclaimed Township Preconditions referred to in paragraph [16] regarding erf 1594, is an aspect which will also have to be investigated by the Law Society and the Registrar of

Deeds and they will also have to investigate the issuing of a valid and genuine clearance certificate regarding erf 1594 on behalf of the applicant.

[35] The first and second respondents relied with regard to the transfer of erf 1594 back into the name of the first respondent on a certain clause inserted into an addendum attached to only some of the deeds of sale, and not all of them, which were concluded between the first respondent as developer of the Township and some of the purchasers of erven in the Township.

[36] This clause was for instance not inserted into the deeds of sale entered into between the first respondent and of the purchasers of erven in the Township as is described in paragraph 5.4.1 on page 771 of the founding papers.

[37] The said clause inserted into the said certain deeds of sale reads as follows:

"3. The parties agree that Erf 1594 Pretorius Park Extension 25 remain the property of the Seller and that the Seller is hereby authorised to rezone Erf 1594 Pretorius Park Extension 25 from "Private Open Space and Communal purposes", to "Special Residential" ("Residential 1") with a density of "one dwelling per 750 M2 and herewith also authorises the application of subdivision of Erf 1594 into two separate erven."

[38] It was submitted by Mr. Botha on behalf of the applicant that to insert such a clause into the deeds of sale was a fraudulent misrepresentation and did not empower the first respondent, *ex lege*, to take transfer of erf 1594 even if all the purchasers of erven would have signed for the transfer of erf 1594 into the name of the first respondent. The first and second respondents could therefore, in any case, not rely on an alleged "unanimous consent" of all the owners of erven in the Township as there was no unanimous consent as many of the owners did not sign such clauses.

[39] It is also clear that, in terms of the wording of the Proclamation of the Township, the applicant was to remain the owner of erf 1594 to utilise it as "communal property" until such time when, and only in the event of, the Township Development Conditions being changed to enable the applicant to validly dispose of the erf by way of sale. A transfer before then was explicitly void *ab initio* as it offended against the proclaimed Township Development Conditions.

[40] The applicant also relied on the fact that the purchase price was stated to be R0.00 in the "deed of sale". It is clear that as the "deed of sale" was not a genuine deed of sale it is not necessary to deal further with this aspect and the authorities in that regard (e.g. Christie: The Law of Contracts, 5th ed. p. 122) that any purported sale was at common law invalid as there

was no purchase price.

[41] It is therefore clear that the first respondent could not validly take transfer of erf 1594, despite the fraudulent conduct on the part of the second respondent, and the transfer must be set aside as being invalid and it is clear that the relief claimed in the second prayer must also be granted.

[42] It is clear that the relief thirdly sought as is set out in paragraph [12] *supra* namely for an order declaring the consents and contractual addenda, which some purchasers of erven in the Township signed, providing that the first respondent "retains" erf 1594, to be invalid, must also be granted.

[43] The court now deals with the relief fourthly sought by the applicant as is set out in paragraph [13] *supra* namely for an order amending the title deeds of erven in the Township to contain improved and better circumscribed obligations on the part of owners of erven to clearly read that all the owners of erven in the Township were compelled to be members of the Home Owners' Association. Bar the raising by the first and second respondents of an argumentative and clearly misplaced point *in limine* based on an argument that all the owners of erven were not joined in the action, there was no opposition to such relief on the part of any of the respondents and none of the owners of erven in the Township objected thereto. The applicant's case regarding the alleged non-joinder of the other owners of erven in the Township, was based on the provisions of section 38 of the Constitution of 1996, and consequently joinder of all the owners was no longer a requirement in such instances. There is thus no merit in the point *in limine* and the applicant is entitled to such relief and an order will be granted in that regard.

[44] The respondents did not oppose the relief the applicant sought fifthly, namely for an order deleting a limitation registered against the title deeds of erven in the Township in favour of the first respondent and which in any case no longer applied, but presented problems to owners of erven in the Township when they tried to transfer their erven after it was sold by them to third parties and the necessary order will be made in this regard too.

[45] The court now deals specifically with each of the prayers contained in the draft order to the notice of motion (pages 5-17 of the record):

ad prayer 1.1:

The delivery of the title deeds is not in issue and will be ordered.

ad prayers 1.2, 1.3 and 1.4:

It is clear that the deed of sale and the transfer itself were void and must be set aside and the necessary order regarding the void deed of sale and transfer and the cancellation of the endorsement on Deed of Transfer No. T06752907 which evidences the transfer of the property into the name of the first respondent, will be made.

ad prayer 1.5:

It will be ordered that the relevant title deeds be delivered to and the necessary steps be taken with regard to the order in terms of prayers 1.2, 1.3 and 1.4 by the applicant's attorneys at the expense of the first and second respondents.

ad prayer 1.6:

The first respondent will be ordered to sign all the necessary documents to give effect to the order made with regard to prayers 1.2, 1.3 and 1.4 failing which the Deputy Sheriff will be authorised to sign such documents.

ad prayer 1.7:

It is necessary, in view of the fraud perpetrated upon the applicant, that the auditor of the applicant must investigate and redraft the 2006, 2007, 2008 and 2009 Financial Statements of the applicant and the First and Second Respondents will be ordered to bear these costs.

ad prayer 1.8:

As the consents contained in any deed of sale and/or any addendum attached to such deed of sale in terms whereof the parties agree that erf 1594 remain the property of the first respondent is void, an order will be issued to the effect that it be declared to be void and of no legal effect.

ad prayer 1.9:

An order will be issued for record purposes and in so far as it may be necessary, to the effect that the first respondent has ceased to be the developer of the Township and is just an ordinary member of the applicant in the sense that it owns an erf in the Township and that he is accordingly subject to the provisions of sec. 5.11.7 of the applicant's Articles of Association.

ad prayer 1.10:

An order will be made to the effect that the sixth respondent shall at the cost of the first and second respondents insert the necessary replacement conditions as is set out in prayer 1.10.

ad prayer 1.11:

An order will be made in terms of prayer 1.11 duly supplemented as is set out in paragraph

8.2 on page 876/7 of the record but further amended by this court.

ad prayer 1.12:

The sixth respondent will be ordered in terms of prayer 1.12 to register the compulsory membership conditions as reformulated in prayer 1.10.

ad prayer 1.13:

The necessary order will be made to compel the first respondent to sign all documents required in terms of the order of the court within a stated period of time failing which any Deputy Sheriff may sign such documents.

ad prayer 1.14:

An order will be made declaring clause "4" or "G"(or numbered otherwise in any title deed of any erf in the Township which reads to the effect that the erf may not be transferred without the written consent of the first respondent) be declared null and void as from the 6th November 2006, and authorising the sixth respondent to amend the title deeds concerned accordingly.

ad prayer 1.15:

A declarator will be issued to the effect that the first respondent as from the 6th November 2006 had no authority in respect of any erf in the Township other than where the first respondent is the owner of such erf.

ad prayer 1.16:

A declarator will also be issued to the effect that the applicant was the sole Home Owners' Authority in the Township as from the 6th November 2006.

ad prayer 1.17:

An order will be issued to the effect that sec. 5.11.8 of the applicant's Articles of Association must be complied with before any application may be lodged to the Registrar of Deeds to subdivide or rezone erf 1594 in the Township by the then owner of the said erf and that the order be registered against the records of the sixth respondent relating to erf 1594.

ad prayers 1.18, 1.19, 1.20 and 1.21:

The necessary costs orders will be made.

[46] Regarding costs it is clear that the conduct of the first and second respondents was fraudulent and despicable and their actions call for a severe punitive order.

[47] The conduct of the third respondent, the attorneys, must now be dealt with. It will be necessary, as examples of their conduct, for purposes of this judgment, to refer to a few aspects (there are many more worrying aspects):

- a) Firstly, there is the letter of the 11th April 2007 by their Mr. van Eetveld (annexure JJH44 record p. 327), to Van As Prokureurs, who were then acting for the applicant. Mr. van Eetveld in the said letter conceded that they were informed by Van As Attorneys that the right of the first respondent to take transfer of erf 1594 was disputed, but Mr. van Eetveld categorically stated the following:

"'n Blote deurlees van die Huiseienaarsvereniging se vergaderingnotules maak dit duidelik dat dit gemene saak was te alle relevante tye dat ons kliënt geregtig is op die neem van oordrag en daar is meer as voldoende stawende dokumentasie wat dit bewys. Daarbenewens het iedere en elke lid van die Huiseienaarsvereniging op die relevante tye 'n dokument onderteken en/of toestemming gegee vir die oordrag en die (sic) indien u kliënt se betwisting van die reg tot oordrag daarop gebaseer is dat daar nie so'n ooreenkoms was nie is dit bloot opportunisties.

Ons instruksies is om u mee te deel dat ons kliënt voortgaan met die oordrag."

- b) As is set out in this judgment the transfer of the property to the first respondent was not resolved at any meeting whether of the board of directors or of the owners of the erven at a general meeting. The assertion that it is proven by the minutes is thus false and irresponsible. It also materialised that the "meer as voldoende stawende dokumentasie wat dit bewys" which Mr. van Eetveld referred to, did not exist.
- c) According to the answering affidavit deposed to by Sonja Janse van Rensburg the third respondent was aware of what the second respondent was up to namely to re-transfer erf 1594 back into the name of the first respondent. One thing she did not deal with, or adequately deal with in her affidavit, was how they got past the clear provisions of the Proclaimed Township Conditions set out in paragraph [16] of this judgment and how a clearance certificate was obtained. It is also not clear how she could have drafted the resolution allegedly "adopted" where there were no minutes and there never was a meeting held and which was contrasted by the point of view of Mr. van Eetveld that reliance was placed on the "consents" of the owners, and not a resolution adopted at a meeting.
- d) The answering affidavit filed on behalf of the third respondent was not up to the standard one would have expected from attorneys in the face of the clear facts of the case.

[48] As it is obviously necessary for the Law Society to investigate the fitness or not of the attorney(s) involved to remain on the roll of attorneys the applicant's attorneys will be ordered to draft a comprehensive referral to the Law Society, which referral must include this judgment, wherein the conduct of the attorneys is specifically detailed and supported with annexures and to assist the Law Society in their investigations of the matter. As it would be unfair to burden the applicant and/or their attorneys with the attorney and client costs relating to the preparation, drafting, typing and making of copies of documents for referral purposes and for attendances on the Law Society and giving of evidence there at any hearing, the third respondent will be ordered to pay all the taxed costs of the applicant's attorneys regarding the referral of their conduct to the Law Society on the scale of attorney and own client.

[49] In the light of the costs order referred to in paragraph [48] and upon other considerations this court will not order the third respondent to pay the costs of the application *de bonis propriis* jointly with the first and second respondents.

[50] The conduct of the valuator, set out in paragraph 4.10 of the founding affidavit and elsewhere in the papers, must also be referred by the applicant's attorneys to the Board of Valuers so that the Board can institute such disciplinary measures against him as the Board may deem fit. The valuation is misleading and the second unnumbered paragraph of paragraph 3.2 (record p. 227) which reads as follows is false and untrue and was clearly generated to enable the first respondent to take transfer of the erf to the prejudice of the applicant and without paying transfer duty :

"In die Stigtingsvoorwaardes is daar egter tussen die ontwikkelaar en die Mooikloof Gardens Home Owners Association ooreengekom dat die eiendom weer terug sal gaan na die ontwikkelaar en het die eienaarsvereniging dus nie 'n reg tot die eiendom vir verdere ontwikkeling nie. Die eiendom is dus vir die Mooikloof Home Owners Association nul rand (R0) werd."

[51] The applicant's attorneys will also be ordered to forward copies of the papers in this matter, this judgment, and the referrals to the Law Society and the Board of Valuers to the South African Revenue Service to investigate the matter and to institute such action and/or to impose such penalties and/or institute such prosecutions as they may deem fit.

[52] The following order is accordingly made

1. 1.1 The first and second respondents are ordered to within 48 hours of the service of this order upon them, at their own expense, to deliver to the applicant's attorneys' office during office hours, the title deeds in respect of erven 1593/12, 1663 and 1641/17, Pretorius Park Extension 25, Pretoria.

- 1.2 It is declared that the deed of sale dated the 24th July 2006, in terms whereof the applicant purportedly sold to the first respondent erf 1594 Pretorius Park Extension 25, Pretoria, as was signed by the second respondent on behalf of the applicant as seller and the first respondent as purchaser, is void ab origine and is set aside.
- 1.3 a) The transfer of erf 1594 Pretorius Park Extension 25 from the name of the applicant into the name of the first respondent under title deed no. T06752907 is declared void and is set aside and the sixth respondent is ordered to cancel title deed no. T 06752907.
- b) The sixth respondent is ordered to simultaneously cancel the endorsement on title deed no. T54036/2006, it being the title deed under which the applicant held the property erf 1594 Pretorius Park Extension 25, Pretoria, to the effect that the property was transferred into the name of the first respondent.
- 1.4 The first respondent is ordered to within 48 hours of the service of this order upon it, at their own expense, to deliver to the applicant's attorneys' office during office hours, title deeds numbers T54036/2006 and T06752907, to enable the applicant's attorneys to prepare the necessary documentation to present to the first respondent for signature and to the sixth respondent for registration and recording.
- 1.5 The first and second respondents are ordered, jointly and severally, payment by the one absolving the other, to pay, upon receipt, the pro forma account of the applicant's attorneys with regard to any fees, costs, duties and expenses to cause effect to be given in the office of the Registrar of Deeds to the contents of paragraph 1.3 (a) and (b) of this order.
- 1.6 The first respondent is ordered to within 48 hours of the presentment to it of the necessary documents as prepared by the applicant's attorneys to cause effect to be given to paragraph 1.3 (a) and (b) of this order, to sign such documents and in the event of the first respondent failing to so sign, any Deputy Sheriff is authorised to so sign the said documents which signature shall be accepted by the Registrar of Deeds as the signature of the first respondent.
- 1.7 The first and second respondents are ordered, jointly and severally, payment by the one absolving the other, to pay, upon receipt, the pro forma account of the applicant's auditors with regard to any fees, costs, duties and expenses to redraft the applicant's 2006, 2007, 2008, 2009 and 2010 Financial Statements caused by the effect of this order regarding the ownership of erf 1594 Pretorius Park Extension 25, Pretoria upon its financial position and to resubmit it to the Receiver of Revenue and to pay any penalties and or levies imposed by the Receiver of Revenue with regard thereto.
- 1.8 It is declared that the consents contained in any deed of sale entered into between the first respondent and any purchaser of an erf in the Township Pretorius Park Extension 25, Pretoria and/or any addendum attached to such

deed of sale in terms whereof the parties agree that the said erf 1594 remains the property of the first respondent, be void and of no legal effect.

- 1.9 It is declared for record purposes and in so far as is may be necessary, that the first respondent has ceased to be the developer of the Township Pretorius Park Extension 25, Pretoria and is just an ordinary member of the applicant in the sense that it owns an erf in the Township and that it is accordingly subject to all the provisions of the applicant's Articles of Association including section 5.11.7 thereof.
- 1.10
 - a) The Registrar of Deeds shall, subject to the contents of and conditions set out in paragraph 1.12 of this order, and after the expiration of the period of time stated in paragraph 1.11 (b) of this order, or after the final determination of any application brought by an owner of an erf in terms of the said paragraph, endorse the insertion or the replacement of existing related and comparable conditions in each and every title deed of the erven in the Township Pretorius Park Extension 25, Pretoria, (referred to as the "Membership Provision") excluding that of erven 1594, 1663, 1593/12 and 1641/17, of/by the draft set out in prayer 1.10 as a pre-ambule and paragraphs (a), (b), (c), (d), (e), (f), (g), (h) and (i) respectively thereto.
 - b) The Registrar of Deeds is ordered to include and register paragraphs (f), (g) and (h) of the draft referred to in paragraph 1.10 (a) of this order against the title deeds of erven 1594, 1663, 1593/12 and 1641/17 in the Township Pretorius Park Extension 25, Pretoria, with the indication therein that the "MGHOA" referred to therein shall mean and be understood to mean the Mooikloof Gardens Home Owners' Association (No. 2004/029778/08) or any Section 21 Company that may become successors in title thereof or position in line of succession thereof within the said Township.
 - c) The first and second respondents are ordered, jointly and severally, payment by the one absolving the other, to pay, upon receipt, the pro forma account of the applicant's attorneys with regard to any fees, costs, duties and expenses to cause effect to be given in the office of the Registrar of Deeds to the contents of paragraph 1.10 (a) and (b) of this order.
- 1.11
 - a) That a copy of this order shall be served by the Deputy Sheriff on each and every owner of an erf in the Township Pretorius Park Extension 25, Pretoria (except erven 1594, 1663, 1593/12 and 1641/17) at the address of the erf together with a written notification containing the full wording of the replacement conditions referred to in paragraph 1.10 (a) of this order and informing each owner of the date this order was made, by the applicant addressed to each owner of an erf, and wherein such owner is specifically referred to the contents of the order as a whole and specifically the contents of paragraph 1.11 (b) of this

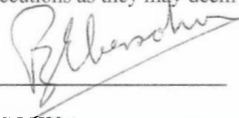
order.

- b) Each owner shall have a period of 3 months from the date of this order to apply by way of notice of motion, served on the applicant, to this court to show cause why the conditions referred to in paragraph 1.10 (a) should not be inserted in the title deed of his/her/its erf, and in the absence of such application by any owner the conditions will be inserted in the title deed of each erf as is set out in paragraphs 1.10 (a) and (b) of this order.
 - c) The first and second respondents are ordered, jointly and severally, payment by the one absolving the other, to pay, upon receipt, the attorney and client bill of costs of the applicant's attorneys with regard to any fees, costs, duties and expenses including the fees of the Deputy Sheriff to cause effect to be given to paragraph 1.11 (a) of this order.
- 1.12 The conditions referred to in paragraph 1.10 (a) to be registered by the Registrar of Deeds against the said erven shall apply from the date of this order and be permanent conditions applicable to the said erf and shall be inserted in each successive title deed of each erf.
- 1.13 In the event of there being any other documents than those stated in this order that has to be signed by or on behalf of the first respondent to give full effect to this order, the applicant's attorneys shall prepare such document(s) and present the first respondent therewith which shall be obliged to sign such document(s) within 48 hours failing which any Deputy Sheriff shall be entitled to sign such document on behalf of the first respondent and such document(s) signed by the Deputy Sheriff shall be accepted for all necessary purposes as being signed by and/or on behalf of the first respondent.
- 1.14
- a) It is declared that clause "4" or "G" (or numbered otherwise) in any title deed of any erf in the Township Pretorius Part Extension 25, Pretoria, which reads to the effect that the erf may not be transferred or as is stated and detailed in prayer 1.14, without the prior written consent of the first respondent, be declared null and void as from the 6th November 2006.
 - b) The first respondent is ordered to within 48 hours of the presentment to it of the necessary documents as prepared by the applicant's attorneys to cause effect to be given to paragraph 1.14 (a) of this order, to sign such documents and in the event of the first respondent failing to so sign, any Deputy Sheriff is authorised to so sign the said documents which signature shall be accepted by the Registrar of Deeds as the signature of the first respondent.
 - c) The first and second respondents are ordered, jointly and severally, payment by the one absolving the other, to pay, upon receipt, the pro forma account of the applicant's attorneys with regard to any fees, costs, duties and expenses to cause effect to be given in the office of

the Registrar of Deeds to the contents of paragraph 1.14 (a) of this order.

- 1.15 It is declared that the first respondent as from the 6th November 2006 had no authority in respect of any erf in the Township Pretorius Park Extension 25, Pretoria, other than where the first respondent is the owner of such erf.
 - 1.16 It is declared that the applicant was the sole Home Owners' Authority within the Township Pretorius Park Extension 25, Pretoria, as from the 6th November 2006 and that any authority the first respondent may have had at that stage in respect of any home owner or erf in the Township (actual ownership of an erf excluded) including also any such rights and obligations of the Developer as may be registered in any title deed in respect of any erf in the Township on that date have passed to the applicant.
 - 1.17 It is ordered that sec. 5.11.8 of the applicant's Articles of Association must be complied with before any application may be lodged to the Registrar of Deeds to subdivide or rezone erf 1594 in the Township Pretorius Park Extension 25, Pretoria, by the then owner of the said erf and that this order be registered against the records of the Registrar of Deeds relating to the said erf 1594.
2. The first respondent and the estate of the second respondent are ordered to pay, jointly and severally, payment by the one absolving the other, the applicant's costs of the application and the costs of the referral to the Receiver of Revenue ordered in paragraph 6 of this order, all on the scale of attorney and own client.
 3. The third respondent is ordered to pay its own costs.
 4.
 - a) The matter is referred to the Law Society of the Northern Provinces and the applicant's attorneys are ordered to draft a comprehensive referral to the Law Society, which must include this judgment and the record of the case, wherein the conduct of the third respondent in their capacity as attorneys is specifically detailed and supported with annexures and to assist the Law Society in their investigations of the matter until its conclusion.
 - b) The third respondent is ordered to pay all the taxed attorney and client fees and costs relating to the preparation, drafting, typing and making of copies of documents for referral purposes and for attendances on the Law Society and the giving of evidence there at any hearing, until the final conclusion thereof, on the scale of attorney and own client.
 5.
 - a) The matter is referred to the Board of Valuers having jurisdiction over the fourth respondent and the applicant's attorneys are ordered to draft a comprehensive referral to the said Board, which must include this judgment, wherein the conduct of the fourth respondent in his capacity as valuator is specifically detailed and supported with annexures and to assist the said Board in its investigations of the matter until its conclusion.

- b) The fourth respondent is ordered to pay all the taxed attorney and client fees and costs relating to the preparation, drafting, typing and making of copies of documents for referral purposes and for attendances on the said Board and the giving of evidence there at any hearing, until the final conclusion thereof, on the scale of attorney and own client.
6. The applicant's attorneys are ordered to forward copies of the papers in this matter, including this judgment, and the referrals to the Law Society and the Board of Valuers, to the South African Revenue Service to investigate the matter and to institute such action and/or to impose such penalties and/or institute such prosecutions as they may deem fit.



P.Z. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

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