

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: A 541/13

In the matter between:

24/4/2015

**HERITAGE HILL DEVCO (PTY) LTD**

**APPELLANT**

and

|       |                           |
|-------|---------------------------|
| (1)   | <u>REPORTABLE: YES/NO</u> |
| (2)   | <u>OF INTEREST TO THE</u> |
|       | <u>JUDGES: YES/NO</u>     |
| (3)   | <u>REVISED.</u>           |
| ..... |                           |

**HERITAGE HILL HOMEOWNERS ASSOCIATION**

**RESPONDENT**

**Coram: Rabie J, Legodi J and Baqwa J**

**Heard: 18 February 2015**

**Delivered:**

**BAQWA J.**

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**JUDGMENT**

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**Summary: In an action for the payment of levies instituted by a Home Owners Association (respondent) against the developer (appellant), the only question for determination was:**

**(1) was the appellant, subsequent to the establishment of the Township and for the purposes of the Articles of Association of the Respondent, the registered owner of individual properties in the Township? If so, it was accepted by the parties that it would be liable to pay the levies.**

**Alternatively**

**(2) was the appellant, the registered owner of the property known as “the remaining extent of the township Louwlandia Extension 48” and not as contended for, the registered owner of the individual erven in the Township of Louwlandia Extensions 48. If so, it would not be liable for levies.**

## **Annotations**

### Case law

- 1) Florida Hills Township Ltd v Roodepoort- Maraisburg Town Council 1961(2) SA 368E- H
- 2) Steelpark Estate Co Ltd v Vereeniging Town Council 1963 (2) SA 367 (T)
- 3) Volkstrust Bpk v Direkteur van Skattings & Andere 1980 (1) SA 760 ( C ) at 763 – H
- 4) Kosmos Ridge Homeowners' Association v Cosmos Ridge (Pty) Ltd [2003 JOL 11481 (T)
- 5) Prospect SA Investments 42 (Pty) v Lanarco Homeowners Association, case number 13346/12, given on 30 June 2014

### **Introduction**

- [1] This is an appeal against the judgment and order granted by this Court per Kollapen J. on 14 February 2013. Leave to appeal was granted by the Court *a quo* on 19 March 2013.

- [2] The judgment was given consequent upon an action instituted by the respondent against the appellant in terms of which it sought payment in the sum of R2, 5 million which it alleges is due by the appellant as levies in respect of appellant's ownership of various erven situate within the Heritage Hill Estate located in the Township of Louwlandia Extension 48 of which the appellant was the developer.
- [3] The respondent is a section 21 company incorporated in terms of the Companies Act 61 of 1973 and its Articles of Association regulates the relationship and rights and obligations of the members of the respondent company.
- [4] Due to the fact that the facts giving rise to the actions were common cause between the parties no evidence was led and the matter was proceeded with on the basis of the pleadings and arguments advanced before the Court *a quo*.

### **The pleadings**

- [5] In its Plea the appellant denied being the registered owner of any erven referred to in the respondent's Particulars of Claim. It further pleaded that in terms of the provisions of section 46 of the Deeds Registries Act 47 of 1937 ("Act") an erf in a Township is only created and commences to exist as an individual erf upon transfer thereof from the developer into the name of the purchaser.

[6] Appellant further pleaded that in terms of clause 9.1 any member of the respondent shall be liable to pay a levy from time to time in respect of each property owned by such member as provided for in clause 9.2 of the Articles of Association and that in terms of clause 1, the definition of “The property” as contained in the Articles of Association means an erf in the Township to be known and which is now known as Louwlandia Extension 48. The Appellant pleaded therefore that there is no obligation vesting upon it to pay any levies to the respondent.

**The Articles of Association (Articles)**

[7] The Articles of Association is annexed to appellant’s Particulars of Claim and it is appropriate to refer to some of the clauses contained therein.

7.1 In Clause 1, “The property” is defined as “*an erf in the Township(s) to be known as Louwlandia Extensions to be established by the developer on portions of the farm Brakfontein 390, Registration Division JR, Province of Gauteng*”.

7.2 Clause 2 provides that any words or expressions not defined in clause 1, shall have the same meaning as that defined in the Act.

7.3 Clause 9.1. provides that “*the directors shall from time to time determine the levies payable by members for the purpose of meeting the expenses which the Association has*

*incurred, or which the Association will incur, in the furtherance of its objects."*

### **Factual Background**

- [8] The appellant obtained transfer of the property known as Portion 53 of the farm Brakfontein 390, Registration Division JR, Province of Gauteng on 6 January 2005 in terms of deed of transfer T/82544/05 registered as such on 30 June 2005 by the Registrar of Deeds, Pretoria.
  
- [9] The land described in the title deed was subdivided into a Township known as Extension 48 and a General Plan in respect of the Township was registered by the Registrar of Deeds on 7 February 2006.
  
- [10] Typically the plan depicts the erven in the Township, the dimensions thereof and a specific number is allocated to each erf.
  
- [11] After the registration of the plan and compliance with all the formalities, the appellant proceeded to sell and transfer some of the erven to individual owners.
  
- [12] The appellant was incorporated under the name Midnight Masquerade Properties 78 (Pty) Ltd. The name was again changed on 13 November 2007 to **Heritage Hill Residential Devco (Pty) Ltd.**
  
- [13] The issues to be decided by the Court *a quo* were the following:

13.1 Was the appellant, subsequent to the establishment of the Township and for the purposes of the Articles of Association of the Respondent, the registered owner of individual properties in the Township? If so, it was accepted by the parties that it would be liable to pay the levies.

Alternatively

13.2 Was the appellant, the registered owner of the property known “as the remaining extent of the township Louwlandia Extension 48” and not as contended for, the registered owner of the individual erven in the township of Louwlandia Extensions 48. If so, it would not be liable for levies.

### **The Law**

[14] The Deeds Registries Act 47 of 1937 (“The Act”) defines “erf” as “*Every piece of land registered an erf, lot, plot or stand in a deeds registry, and includes any defined portion, not intended to be a public place, of piece of land laid out as a township, whether or not it has been formally recognized, approved or proclaimed as such.*”

[15] The Deeds Act defines “registered” as registration in the Deeds Registry. 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.

- [16] Section 46 (1) of the Deeds Act 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”.*
- [17] From a reading of the above, the substratum for registrable transactions is the General Plan and that substratum comes into being once the General Plan is registered in the Deeds Registry.
- [18] On the other hand Section 47 enables an owner of land in respect of which a register has been opened to transfer the whole or a portion of such land provided that if a portion only is sought to be transferred, the transfer shall be passed in accordance with a diagram from which shall be excluded all erven on the land which have already been transferred and secondly the boundaries of such portion shall coincide with one or more of the lines of division shown on the General Plan and shall not intersect any of the erven shown thereon.
- [19] The purpose of the provisions of Section 46 and 47 are 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.



- [20] 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.

**Application of Law to the facts**

- [21] The appellant contends that it is no more than the owner of the remainder of the Township known as Louwlandia Extension 48 and that it was not the owner of the individual erven situated in that township. The contention is not sustainable when one considers the provisions of the Deeds Act referred to above and the clause which deals with membership of the respondent.

- [22] Clause 4 of the Articles of Association deals with “membership” of the respondent and reads as follows:

**MEMBERSHIP**

4.

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.... ”*

- [23] The imposition of levies is dealt with in clause 9 which empowers the directors of the respondent, from time to time, to determine the levies payable by the

members for the purpose of meeting all expenses which the respondent has incurred or which the directors reasonably anticipate the respondent will incur in the furtherance of the objects of the respondent. Clause 9.2 provides: *“Members 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”*.

[24] The appellant bases its submissions on the decision in the matter of **Kosmos Ridge Homeowners Association v Kosmos Ridge (Pty) Ltd 2003 JOL 11481(T) Par 5**. In the Kosmos Ridge Matter the Court determined that an erf is created when it is transferred from the developer into the name of the purchaser and that the balance of the Township remains farmland and that there is no registered owner in respect of any such “unsold erven” in terms of the general plan, which have not been transferred as yet.

[25] The incorrectness of the conclusions in the **Kosmos Ridge** matter are apparent from the discussion of the provisions of sections 46 and 47 above. The same issues were also discussed and dealt with in the *Court a quo* and I am in agreement with the conclusions reached in that regard by the Court a quo when it pronounced as follows:

[27] *“ If one has regard to the provisions of section 46 of the Deeds Act then it is clear that the registration of the general plan had the effect of creating separate erven, the ownership of which could only have vested in the township developer, and in this instance that would have been the defendant.*

[28] *In the context of this action there can hardly be any suggestion that the dispute in question is a dispute around farm land. Indeed the membership of the defendant in the plaintiff company is a membership with a view to the advancement of the township known as Louwlandia Extension 48.*

[29] *In that context it must accordingly follow that the common interest of the plaintiff and the defendant which bind them together in the plaintiff company is indeed in relation to the township and that the imposition of levies by the plaintiff is indeed in respect of township land and for the benefit of the owners of such land. A township is defined by its own unique characteristics distinct from a farm. It consists of separate erven for residential and other purposes all of them clearly identified on the general plan and all of them take on and assume a separate identity. This is as much evident from the general plan and from the consequences and effects of section 47 of the Deeds Act”.*

[26] The Court *a quo* also discussed two decisions in which the Court expressed itself with regard to the matter of the remainder of the Township, namely that portion where the individual stands have not been sold and transferred to purchasers. Those matters were: **Florida Hills Township Ltd v Roodepoort Maraisburg Town Council 1961 (2) SA 368 (T)** and **Rhynheld Township Ltd V Benoni Township Council and Others 1950 (4) SA 717 (T)**. The Court *a quo* sought to distinguish those matters from the present case on the following basis:

[32] *“The decisions in **Florida Hills and Rhyfield** dealt with the relationship between a local authority and a township developer and with the*

*valuation of unsold lots in a township. The legal nature of the relationship between the parties in those matters was one that flowed ex lege and the dispute centered around the method used to value such erven. In my view the relationship the parties find themselves in, in the context of the present dispute is certainly distinguishable. The relationship between the parties evidenced by the Articles of Association is a contractual relationship underpinned by membership base inter alia on the ownership of land in the township and the imposition of levies presumably to advance the interests of all land owners in the township. The Articles of Association to that extent evidences a coming together of property owners for the purpose of their collective benefit. In this regard, it could hardly be contended that the defendant's involvement in the plaintiff was as owner of farmland and not land in a township. On the contrary the membership provisions in the Articles of Association treat the developer, to the extent that it owns land, in the same way as any other person who owns land in the township."*

*[33] For the purposes of the Articles of Association the defendant was in fact the owner and indeed the registered owner of the various erven in the township that came into existence upon the registration of the general plan and the subdivision of the township. It must follow that if the various individual erven depicted on the general plan vested in the defendant, the answer to the question as to who the registered owner of those erven were for the purposes of the Articles and the imposition of levies could only be that it was the defendant."*

[27] I concur with the reasoning and the conclusion reached by the Court *a quo*. The decision of the Court *a quo* is quoted with approval in the unreported judgment in the KwaZulu – Natal High Court: **Prospect SA Investments 42 (Pty) Ltd v Lanarco Homeowners Association case number 13346/12** delivered on 30 June 2014 where Kruger J expressed himself as follows:

[27] “*The conduct rules provide for the payment of levies in respect of all erven. I agree with the judgment of Kollapen J. in Heritage Hill Home Owners Association v Heritage Hill Devco (Pty) Ltd 2013 (3) SA 447 (GNP) where he held, at paragraph 36 that:*

“*..... the very idea of the formation of the plaintiff is to create a structure for the benefit of all owners of the land in the township, all of whom automatically become members on account of their ownership of land and all of whom are entitled on account of their membership to participate directly in the decision making process of the plaintiff with regard to the imposition of levies and the use to which such revenue is to be put*”.

[28] *At paragraph 39 and 40 he elaborated further and held:*

“*[39] ....when one has regard to the Articles of Association and indeed to the purposes to be achieved by the imposition of levies, then it is clear.... that levies are ultimately utilized for the benefit of the township. In this regard such benefits would accrue to the developer as owner of the individual erven. The developer’s ability to market such erven would in large measure be linked to the manner in which the township is administered and the manner in which different issues such as security,*

*aesthetics, lightning etc. are dealt with. To the extent that levies ultimately impact on the ability of the plaintiff to provide such services, the defendant could hardly be said to be prejudiced if it were required to pay such levies, as such levies ultimately redound to its benefit.*

*[40] On the contrary, if the defendant could argue that it was exempt from paying such levies then the consequence of such a stance would be inequitable, in that it would disproportionately place the burden for the services in the township that are to be funded from levies, on those individual property owners who have taken transfer from the developer and not the developer. Having regard to the fact that such services as are to be provided from the levies ultimately accrue to the benefit of all property owners in the township, the defendant would be in an unduly advantageous position if such a stance was sustainable”.*

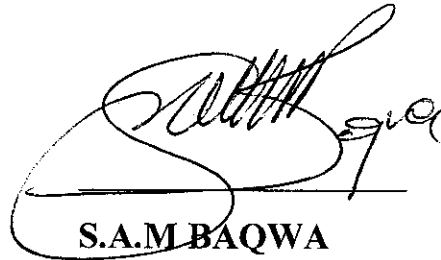
[28] For the reasons stated above it becomes quite apparent that from a legal, contractual or even an equity basis, the stance taken by the appellant in this appeal cannot be justified.

[29] I accordingly find that the Court a quo was correct in its finding that the appellant is the registered owner of the unsold erven within the context of the respondent’s Articles of Association.

In the result I propose that the following order be made:

29.1 The appeal against the judgment on 14 February 2013 is dismissed

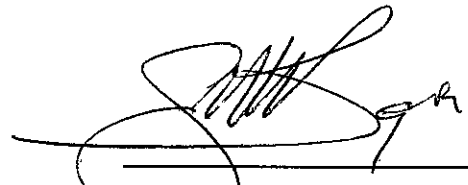
29.2 The Appellant is ordered to pay the Respondent's costs of the appeal which costs shall include the costs of two Counsel.



**S.A.M BAQWA**

**(Judge of the High Court)**

**I agree**



**M.F. LEGODI**

**(Judge of the High Court)**

**I agree and it is so ordered.**



**C. P RABIE**

**(Judge of the High Court)**

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