



IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~.

(3) REVISED.

5/2/2013
DATE


SIGNATURE

CASE NO: 31022/2010

DATE: 14/2/2013

IN THE MATTER BETWEEN

HERITAGE HILL HOME OWNERS ASSOCIATION PLAINTIFF

AND

HERITAGE HILL DEVCO (PTY) LTD DEFENDANT

JUDGMENT

KOLLAPEN, J

[1] In this action the plaintiff has issued summons against the defendant in terms of which it seeks payment in the sum of R2,5 million which it alleges is due by the defendant to it as levies payable by the defendant in respect of the defendant's ownership of various erven situated within the Heritage Hill estate located in the township of Louwlandia Extension 48.

- [2] The plaintiff is a section 21 company incorporated as such 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 plaintiff company.
- [3] The defendant, it is common cause, is the developer of the township known as Louwlandia Extension 48 and as developer is also a member of the plaintiff.
- [4] The Articles of Association of the plaintiff provides for two categories of membership:
- (a) during the development period the developer would have seven nominees as members of the plaintiff who are not registered owners of portions of the property; and
 - (b) any person, including the developer, who is the registered owner of property or portion of property would be a member of the plaintiff.
- [5] The defendant in its plea denied that it was the owner of any individual properties within the township and pleaded that it was the owner of the remainder of the township known as Louwlandia Extension 48. On that basis it contended that it was not liable for levies as envisaged and contemplated in the plaintiff's Articles of Association.

- [6] The parties were able to reach agreement on all of the issues in dispute save for the question of whether it could be said that the defendant was the registered owner of erven in the township as contemplated in the Articles of Association. The plaintiff's stance was that the defendant was in fact the registered owner of erven as contemplated in the Articles of Association while the defendant's stance was that it was the registered owner of the remaining extent of the township and not the owner of individual erven.

Background

- [7] The property known as Portion 53 of the farm Brakfontein 390, Registration Division JR, Province of Gauteng was transferred to the defendant in terms of deed of transfer T/82544/05 registered as such on 30 June 2005 by the Registrar of Deeds in Pretoria.
- [8] It is common cause that the land described in the aforementioned title deed was laid out into a township known as Louwlandia Extension 48 and a general plan in respect of such a township was registered by the Registrar of Deeds on 7 February 2006.
- [9] If one has regard to the general plan then it is evident from the plan that it depicts various erven and in respect of each such erf the location thereof, the dimensions thereof are clearly identified and an erf number is allocated to each such erf.

- [10] The defendant as township developer would then be entitled to sell and transfer erven as depicted on the general plan to individual owners without there being any need for the individual erven in question to be first transferred to the developer for onward transfer to those who had purchased erven in the township from the developer.
- [11] The plaintiff's Articles of Association provides in Clause 9.2 thereof that members of the plaintiff's association shall be liable in respect of any levy determined from time to time in equal shares in respect of each property owned by such member.
- [12] If regard is had to the definition of member as the registered owner of property, the basis accordingly for the payment of levies by any member of the plaintiff's association would be in respect of its registered ownership of property in the township.
- [13] Notwithstanding the description of the plaintiff as the Heritage Hill Home Owners Association it is evident from the Articles of Association that membership was not confined to home owners but rather to registered owners of property (in addition to the members who were nominees of the developer).
- [14] The Articles of Association in turn describes "the property" as "an erf in the township to be known as Louwlandia extensions to be established by the

developer on portions of the farm Brakfontein 390, Registration Division JR, Province Gauteng".

[15] Arising from this, the only question in dispute and for determination by this court is: -

- (i) Was the defendant, following the establishment of the township and for the purposes of the Articles of Association of the plaintiff, the registered owner of individual property/ies in the township? If it was, then it was accepted by the parties that it would be liable to pay levies; or
- (ii) Was the defendant 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 Extension 48? In such event it would not be liable for levies.

The provisions of the Deeds Registries Act and other related provisions

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

- [17] The Deeds Act further defines "registered" as registered in a deeds registry. It is clear having regard to the definition of both 'erf' and 'registered' as contained in the Deeds Act, that once the township had been proclaimed and the Registrar of Deeds had effected as he did on 7 February 2006, the registration of the general plan of the township of Louwlandia Extension 48, the erven in question and as depicted on the general plan were registered as such.
- [18] The effect of the registration of the general plan was to subdivide the land which was formerly a farm and to provide for the basis to now deal with the subdivided land either collectively or as individual erven.
- [19] Although the defendant remained the owner of essentially the same land that was previously a farm, the effect of the establishment of the township had changed the nature of the land from farm land to land in a proclaimed township. See *Florida Hills Township Ltd v Roodepoort-Maraisburg Town Council* 1961 2 SA 386 (T) at 388. In this regard the conclusion in *Kosmos Ridge Homeowners Association v Cosmos Ridge (Pty) Ltd* (2003) JOL 11481(T) that the balance of the township still remained farmland is inconsistent with the finding in *Florida Hills* that the nature of the land upon proclamation as a township had changed from farmland to land in a proclaimed township.
- [20] The effect of the establishment of the township and the subdivision of the land in accordance with the general plan also meant that the defendant while essentially

remaining the owner of the same content of land was now restricted in the manner in which it was able to deal with the land in question. It was obliged to deal with the land in question in accordance with the land being proclaimed as a township and in accordance with the subdivision of the land which was reflected in the general plan registered by the Registrar of Deeds.

[21] 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 the land subdivided shall furnish a copy of the general plan to the Registrar, who shall, subject to compliance with requirements of this Section and of 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."

It is clear from the above that the registration of the plan by the Registrar had the effect in law of subdividing the land and of providing a basis in terms of which registrable transactions in respect of the lots or erven shown on the plan could be registered. This section, read together with the definition of an 'erf' referred to above, would mean that all the erven in the township were registered as such and that the opening of the register of the township by the Registrar would then provide the basis for registrable transactions in respect of such erven to be registered .

Section 47 of the Deeds Act in turn provides that the owner of land in respect of which a register has been opened may by one deed transfer the whole or any portion of such land or a share in the whole 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.

[22] It is evident therefore from the provisions of section 46 and section 47, that the manner in which the township developer is able to deal with land in the township following the subdivision and the registration of the township must be such that it accords with the nature of the subdivision and indeed is such that it recognises the existence of the individual erven depicted on the general plan.

[23] As a matter of fact and as a matter of law it could hardly then be contended that following the establishment of the township, the individual erven depicted on the general plan did not come into existence as individual erven capable of being dealt with, sold and transferred. The fact that the developer had the right to sell the whole land or a portion thereof does not in my view detract from the conclusion that the erven depicted on the general plan came into existence as such. The two propositions are in my view not mutually destructive and indeed are reconcilable.

[24] If it is to be argued that the ownership of the developer in and to the land were not moderated by the establishment of the township and the subdivision, then the provisions of section 47 would hardly make sense to the extent that it provides restrictions in the manner in which the township developer may transfer and deal with land in the township. This suggests compellingly in my view that the consequence of the subdivision and the establishment of the township was to forever change the substance of the ownership of the developer. It converted the land from farm land into a township and it created within the township separate and identifiable erven which could be the subject of individual ownership.

[25] It must accordingly follow that even if the defendant contends that it was no more than the owner of the remainder of the township known as Louwlandia Extension 48, the argument that it was not the owner of the individual erven situated in that township is in my view not sustainable on account of the above.

[26] If one accordingly accepts that the defendant was for the purposes of this action the owner of land in the township, excluding of course erven sold and transferred to individual purchasers, could it be said that it was the registered owner of such erven for the purposes of the Articles of Association?

[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 and the development 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 and distinct identity. This is as much evident from the general plan and from the consequences and effects of section 46 and section 47 of the Deeds Act.

The law on the matter

[30] Plaintiff sought to rely on the judgment in *Florida Hills Township Ltd v Roodepoort-Maraaisburg Town Council* referred to above as well as *Ryhnfield Townships Ltd v Benoni Town Council & Another* 1950 4 SA 717 (T).

[31] In the *Florida Hills* matter the court concluded that when township property is sold as individual erven the remainder of the property is reduced from time to time by the sale of individual erven but that the unit of the remainder retains its own identity and continues to appear as the remainder in the deeds registry. It accordingly concluded that it was that remainder which had to be entered on the roll as a unit in the ownership of the township owner. A similar approach was taken by the court in the *Rhynfield* matter and it was the plaintiff's contention that this court was bound by the decisions in both *Rhynfield* and *Florida Hills* which decisions it was contended, were relied upon by HARTZENBERG J in the matter of *Kosmos Ridge Home Owners Association v Kosmos Ridge (Pty) Ltd* [2003] JOL 11481 (T). This matter dealt with the payment of levies by a township developer and HARTZENBERG J relying on *Rhynfield* and *Florida Hills* concluded that the individual erven did not exist before there was a specific transfer in respect of such a specific erf registered in the Deeds office.

[32] The decisions in *Florida Hills* and *Rhynfield* 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 based *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 purposes of their collective benefit. In this regard it could hardly be contended that the defendant's involvement in the plaintiff was as owner of farm land 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.

[34] In *Knysna Hotel v Coetzee N O 1998(2) SA 743 SCA*, the Court after examining the system of land ownership and in distinguishing between a common law and registered owner of property concluded that 'it was the co-operation of the registered owner which was required for any transfer, irrespective thereof whether he was the true owner or not'.

In the context of the individual erven in the township *in casu*, it would follow that the transfer of those erven would have to be effected by the registered owner and the only entity that would be such a registered owner would be the defendant.

[35] In my view the Court in *Florida Hills* and *Rhynfield* dealt with this issue in an entirely different context and to that extent those decisions are distinguishable. In those matters the relationship between the local authority and the landowner was not premised on the description and the layout of the land as a township while *in casu* it is the existence of the township that brings and binds the parties together. In addition the genesis of the relationship and the objective it sought to advance were also distinguishable. When a local authority values property and imposes taxes thereon, those taxes contribute to the broad tax base of the local authority who by and large may determine how such taxes are to be utilized. While its use may endure directly for the benefit of the landowner, there is no requirement that it does so nor may such a landowner directly participate in such decisions with regard to how such revenue is utilized.

[36] On the other hand the very idea of the formation of the plaintiff is to create a structure for the benefit of all owners of 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 processes of the plaintiff with regard to the imposition of levies and the use to which such revenue that is so generated is to be put. This

significantly different context is accordingly important in considering the effect, if any, of the dicta in *Florida Hills* and *Rhynfield* in the matter before this Court. In my view that changed context creates a different basis upon which the rights and obligations of the members of the plaintiff are to be determined.

[37] In my view the decision in *Kosmos Ridge* to the extent that the court found itself bound by the decisions in *Florida Hills* and *Rhynfield* was wrong. For the reasons I have already given those decisions relate to a different context and indeed a different legal relationship and are clearly distinguishable from the facts in the present matter. In addition it appear from the *Kosmos Ridge* judgment that 'registered owners' was defined in the Articles in that matter to have reference to owners who received transfer . There is no such provision in the Articles of the plaintiff. Under those circumstances this court is entitled and indeed justified in departing from the decision in *Kosmos Ridge*.

[38] For the purposes of the Articles of Association it would be artificial and narrow to suggest that the individual erven which all are situated in the township only come into existence when those individual erven are sold and transferred to the first purchasers. In the context of a township those individual erven have an identity similar and comparable to the identity of erven already sold and transferred. For those reasons I am inclined to conclude that the defendant was for the purposes of the Articles of Association the registered owner of the various properties described in annexure "A" in the township Louwlandia Extension 48.

[39] I may pause to mention that 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 not confined to home owners but to property owners and that levies are ultimately utilised 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, lighting, 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 was 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 is 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 payable 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.

[41] The above aside I am nevertheless convinced that as a matter of law the plaintiff has succeeded in proving, for the reasons already given, that the defendant for the

purposes of the Articles of Association and for the purposes of attracting liability for levies imposed by the plaintiff, is in fact the registered owner of the erven in the township as set out in annexure "A" to the plaintiff's particulars of claim.

[42] The parties were in agreement that in the event of the court deciding the question in favour of the plaintiff the *quantum* of the plaintiff's claim was agreed in the sum of R2,5 million.

[43] The parties were in agreement that having regard to the complexity of the legal dispute between the parties that the costs of two counsel were warranted.

[44] In all the circumstances I make the following order:

- (1) The defendant is ordered to pay the plaintiff the sum of R2,5 million.
- (2) The defendant is ordered to pay interest on the above amount at the rate of 15,5 % per annum from date of judgment until date of final payment.
- (3) The defendant is ordered to pay the plaintiff's costs of the action which costs shall include the costs of two counsel.



N KOLLAPEN

JUDGE OF THE NORTH GAUTENG HIGH COURT

31022-2010

HEARD ON: 14 NOVEMBER 2012
FOR THE PLAINTIFF: A F ARNOLDI SC & J W SCHABORT
INSTRUCTED BY: JARVIS JACOBS RAUBENHEIMER INC
FOR THE DEFENDANT: M C ERASMUS SC & J A VENTER
INSTRUCTED BY: ADRIAAN VENTER ATTORNEYS