IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED ✓

12.5.2015
DATE

SIGNATURE

CASE NUMBER: 7334/15

DATE: 12 May 2015

WELVERDIEND PROPERTIES SHARE BLOCK (PTY) LTD — Applicant

V

WELVERDIEND HOME OWNERS ASSOCIATION — First Respondent

TREVOR JORDAN PROPERTIES (PTY) LTD t/a
JORDAN PROPERTIES (PTY) LTD — Second Respondent

PORTION 6 OF THE FARM WELVERDIEND 243 (PTY) LTD — Third Respondent

MEC, LIMPOPO DEPARTMENT OF ECONOMIC
DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM — Fourth Respondent

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JUDGMENT

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[3] BRIEF FACTS

The applicant is a long term lessee over Khaya Ndlovu in terms of a 99 year notarial deed of lease which is registered at the Deeds Office, Pretoria. A copy of the lease is annexure 'KN4' to the founding affidavit. The lease commenced on 12 July 2004. The Khaya Ndlovu property is owned by the third respondent which was duly and originally incorporated on 26 June 2003. The third respondent then was known as Richacres Investments 9 (Pty) Ltd. It acquired the present name in July 2005. The third respondent is the "landowner". The applicant has annexed as 'KN6' a layout diagram showing the remaining extent of Portion 6 of the Farm Welverdiend 243KT. The leased Portion A, Khaya Ndlovu, is cross-hatched as shown and marked A. Portion 15, the Manor House, is shown in white and marked D on 'KN6'. Richoil Welverdiend Investments 7 (Pty) Ltd, according to the applicant, was originally involved in the Khaya Ndlovu development. Mr. Trevor Jordan was and still is a director of Richoil. The applicant contends that it was set up by the landowner, commencing in 2004 and that the second respondent and Richoil were also involved in its setting up. Mr Trevor Jordan (Jordan) was the main man and the driving force in its establishment. The applicant contends that it was established for the share block scheme which was set up over the whole farm. The relevant authority for the establishment of a private resort over the farm was originally granted to the second respondent on 2 November 2004 by the Limpopo Provincial Government. The Environmental Authorisation is annexure 'KN5' to the founding affidavit. 'KN5' consists of a covering letter and the Limpopo Provincial Government's Record of Decision "RoD". The applicant, after the granting of the Environmental

Authorisation, was incorporated by Richoil which is one of the Jordan entities. Upon the setting up of the share block scheme, according to the applicant, the landowner directed by Mr Jordan sub-divided Portion 15 of the Farm on which the "Manor-House" is situated. The portion, according to the applicant, was then sold and transferred to the Trevor Jordan Trust thereby ceasing to form part of the private resort originally authorised under the RoD and separated from Khaya Ndlovu. The Trevor Jordan Trust is registered at the Masters Office, Pretoria under IT1547/1991. The trust, according to the applicant, has its place of business at the "Manor House", Khaya Ndlovu, Hoedspruit, Limpopo Province situated on Portion 15 of the remaining extent of Portion 6 of the Farm Welverdiend 243. The portion is substantially within Portion A of the property over which the applicant holds the lease. Mr Trevor Jordan, a director and shareholder of the landowner, in 2004 represented the landowner which is now represented by Mr. Dirk Schoeman (Schoeman). In December 2004, according to the applicant, the second respondent and the first respondent purported to conclude an agreement effectively transferring the Environmental Authorisation 'KN5' from the second respondent to the first respondent. From then, the applicant contends, the first respondent has interfered in the management of Khaya Ndlovu by the applicant. This interference has resulted in this application which is opposed by the first, second and third respondents.

[4] The first respondent, according to the applicant, has represented to the applicant and third parties that it is the holder of rights in terms of the Environmental Authorisation annexure 'KN5'. Further, the first respondent is said to have asserted

rights in terms of the Environmental Authorisation against the applicant. The applicant contends that the first respondent is not the holder of rights in terms of annexure 'KN5' and that it must be stopped in its tracks as a matter of urgency.

[5] The Memorandum of Association of the applicant gives the main object of the applicant as:

"to operate a share block scheme in respect of certain immovable property situated at the Remaining Extent of Portion 6 of Farm Welverdiend 243, registration division KT Northern Province."

[6] The applicant contends that it enjoys management and administrative control over Khaya Ndlovu in terms of, *interalia*, the Share Blocks Control Act No. 59 of 1980 ("SBCA"), its Articles and Memorandum of Association and the lease agreement.

[7] The applicant contends that it has been managing and running Khaya Ndlovu for more than ten years. This does not seem to be controverted.

[8] It is perhaps important to mention that all shareholders of the applicant, according to the applicant, are also members of the first respondent. The first respondent, however, has members in excess of 100 who are not shareholders of the applicant. All members have equal voting rights.

[9] It is also noteworthy that the relationship between the applicant represented by its board and Trevor Jordan and Trevor Jordan entities, according to the applicant, has deteriorated. This, according to the applicant, was caused by the landowner which granted and registered various servitudes over Khaya Ndlovu without the applicant's consent. This included rights of traverse for the Manor House and for several owners of shares in the adjacent Leadwood development.

[10] It is also significant to note that the relationship between the applicant and the first respondent, according to the applicant, was amicable and co-operative prior to 2014. The majority of some members of the first respondent have been and are Raptors View property owners and holders of transverse rights over Khaya Ndlovu. The relationship between them and their representatives and the applicant is said to have been friendly.

[11] The purported granting of transverse rights to members of Leadwood, according to the applicant, showed the breaking up of the relationship between the applicant and the first respondent. Case number 1275/15 which the applicant has instituted deals with these rights.

[12] The applicant contends that the Annual General Meeting ("AGM") of the first respondent decided that the first respondent would merely collect levies from the Raptors View traverse holders for payment monthly over to the applicant. The first respondent, then, neither sought nor performed any management or similar role in

respect of Khaya Ndlovu, according to applicant. This set up changed after the 2014 AGM when the new board of the first respondent published a manifesto, annexure 'KN8', from which it can be gleaned that the first respondent was to be given a considerably expanded role in relation to Khaya Ndlovu. The board of the applicant was increasingly concerned and unhappy about the first respondent's conduct of wanting to become more actively involved in the management of Khaya Ndlovu.

[13] The applicant contends that on 6 October 2014 the first respondent and the landowner entered into a Memorandum of Understanding ("MoU") which is annexure 'KN9' to the founding affidavit. In terms of the MoU, the first respondent would become owner of the shares in the Landowner Company which would then make the first respondent the owner of Khaya Ndlovu. It was then envisaged, according to the applicant, that that would include "the right to sell a maximum of 303 traverse rights over the property". Leadwood development would be granted various commercial and non-commercial traverse rights. Paragraph 5 of the MoU, according to the applicant, evinces that the applicant's long-term lease over Khaya Ndlovu would be cancelled. A sectional title scheme in relation to 35 stands only would substitute the lease. The applicant would then lose its management and control over the property in that it would then be reduced to managing through a proposed new Home Owners Association a greatly reduced area consisting of 35 stands only. The applicant contends that it only became aware of the contents of the document after 10 January 2015.

[14] The applicant contends that a settlement proposal was put forward at a meeting which was arranged by the first respondent and the Jordan entities on 10 January 2015. The proposal, according to the applicant, was conceived by the second respondent and the Landowner. The applicant was neither invited nor consulted about the proposal and the meeting. The proposal, according to the applicant, was similar to the MoU except for one difference which was that the first respondent would take over the management of Khaya Ndlovu and its wildlife instead of becoming the owner of the property. The first respondent, as it was contended, would be responsible for the RoD while the applicant would merely be responsible for "matters relating to stands and houses". The applicant concluded that the first respondent, the second and the third (the landowner) had intended to usurp the authority and status of the applicant's board which was being sidelined as though it and its members had no direct and substantial interest in the property. The applicant's members, according to the applicant, had major direct investment in Khaya Ndlovu compared with the indirect investment and interest of outsiders.

[15] On 16 December 2014 the board of the first respondent wrote a letter (annexure KN11) to the board of the applicant informing it that the two respondents and the Landowner had entered into a formal agreement dated 15 December 2014 in terms whereof the first respondent accepted full assignment of the obligations and rights of the RoD. The letter specifically stated that the first respondent was then "both the *de facto* and *de iure* implementing and management agent for the requirements of the

RoD for Welverdiend. A copy of the agreement is annexure 'KN12' to the founding affidavit.

[16] The agreement, according to the applicant, appears to have been concluded "for the purpose of formally transferring the rights, obligations and responsibilities of the Record of Decision ("RoD")". The applicant contends that the agreement demonstrates that the three parties are "committed to professionally managing operating and developing the subject property described as Portion 6 of the Farm Welverdiend 243KT." The developer, according to the agreement, would notify the Provincial Authorities within 30 days of signature thereof as required by clauses 7.15 and 7.16 of the RoD.

[17] The first respondent, also at about the same time, sent a "special WHOA News Bulletin December 14" to all its members announcing the purported transfer of the responsibility of the RoD from the developer to the first respondent. The said "assignment", according to the first respondent, was based on clauses 7.15 and 7.16 of the RoD.

[18] The applicant, in its letter dated 17 December 2014 – Annexure 'KN14' to the founding affidavit, denied that the Environmental Authorisation ("EA") rights were assignable without a formal application to the relevant Limpopo Authorities. The letter stated that the applicant "has and retains full rights, management, administration and control over Khaya Ndlovu." The letter states that the

interference with the operation and management of the property by the first respondent's board would not be tolerated by the applicant. The letter further threatened that a new company called the Welverdiend Stakeholders Association would be formed to manage and administer the affairs of Khaya Ndlovu together with Raptor View transverse owners and the applicant.

[19] The applicant discovered that the landowner represented by Schoeman on 11 December 2014, wrote a letter to the first respondent purportedly confirming that the first respondent was authorised to act as their "authorised manager and agent to ensure compliance with the RoD" relevant to the property in question. The letter 'KN15' required the first respondent to appoint a suitably qualified Environmental Control Officer ("ECO") which is also said to stand for Environmental Conservation Officer. It is noteworthy that the EA had been held by the second respondent and not the landowner.

[20] The first respondent held the view that the EA over Khaya Ndlovu had been transferred to it simply because the rights and obligations of the EA, according to it, had been "assigned" to it in terms of the MoU ('KN12') and the letter from the landowner ('KN15'). Paragraphs 7.15 and 7.16 of the RoD were also said to allow for that and that the relevant authorities had, accordingly, been informed as required.

[21] The applicant contends that the alleged transfer of the EA is null and void. It bases the contention on the fact that:

1. Paragraphs 7.15 and 7.16 of the RoD do not provide for the assignment or transfer of the rights as contended for by the first respondent;
2. The Environmental Impact Assessment Regulations 2010 published under GNR543 dated 18 June 2010 were not complied with. These are, *inter alia*, regulations 39 and 40. Regulation 39 provides that a holder of an EA may apply to the relevant competent authority for amendment should there be material change in the circumstances which existed when the authorisation was granted. Similarly an application is required where any detail contained in the EA has to be amended, added, substituted, corrected, removed or updated. Regulation 40 provides that such application must be in writing and properly motivated. A change in terms of regulation 39(2) requires such application.

[22] The applicant regarded the first respondent's and Mr Leo Smith's (Leo Smith) assertion of their alleged authority over Khaya Ndlovu under the EA as serious and unwarranted interference in its affairs. Leo Smith is a director of the first respondent. He claimed to be the Environmental Conservation Officer of Welverdiend based on the first respondent's purported assumption of the EA. The applicant did not recognise this. The applicant contends that in line with its responsibilities it was erecting fence on the boundary between its property and the Manor House (Portion 15) and doing bush clearing when the first respondent and the Trevor Jordan Trust took exception to it and removed the fence. Leo Smith and security guards from Kamakaze Company, according to the applicant, forcibly removed the erected fence and took control of the main entrance gate to the property. Mr. Craig Beaten

(Beaten), the applicant's manager of Khaya Ndlovu and those who helped him were physically prevented from carrying out their work. It is contended that the guards physically threatened members of the applicant. The applicant further contends that the dispute is between the applicant, Trevor Jordan Trust and the Landowner. Criminal charges, according to the applicant, have been laid by it with the SAPS in Hoedspruit who are investigating the complaint. The guards, according to the applicant, remain positioned at the main gate in addition to the contracted Protrack security guards at Khaya Ndlovu. They control the entrance to khaya Ndlovu in order to impede the applicant in the execution of its job. The applicant contends that the first respondent and the applicant are in a stand-off position regarding the execution of its job.

[23] The first respondent in its email to the applicant ('KN22'), according to the applicant, demonstrates its intention to want to manage the entire farm. The applicant, through its attorneys Adams and Adams, addressed a letter to the first respondent with a view to getting it to desist from its conduct but this did not assist as the first respondent then wrote to the applicant's members. Their letter is annexure 'KN24'. The letter proposes the conversion of the Khaya Ndlovu development from a share block to sectional title scheme. The proposal, according to the applicant, involves, *inter alia*, the taking away of the applicant's management rights and transferring management control of the common land to the first respondent. This, apparently, did not go down well with the applicant's members several of whom, according to the applicant, have invested as much as R5 million or more in Khaya Ndlovu. They too

appear to be aware that the proposal will result in the applicant's members losing management and control over the common land.

[24] The applicant believes that the first respondent supported and assisted by the second respondent and the Jordan entities are planning to take over control and management of Khaya Ndlovu and relegate the applicant and its management rights to a minor role. The applicant identifies the people behind this being the directors of the first respondent, including four members of the minority group of the applicant's shareholders one of whom is Leon Smith, an owner of a property on Leadwood and the ninth respondent in the legal proceedings to cancel transverse right servitudes instituted by the applicant under case number 1275/2015.

[25] To achieve what it wants the first respondent, according to the applicant, has –

1. without reference to or consultation with the applicant's board, taken active steps to sidestep and neutralise the applicant's board and its management and control over Khaya Ndlovu by putting forward a settlement proposal and a sectional title proposal directly to the members of the applicant;
2. informed all members of the applicant and the first respondent who include traverse owners from Raptor View and Leadwood that it is now the holder of the EA;
3. destroyed a section of fencing done by the applicant using outside security guards and employing physical force and threats;

4. maintained the Kamakaze guards on the property controlling access to the entrance gate and Khaya Ndlovu;

5. called the security guards said to be an "anti-poaching" unit on the applicants property with unknown instructions;

6. appointed Leo Smith as the ECO under its authority while Leo Smith, according to the applicant, has a significant conflict of interest with the applicant in two cases and interferes in the execution of the applicant's job of resolving disputes between its members.

7. caused a situation on the property which has now become intolerable and charged with tension.

The applicant, as a result, has asked the court to regard the matter as urgent.

[26] The applicant contends that:

1. it is the holder of a 99 year lease of the property which entitles and obliges it to take control of and manage the property;

2. the first respondent has no rights arising from the purported transfer of the EA and that it therefore has no right to interfere in the management of the property;

3. it has a *prima facie* right to restrain the first respondent from contending that it holds rights and/or may exercise rights in terms of the EA;

4. the first respondent has, by its conduct, threatened the right of the applicant to manage the property and that the applicant has a reasonable apprehension that the first respondent, in future, may repeat the conduct unless the first respondent is restrained from doing so;

5. the balance of convenience favours the granting of the interim relief to the applicant;
6. the first respondent will suffer no prejudice should the interim order be granted in that the first respondent, for more than ten years, had been playing a passive role;
7. if relief is refused substantial and self-evident prejudice will be suffered by the applicant and that the balance of convenience substantially favours the applicant and the grant of such relief;
8. the respondent, not desisting from its conduct, leaves the applicant with no adequate alternative remedy except to approach the court for urgent relief;
9. the relief in Part B of the notice of motion will proceed in the normal way as set out in Part B.

[27] As I have alluded thereto, the first, second and third respondents oppose the application. They are represented by Schoeman, an attorney on the non-practising roll. He is the deponent to the answering affidavit. He states that he was involved in the "acquisition of the Remaining Extent of Portion 6 of the Farm Welverdiend no. 243KT ("the property") by the third respondent ("the landowner"), the conceptualisation of the development and the subsequent establishment of the Share Block Scheme which is operated on the property by the applicant."

[28] The respondents aver that the applicant is not entitled to the relief which it seeks.

[29] The respondents (i.e. the first, second and the third respondents) conceded that they delivered the answering affidavit out of time and they accordingly sought condonation for that. Their application was not opposed and is, accordingly, granted.

[30] The respondents filed notices in terms of Rule 35(12), Rule 7 and Rule 47(1). The applicant responded to the notices. Mr. Labuschagne, for the applicant, submitted that the respondents' application for security for costs could be reserved for determination together with Part B and any counter-application instituted by the respondents, if any. Similarly costs of the application, according to Mr. Labuschagne, could be reserved for determination together with Part B and any counter-application instituted by the respondents, if any. I find merit in this.

[31] The respondents' opposition to the application is based on the following grounds:

1. Non-joinder of the registered owners of Portion 15 (a Portion of Portion 6) of the Farm Welverdiend No. 243KT (Portion 15). The registered owners of Portion 15 are the trustees for the time being of the Trevor Jordan Trust (Master's Reference No. 17 1537/1991 ("the trust").

   Mr Labuschagne for the applicant submitted that the rights of the registered owners of Portion 15 were not affected and that it was unnecessary to join them. While there is merit in the submission, it is also so that there is a relationship between those owners and the second respondent.

2. The relief sought in Part A is academic in view of the fact that the environmental authorisation (EA) 'KN5' has lapsed.

It will be remembered that the EA was held by the second respondent. It will also be remembered that an agreement 'KN12' was concluded by and between the second and the first respondent purportedly transferring the EA from the second respondent to the first respondent. The EA was valid for two years from 2 November 2004 until 2 November 2006. The respondents say that it expired either on 29 October 2006, alternatively on 2 November 2006. The respondents, according to the applicant, based a number of what they said and did on the fact that their agreement, 'KN12', was a valid agreement in terms of which they could say what they said and do what they did. Evidence evinces that they proceeded and acted like they did because they regarded themselves covered by this agreement. They, according to the applicant, also purported to act under and by virtue of the environmental authorisation. This, the respondents confirm in their answering affidavit. They in paragraph 7.14.3 of their answering affidavit say: "Inasmuch as the first respondent has at times purported to act under and by virtue of the environmental authorisation it was mistaken." This is clearly an admission on the part of the respondents. This lends credence to the applicant's case. The respondents, after the problem had arisen and after the applicant had told them that the EA was only held by the second respondent and that it was not capable of being transferred, conceded in paragraph 4.10 of their answering affidavit that the EA had lapsed and incapable of being transferred. The respondents state that the first and second respondents in entering into the agreement, 'KN12', had done so "on the mistaken assumption that the EA still existed." They state that they were advised that no rights had been transferred in terms of the said agreement. It is clear that the first respondent acted under and by virtue of the EA and the agreement, 'KN12'. Although the respondents clearly say that the EA has lapsed and that no rights were transferred in terms of the agreement, such purported agreement still exists in that it has never been renounced and declared invalid. The fact that the respondents have now been advised about the invalidity thereof does not mean that the first respondent will desist from acting as it did. The respondents are also not saying that this will not happen again. This, it must be remembered, has the effect of confirming what the applicant is complaining about. A proper consideration of the applicant's case evinces that it cannot be correct that "the application for interim relief is a purely academic exercise." It is significant to note that the respondents were only advised that the EA had expired in 2006 and that the EA , in any event, did not grant rights of management and control. This can clearly be gleaned from paragraph 4.17.3 of the answering affidavit and this, in my view, supports the applicant's complaint and strengthens its request for interim relief. Evidence shows that the applicant, indeed, needs assistance.

3. The applicant asks the Court to grant an interdict which has the effect of preventing the first respondent from carrying out activities and functions which all the parties have contractually. The applicant, in my view, has demonstrated that it had been enjoying the management and control of the property for more

than ten years. Evidence does not demonstrate interference from the side of the applicant. The opposite appears to be the case. The respondents' evidence bolsters this.

4. The application is not urgent. Once more evidence which is easy to follow, based on confirmed facts, demonstrate that the matter is, indeed, urgent. There is no doubt about it. I regard the matter as urgent. If regard is had to the evidence it becomes understandable that there, indeed, is a link between the relief sought in Part A and the relief sought in Part B. Regarding prayer 1 of Part A of the Notice of motion I have already found that the matter is urgent. As regards prayers 2.1, 2.1.1 and 2.1.2 evidence has revealed that the first respondent, indeed, purported to act under and by virtue of the EA. The first respondent has not categorically said that this will not happen again. The prayers are perfectly warranted. With regard to prayer 1 of Part A of the Notice of motion, the need remains there for an order declaring invalid the purported transfer of rights held in terms of the EA, 'KN5', from the second to the first respondent. Coming to prayer 2 a declaration that the second respondent was the holder of rights in terms of the EA would be proper; however this may not be necessary.

[32] There is indeed a relationship between Part A and Part B of the Notice of motion. The first respondent has not undertaken not to repeat its activities complained of by the applicant. This is what makes the relief sought in Part A of the notice of motion relevant. There are a number of worrisome activities by

the first respondent that developed as a result of the EA and the purported agreement between the first and the second respondents. Part A of the applicant, in my view, should be granted.

[33] Mr. Labuschagne has provided me with a draft order which I have perused. I agree therewith and I am happy to make it an order of the court.

[34] In the result, I make the following order:

The draft order I have marked "X", signed and dated is made an order of the Court.

M.W. MSIMEKI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	*Adv. Labuschagne*
Instructed by:	*Adams & Adams*
Counsel for the respondents:	*Adv. Geldenhuys*
Instructed by:	*c/o Coetsee Van Rensburg Inc.*
Date Heard:	*24 February 2015*
Date of Judgment:	*12 May 2015*

"X"

12-5-2015

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

In the Urgent Court held on 24 February 2015 before Msimeki J

CASE NO: 7334/15

In the application of:

WELVERDIEND PROPERTIES SHARE BLOCK (PTY) LTD	Applicant
and	
WELVERDIEND HOME OWNERS ASSOCIATION	First Respondent
TREVOR JORDAN PROPERTIES (PTY) LTD t/a JORDAN PROPERTIES (PTY) LTD	Second Respondent
PORTION 6 OF THE FARM WELVERDIEND 243 (PTY) LTD	Third Respondent
MEC, LIMPOPO DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM	Fourth Respondent

DRAFT ORDER

IT IS ORDERED:

1. Pending the finalisation of the relief set out in Part B of the application, and any counter-application instituted by the respondents, if any, the first respondent is restrained and interdicted from:

   1.1 Representing to any third parties that it is the holder of rights in terms of an environmental authorisation granted by the Limpopo Department of Economic Development, Environmental Affairs and Tourism on 2 November 2004 in terms of Sec 28(a) of the Environmental Conservation Act, 78 of 1989, as set out in annexure "KN5" to the founding affidavit ("the Environmental Authorisation");

   unlawfully

   1.2 Asserting rights in terms of the Environmental Authorisation.

2. The first, second and third respondents' application for security for costs is reserved for determination together with Part B, and any counter-application instituted by the respondents, if any.

3. Costs of the application are reserved for determination together with Part B, and any counter-application instituted by the respondents, if any.

BY THE COURT

THE REGISTRAR