

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **17928/2022**

In the matter between

**ALOE HOMEOWNER'S ASSOCIATION,
ALBERTINIA**

Applicant

and

**THE TRUSTEES FOR THE TIME BEING OF
THE LIEBENBERG TRUST [IT1727/95]**

First Respondent

NOLENE OWEN N.O.

Second Respondent

JUDGEMENT ELECTRONICALLY DELIVERED ON 16 MAY 2025

MTHIMUNYE, AJ

Introduction

[1] There are two applications under case number 17928/2022 before this court. In the main application, Aloe Park Homeowners Association ("Homeowners Association"), as the Applicant who primarily seeks a mandatory interdict, compelling the Trustees for the time being of the Liebenberg Trust and Nolene Owen N.O ("the Respondents") to transfer ownership of Erf 3[...] A[...], situated within Aloe Park Housing Development, Western Cape, ("Erf 3[...]") as well as declaratory orders.

[2] The declaratory orders sought by the Applicant in the Notice of Motion read as follows:

- “1. Declaring Erf 3[...] and Erf 2[...] as common property in the Aloe Housing Development;*
- 2. Declaring that the provisions of the Aloe Park Homeowners Constitution is binding on both the Applicant and the Respondents;*
- 3. Compelling the Respondents to take the necessary steps within 14 days of the grant of the Court order, to facilitate transfer of the section of property known as Erf 3[...] and Erf 2[...] to the Applicant;*
- 4. Should the Respondents’ fail to comply with the order, the Sheriff is authorized to sign any and all necessary documents to give effect to the transfer of the property to the Applicant in terms of the sale agreement between the parties;*

[3] The Respondents opposed the application and filed a counter application together with an answering affidavit, which also serves as their founding affidavit to the counter application. The applicant subsequently filed a replying affidavit to the answering affidavit, whereas the respondents filed no reply to the applicant’s replying affidavit.

[4] In the counter application, the Applicants are the Trustees for the time being of the Liebenberg Trust and Nolene Owen N.O. and the Respondents are the Aloe Homeowners Association. In this counter application the Applicants who are cited as the Respondents in the main application sought the following relief:

- “1. Declaring the amended Constitution of the Applicant purportedly adopted on 12 November 2021 as per Annexure “I” to the Founding Affidavit to be void and of no force and effect.*
- 2. Declaring that the Constitution of the Applicant dated 7 October 2008 as contained in Annexure “D” to the Founding Affidavit shall remain effective until it had been lawfully amended or substituted.*

3. *Directing the First Respondent to lodge an application for the subdivision of Erf 3[...] in the Aloe Park Housing Development, Albertinia within 90 days from date of this Order, the costs thereof to be paid by the Applicant.*
4. *Directing the Applicant to pay the costs of this application.*
5. *Affording the Respondents such further and alternative relief as this Honourable Court may deem just.”*

[5] The Hessequa Municipality (“Municipality”) filed a notice to abide with this court’s decision together with a report on 24 March 2024, wherein they stated that they had no objection to the relief sought by the Applicant. In addition, they also filed a report which stated that Erf 3[...] (“the Erf”) should be regarded as common property and be transferred to Aloe Homeowner’s Association.

[6] On 18 March 2022 as evidenced at Annexure “I” to the applicants founding affidavit the Municipality sent an email to the Homeowners Association informing them that the Municipality has approved the Homeowners submitted Constitution for Aloe Park, Erf 1[...], A[...].

Background

[7] It is common cause that the First Respondent (“the Trust”) purchased the property known as Erf 1[...] A[...] situated within the municipal area of Hessequa Municipality and successfully applied for its subdivision under general plan SG number 5477/2007 which was held in terms of a Deed of Transfer number T95745/2005. The aforesated subdivision of Erf 1[...] A[...] was intended for the establishment of a housing development scheme as inter alia contemplated in the Hessequa Local Municipality: Land use Planning Ordinance, 2015 read with Provincial Ordinance 15 of 1985 of the Western Cape Province.

[8] The Trust, being the developer provided the required roads and services infrastructure and put up for sale as residential properties the subdivided erven within the development, with the exception of inter alia erven number 3[...], 3[...], 3[...], 3[...] and

2[...]. On 12 November 2021 at meeting that was held a resolution was taken that the Applicant was to hold erven number 3[...], 3[...] and 3[...] on behalf of the property owners to serve as public (common) spaces.

[9] The Applicant seeks this court to declare the two remaining erven 2[...] and 3[...] to also be declared as common property in the development in terms of the resolution that was taken on 12 November 2021 when the new draft Constitution came into being.

Issue to determine

[10] In order to determine the validity of the amended 2021 Constitution of the Aloe Park Homeowners Association, the court is enjoined to consider both the main as well as the counter application as both these applications are interrelated. The key supporting documents are the same, although the reliance placed on them are different.

[11] I will now first turn to deal with the Applicant's case and the Respondents' response to it.

Applicants Case

[12] It is common cause that the Applicant came into being at the time when the first property was transferred in 2016 in accordance with the provisions of section 29 of Hessequa Municipality. A constitution was drawn up on 7 October 2008 and ratified on 10 May 2016. Resulting in this Constitution coming into being, duly accepted by all members of the Applicant, including the First Respondent and the Second Respondents who owned several portions of the development and were also the developers to this development.

[13] It is also common cause that the members of the Applicant including the Respondents accept that the definitions found in paragraph 2 of the 2016 Constitution, defines various areas of property.

“2. WOORDOMSKRYWINGS

- 2.1 *In hierdie Grondwet en die Reels het die onderstaande woorde en uitdrukkings die betekenis wat daarteenoor aangedui word tensy dit uit die samehang anders blyk-*
- 2.1.1 *“erf”, ‘n erf in die ontwikkeling;*
- 2.1.2 *“die gemeenskaplik eiendom”, mey betrekking tot die ontwikkeling, sodanige dele van die ontwikkeling as wat nie deelvorm van ‘n erf nie;*
- 2.1.3 *“geregistreerde eienaar”, die geregigestreeerde eienaarvan tyd tot tyd van enige erf wat deel vorm van die ontwikkeling;*
- 2.1.4 *“die huurder”, enige persoon wat ‘n huurooreenkoms ten opsigte van ‘n erf in die ontwikkeling het;*
- 2.1.5 *“die lid”, ‘n lid soos omskryf in klousule 5 hiervan;*
- 2.1.6 *“die ontwikkelaar”, Liebenberg Trust;*
- 2.1.7 *“die ontwikkeling”, die behuisingsontwikkeling voortspruitend uit die onderverdeling van Erf 1[...] A[...], soos aangedui op Algemene Plan Nr;*
- 2.1.8 *“persoon”, sluit in ‘n maatskappy, beslote korporasie, trust, vennootskap of enige ander vereniging van persone wat regtens geregtig is om die eienaar van onroerende eiendom te wees;*
- 2.1.9 *“die reels”, die aanvanklike reels van die vereniging enige opvolgende reels wat deur die vereniging gemaak word;*
- 2.1.10 *“die vereniging”, die Aloe Park Huiseienaarsvereniging;*
- 2.1.11 *“die voorsitter”, die voorsitter van die vereniging;”*

[14] The Applicant avers that on 22 March 2019, at an annual general meeting of the members it was resolved that the Trust would transfer the common property of the development into the name of the Applicant. It was also further agreed that the Applicant would contribute towards the costs of transfer in the amount of R 7500. The resolution and the minutes of the meeting are attached to the Applicants founding affidavit as Annexure”G”.

Minutes of Annual General Meeting

[15] A brief summary of the minutes of the meeting dated 22 March 2019 attached to the founding papers, reflect that the meeting was opened by Ms Yolande Botha with a prayer. Further that the meeting was properly constituted and a quorum

established by the following owners being present; Nolene Owen (Liebenberg Trust), Vanie Oosthuizen, Quartus Coetzee, John Hiten, Jeane Joubert, Marie Gericke, Ria Malan and As Hugo, together with the following proxy's AC Marias - Quartus Coetzee, Vestpoint - Vanie Oosthuizen, AJ Botha – Voorsitter, LCR Laubscher – Voorsitter, HW Viljoen – Van Zyl Oosthuizen, L Oosthuizen – Voorsitter, Great Brak Saw Mills – AS Hugo, HM Pienaar – Quartus Coetzee. Moreover, that the minutes of the previous meeting was approved and accepted as the correct version of the meeting.

[16] A resolution was passed at the meeting, in terms of which those present and by proxy resolved to transfer three specified erven i.e erven numbers 3[...], 3[...] and 3[...] respectively to the Applicant to take responsibility of the maintenance and upkeep of these erven.

[17] It is not disputed by the Trust in their answering papers, that the Trust passed transfer of erven 3[...], 3[...] and 3[...] into the name of the Applicant. The applicant further avers that mentioned in the resolution but not transferred is Erf 2[...] and 3[...]. Furthermore, that Erf 2[...] was added in erroneously and therefore not transferred.

[18] The contention with regard to Erf 2[...] being added in error is common cause between the parties. The Trust in their answering papers contend that Erf 2[...] cannot by any stretch of imagination be described as a public space.

[19] In response to the contention by the Applicant that Erf 3[...] had also to be transferred to them, the Trust vehemently deny this in their answering papers. In substantiation of their denial they contend that Erf 3[...] was never mentioned in Annexure “G”, as a result it was never transferred to the Applicant. Moreover, that the reason for this omission from Annexure “G” is simply that there was no obligation or undertaking given by the Respondents to transfer Erf 3[...] to the Applicant.

[20] The Applicant further aver that its Constitution was amended and ratified on 12 November 2021 and accepted by all members of the Applicant. Accordingly, it came into force and effect by means of the special general meeting that was held on 12 November 2021. The Trust in response to this contention in their answering

papers contend that the Constitution attached to annexure “I” of the founding affidavit is unlawful and void due to non-compliance with the notice requirements for a special general meeting. Moreover, the meeting lacked the required majority vote, and the amendments made to the draft proposed new Constitution were not authorized and done ex post facto.

[21] The Trust further emphasized that the inclusion of Erf 3[...] in the definition of ‘development’ (*“ontwikkeling”*) was unauthorized and had not been validly approved by a 90% majority of owners of land in the development. In addition, that the purported new definition of *“ontwikkeling”* contained in clause 2.1.32 refers to an approved development under general plan number 1759/2024, whilst the approved general plan in respect of this development is SG number 5477/2007.

[22] The Applicant went further and aver that it is patently obvious that by reading the amended Constitution, common property is defined as *“die erwe in die Ontwikkeling wat paaie of privaat oop ruimtes is of wat benodig word vir dienste ten opsigte van die Ontwikkeling, sowel as die geboue en verbeteringe opgerig op die erwe, insluitende die sekuriteitstoegang asook die omheining ten opsigte van die Ontwikkeling”*.

[23] Additionally, that it is clear that the security entry of the development is included as part of the common property, and that the Constitution of the Applicant had specifically mentioned the Erf numbers that forms part of the development. Referring to the diagrams attached at Annexures “E” and “F” to the founding papers, the applicant allege that Erf 3[...] is reflected as common property, more specifically the main entrance gate of the development and the road through same, and the road running along the back of the property is part of the common property.

[24] The Respondents rejected these averments made by the Applicant and stated in response in its answering papers that it is patently obvious that the amendments to the existing Constitution approved and accepted by it on behalf of the First Respondent had excluded Erf 3[...] from the definition of the development. Moreover, that Erf 3[...] had been intentionally excluded from clause 2.1.32 of the final draft of the proposed new Constitution, after due consideration. Furthermore, that the

definition of “*gemeenskaplike eiendom*” (“common property”) had been drafted to make specific reference to roads and to the entrance to the development, as the roads which form part of Erf 3[...] as well as the entrance to the development would form part of the portion of Erf 3[...] to be transferred to the Applicant in future, after the intended sub-division of Erf 3[...].

[25] The Applicant avers that clause 27.1 of the amended Constitution states that all property is to be transferred into the name of the Homeowners Association, which is the Applicant. In response this averment the Trust contended that they have not accepted or ratified the unlawful purported amended Constitution and are therefore not bound by it. Furthermore, that the Trust is not obliged to transfer full ownership of any portion of Erf 3[...] as even if the access road which forms part of Erf 3[...] and the entrance to the development were to be regarded as “common property”, such portions are not separately registrable in the name of the Applicant, until the intended sub-division had occurred. Further that the portion of Erf 3[...] intended to be sub-divided and excised, is not intended to be regarded as “common property”.

Respondents Counter Application

[26] The Trust in its answering affidavit raised the following points in limine, if it is upheld it will dispose of the Applicant’s application:

Non-joinder

[27] The Trust raised the issue of non-joinder of the Registrar of Deeds, the Municipality of Hessequa and Tiasolve (Pty) Ltd (a tenant of the office building on Erf 3[...]).

[28] With regard to the non-joinder of the Hessequa Municipality and the Registrar of Deeds, it is common cause that prior to the commencement of the proceedings the Applicant brought an application on 28 November 2024 to join both the Registrar of Deeds and the Hessequa Municipality as parties to the application. In addition, the Hessequa Municipality filed a notice to abide to this Court’s decision. The Respondents further did not persist with the issue of non-joinder of Tiasolve (Pty) Ltd. Accordingly, the issue of the non-joinder of the Hessequa Municipality and

Registrar of Deeds and Tiasolve (Pty) Ltd is thus moot and need no further consideration by this Court.

Which Constitution is extant

[29] The Respondents allege that the 2008 Constitution was accepted and signed on 7 October 2008 and became binding upon the Applicant and its members since 10 May 2016. Further that the members, irrespective of whether they are personally present at a general meeting, or are represented by a proxy, are entitled to bring out only 1 vote in respect of each Erf registered in their names. Accordingly, any amendment to, or substitution of the Constitution must be authorized and adopted by means of a Special Resolution supported by at least 90% of the total members of the Applicant. Moreover, in order to lawfully and validly carry a motion at a Special General Meeting of the Applicant, a minimum number of 139 votes (erven) were required to vote in favour thereof, keeping in mind the requisite 90% support threshold contained in clause 15.1.2 of the 2008 Constitution.

[30] Whereas at the special general meeting that was held on 12 November 2021 for purposes of amending the 2008 Constitution, only 99 erven were represented, as a result the threshold required for the intended amendments to the 2008 Constitution could not have been attained at the Special General Meeting.

[31] The Respondents further submitted in their heads of argument that irrespective of whether the Trust's proxy, Ms Viljoen acted without authority, the fact remains that the required minimum number of 139 votes in favour of amending the 2008 constitution had not been obtained.

Arbitration Clause

[32] The third point in limine raised by the Trust is that in the event that the Court finds that the 2008 Constitution still lawfully exists, their counter application should be granted which will result in the Applicant's dispute with the Trust being subject to arbitration proceedings in terms of clause 16 of the 2008 Constitution.

In the event of any dispute between (a) any of the Members (b) any of the members and the developer and (c) any of the members and the association in respect of the interpretation or the application of this Constitution or the Rules, such dispute is resolved through arbitration ...”

[33] The contention by the Respondents is that the Trust had at all times relevant to the dispute own 82 erven in the housing development. And that in terms of clause 5.1 of the 2008 Constitution, membership of the Applicant follows automatically by virtue of ownership of erven. Respondent contends that clause 16 of the 2008 Constitution expressly provides for a dispute between a member and the Applicant to be resolved by means of arbitration where the dispute concerns the interpretation or application of the 2008 Constitution. Moreover, that the Applicant's case is based in its entirety upon the application of the Constitution and specifically the Applicant's perceived "obligation" to take transfer of such portions of the common property within the development as which are registrable.

[34] The Respondents further contends that a party who resist the stay of court proceedings pending the final determination of the dispute by means of arbitration proceedings, bears the onus of convincing the Court that exceptional circumstances exist which militate against the stay of proceedings and the enforcement of the agreed arbitration procedure. Further that the Applicant did not disclose a single consideration which would constitute a compelling reason to enforce the agreed arbitration procedure for the resolution of the present dispute. Accordingly, they submit that the relief sought by the Applicant must be stayed pending the determination of such by an arbitrator in terms of clause 16 of the 2008 Constitution. Additionally, that there counter application is not affected by the Arbitration clause contained in the 2008 Constitution, as an arbitrator has no jurisdiction to consider the validity of the arbitration agreement itself, if its jurisdiction is based on an impugned agreement.

No clear right proven

[35] The Respondents contend that in the event of the Court exercising its discretion not to stay the main application and to adjudicate on the merits of the relief sought by the Applicant, they have demonstrated that the Applicant lacked a clear

right to transfer of ownership of Erf 3[...], similarly that the Applicant also lacks locus standi to apply for ownership of Erf 3[...] be transferred to the Applicant.

[36] The Respondents contended that the Applicant have failed to prove an agreement to transfer Erf 3[...] to it, much less a written agreement in such regard. Further that the Applicant's case is null and void in terms of clause 27.1 of the 2021 Constitution. Moreover, that even if clause 27.1 were to be disregarded, the clause placed an obligation on the Applicant to accept transfer of the Erf 3[...] into its name.

[37] The Respondents further contended for as long as the Respondents retains ownership of Erf 3[...], it remains liable for the maintenance thereof, and that the Homeowners Association does not require ownership for purposes of accepting a maintenance responsibility.

Declaratory Orders

[38] The Respondents contended in their heads of argument that in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013, this court enjoys a discretion to, at the instance of an interested party, enquire into and determine any existing, future or contingent right or obligation, irrespective of whether consequential relief is claimed upon such determination.

[39] The Respondents relied in this regard on the decision of ***Rail Commuters Action Group v Transnet Limited t/a Metrorail 2005 (2) SA 359 (CC)*** at 410, where the Constitutional Court remarked as follows in respect of the Court's discretion pertaining to issuing declaratory orders:

"It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances."

[40] The Respondents submitted that a proper case had been made out for the granting of declaratory relief they prayed for in prayers 1 and 2 of their counter application.

Applicant's submissions in reply to Counter Application

[41] The Applicant submitted when Erf 3[...] were advertised to the members of the Homeowner's Association it included the entrance to the development, which resulted in them buying into the development. There was no application for the subdivision at any stage brought to their attention by the Respondents. Furthermore, that no general, special or annual meeting were held by the developer to table its intention to subdivide Erf 3[...]. Further that the Erf is common property, as the entrance to development leads to the main road that leads to the development, it is also where entry and exit happens.

[42] The Applicant further submitted that the Respondents never advertised or brought to the Applicant's members attention that they intended to subdivide Erf 3[...], or bring an application for such subdivision. Nor did the respondents discuss their intention to subdivide Erf 3[...] at any special, general or annual meeting. The applicant submitted that although the respondents are disputing this in their answering affidavit, there is no correspondence to show that the subdivision was canvassed with the applicant or its members.

[43] Applicant submitted that the court should take cognizance of the fact that the Respondents when filing their counter application, filed an answering affidavit to the main application, which in turn also stands as the founding affidavit to the counter application. Furthermore, that the failure of the Respondents to file a response to their replying affidavit, in which they responded to the Respondents' answering affidavit, resulted in the contentions made by them in their replying affidavit in so far as they relate to the counter application remaining unchallenged.

[44] In their replying affidavit the Applicant raised the following points in limine:

The Arbitration Clauses defence

[45] The Applicant submitted that an arbitration clause in a written contract does not deprive the Court of its jurisdiction over the dispute covered by the agreement. Moreover, an arbitration agreement is not an automatic bar to the legal proceedings. Further that in this instance both arbitration clauses refer to specific members and disputes between members and members of the Homeowners Association, and not to the Applicant or the developer. It also specifically concern the interpretation of the rules of the constitution.

[46] The Applicant further submitted that the Respondents in their heads of arguments misquoted paragraph 31.9 at page 294 of the founding affidavit, to mean that the Applicant implied that it was not necessary to come to court, if the plan to subdivide the Erf was previously put before them. The Applicant submitted that the reason for this statement was that the subdivision of the Erf will have great cost implications for the Homeowners Association as it involves the rezoning of the property, which was never previously discussed with the Homeowners Association. This is because the Applicant is responsible for the roads and maintenance of the infrastructure.

[47] Additionally the Applicant submitted that in order for the Respondents to rely on either the 2021 or 2008 arbitration clauses, they had to comply with two requirements:

[48] Firstly, that the Respondents had to bring an application in terms of the civil proceedings, section 6 of the Arbitration Act. That this application had to be brought before the delivery of any pleadings which the respondents or before they intended to take any further steps in the proceedings. The Applicant relied in this regard on the decision of **Conress (Pty) Ltd v Gallic Construction (Pty) Ltd [1981] 3 All SA 337 (W)**.

[49] Secondly, the Applicant relied on the case of **Yorigami Maritime Construction CO Ltd v Nissho-Iwai Co Ltd [1977] 4 All SA 733 (C)**, where it was stated, for the stay of the proceedings pending the final determination of the dispute by an appointed arbitrator the Respondent has to file a special plea.

[50] The Applicant submitted that if we look at this matter appearance was entered into by the Respondents and instead of a stay of proceedings being brought the Respondents instead filed a counter application, resulting in entering into a discussion of the merits by filing an answering affidavit.

[51] Applicant submitted that in this matter they rely on the 2021 constitution which was passed at a vote at a special general meeting. Further that the members voted to have the constitution amended and brought into effect. As part of that constitution Erf 3[...] is mentioned as an Erf in the development. Additionally, the constitution also defines what the common property is and what forms part of the common property, accordingly this is not an arbitrable dispute. Therefore, the Arbitration point in limine raised by the Respondents are defective and fails to meet the requirements as expounded upon in the relevant authorities.

The Voting Process defence

[52] The Applicant submitted in order for the Respondents to rely on the 2008 constitution, the correct process for the Respondents' to have followed would have been to apply to this court to set aside the voting process and subsequent ratification of the 2021 constitution. Thereafter, to follow the Oudekraal principle whereby the respondent will make use of the process of forcing the Homeowners Association to an arbitration. **(Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004).**

[53] Oudekraal principle says, where an administrative action is unlawful or incorrect it remains as effective until it is set aside in court proceeding for judicial review. The applicant submits that the respondents attached to their answering affidavit at AA6 at page 274 a list of members who attended the meeting that passed the constitution of 2021, totaled to 149, the Respondent hold 82 of the votes and the proxy was HW Viljoen. The proxy form clearly says that the Liebenberg Trust appointed HW Viljoen to act as their representative at the annual general meeting to be held on 12 November 2021, and to vote on the approval of proposed changes to the Constitution and any other decisions that may arise.

[54] Applicant submitted that part of this is an approval of the post changes of the 2021 constitution, approval to the post changes to the contract law. The meeting was properly constituted and had a proper forum. The person who was given the power of attorney to act on behalf of the first and second respondent, had a proper mandate to do so. To now say that there was no proper mandate, that the meeting was improperly done that the voting process was flawed is opportunistic by the respondents.

[55] Further that the argument by the Respondents in their answering affidavit that, there was only 99 members that voted and there had to be 139 members is incorrect, because if you take away the 82 votes of the Trust it does not meet the 99-member requirement. This is on the assumption that the voting process was flawed. They submitted that the contrary is reflected on the register that the respondents have attached to their answering papers, that in actual fact there was 149 votes in total. Even if the math was incorrect in respect to the 99 members that only voted, the register itself contradicts that.

[56] The Applicant contended that the Respondents contention at paragraph 20.1 of their answering affidavit is incorrect, in that the Applicant had agreed that there was no agreement with regard to the transfer of the whole of the Erf 3[...]. The letter sent by Mr Siljeur at K1 to the Liebenberg Trust at paragraph 5 in particular “then for a reason unknown to our client...this will be done without demand of any compensation.”

[57] The Applicant contended that the letter that was sent by Mr Siljeur which is annexed to their founding papers as annexure “K1” clearly states that the Trust and the Second Respondent refused to acknowledge that Erf 3[...] forms part of the common property, despite the fact that it was included in the constitution as an Erf number and that it falls under the definition of common property, and that the gate and access road to the complex are part of that Erf and that they had agreed thereto. Moreover, no response to Mr Siljeur’s email was received from the Trust.

[58] The Applicant contended that the allegation made by the Respondents in their answering affidavit allegations that Ms Botha out of her own amended the

constitution and included Erf 3[...] and changing the erven from 152 to 154 is unsubstantiated, as this was not done by Ms Botha but instead by the municipality when the constitution was sent to them for consideration. Notwithstanding, the Respondents, have not challenged that there was a meeting or the outcome or process of the meeting, neither has the 2021 constitution been set aside, thus the constitution still stands and is applicable. The reliance of the Respondents on the old constitution, by relying on 90% of the vote to pass a special resolution or to pass a change in the constitution holds no water as the current constitution relies on 70% vote to be passed to effect a change in the constitution. Considering the amount of people at the meeting a total of 149 votes, both the 75% as well as the 90% hurdle has been crossed.

The Arbitration Process Defence

[59] The Applicant submitted that mediation was attempted by them with Ms Owen and the Trust, as is apparent from the correspondence attached to the founding affidavit, however that there was no reciprocation from the Trust and Ms Owen to resolve the dispute and the only option the Applicant had was to bring this matter before this court. Even if this matter had to be arbitrated before coming to court the Applicant complied in terms of section 36 of the Constitution whereas Ms Owen and the Trust failed to respond to any of the Applicant's emails who tried to resolve matter amicably. Respondent resisted all attempts to resolve the dispute.

Pacta Sunt Servanda Maxim Defence

[60] The Applicant relied on the case of **Brothers Property Holdings (Pty) Ltd v Dansalot Trading (Pty) Ltd t/a Chinese Fair (6149/2021) [2021] ZAWCHC 171 (1 September 2021)**, where at paragraph 27 of the judgment, Hockey AJ, refers to the matter of **Barkhuizen v Napier 2007 (5) SA 323 (CC)**, where Ngcobo J noted at paragraph 57 of his judgment, that the pacta sunt servanda maxim;

"... gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity."

[61] Applicant submitted that if one applies this principle by Ngcobo J, to the factual matrix here, it should be accepted that the Respondents have freely entered into the voting process and are accordingly bound by it until an application has been brought before this court to have the vote process set aside.

[62] Moreover, the Respondents cannot by way of a counter application seek to declare the 2021 constitution null and void. The applicant contend that this court will first have to deal with the question of whether the voting process of the 2021 constitution was flawed or an unlawful administrative action. In support of this contention the applicant relies on ***Beadica 231 CC and Others v Trustees for the time being of the Oregan Trust and Others (CCT109/19) [2020] ZACC 13***, where Theron J emphasizes at para 81 of the judgment that,

“[81] The rule of law requires that the law be clear and ascertainable. As stated by this Court in *Affordable Medicines*: “The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they regulate their conduct accordingly.”¹⁹⁰ The application of the common law rules of contract should result in reasonably predictable outcomes, enabling individuals to enter into contractual relationships with the belief that they will be able to approach a court to enforce their bargain. It is therefore vital that, in developing the common law, courts develop clear and ascertainable rules and doctrines that ensure that our law of contract is substantively fair, whilst at the same time providing predictable outcomes for contracting parties. This is what the rule of law, a foundational constitutional value requires.¹⁹¹ The enforcement of contractual terms does not depend on an individual Judge’s sense of what fairness, reasonableness or justice require. To hold otherwise would be to make the enforcement of contractual terms dependent on the “idiosyncratic inferences of a few judicial minds.”

[63] It is the Applicant’s argument that it is common cause that in both these constitutions there was an intent for there to be common property in the development, and for this common property to be transferred in the Homeowners Association’s name and it has been defined in both constitutions. That is what is reasonable and predictable that the applicants find it reasonably predictable that the Erf 3[...] is common property and that it has the roads and gatehouse and that it should be transferred to them.

[64] The Respondents are thus bound by the 2021 constitution and should therefore transfer the common property of Erf 3[...] into the name of the applicant.

Costs

[65] With regard to costs the applicant cited ***Ferreira vs Levine NO and Others; Vryenhoek and Others v Powell NO and Others [1996] ZACC 27 (19 March 1996)*** which is trite law that award of costs unless otherwise expressly enacted in the discretion of the presiding judicial officer, the successful party should be as a general rule to be awarded costs. Had the respondents responded to the applicant's correspondence and entered into meaningful engagement this matter might have been mediated and not before this court. I am of the view that costs should be awarded to the applicant.

Respondents' submissions

[66] The Respondents in response to Applicant's submissions, submitted that the Applicant at paragraph 16 of its founding affidavit has proven to set out a false case. In that the foundation for the relief sought by the Applicant does not support the relief the Applicant is seeking in its notice of motion, accordingly the main application of the Applicant should be dismissed.

[67] They contend that to the contrary their counter application must succeed as the Applicant failed to set out the basis for its application in its founding papers. They submitted that the Applicant in their founding affidavit did not rely on the 2008 constitution in its unamended form, thus the applicant cannot rely on it now during argument. They submitted that paragraph 34.3 at page 297, proves that the Applicant's version is false, and that the applicant concedes that its version is false, in that the Applicant conceded that the proposed changes were made by the Municipality after the meeting and that no changes were made by Ms Botha herself.

[68] The Respondent further submitted that the Applicant in its founding papers and in its heads of argument contended that the majority of members voted at the special meeting, however failed to mention that in the constitution there is a clause that requires prior circulation of annexure "I". This annexure "I" was never circulated

although annexure “I” was voted on at the special meeting. Respondents referred to page 25 and 37 of the 2016 constitution, relevant clause with regard to the circulation.

Clause 15.1 “Spesiale besluite”

A loose translation is an introduction to special resolutions

Clause 15.1.1 Which will have the effect that any part of the constitution is amended or recalled must be accepted by way of not less than 90% of total members, and not members that are present. The Respondents submitted that the Applicant’s case is that those who were present voted, whatever the percentage was, whereas according to the 2016 constitution 90% of all members must vote for an amendment to the constitution. Prior written consent of any property owner has first to be obtained before any amendments which may affect the rights of the owner can be made. Accordingly, the Respondent submits that the case put up by the Applicant in its founding papers is that the meeting was not in accordance with clause 15 of the constitution, as not all members voted and there was no prior written confirmation from the Trust.

[69] The Respondent further submitted at page 298, paragraph 26.1, that Ms Botha averred that all the members were present, which is incorrect. Further that it appears that Anna Viljoen and HW Viljoen is not the same person. This confusion with regard to which Viljoen signed the resolution is neither here nor there as it is apparent that Botha was authorized by Viljoen, a trustee of the trust to depose of the affidavit.

[70] The Respondent submitted that prayer 2 of the notice of motion cannot be granted, as the relief is sought on the basis of annexure “I” being circulated. Accordingly, if annexure “I” falls away, therefore the relief sought by the Applicant cannot be granted. Respondent submitted that the question would be what right the applicant seeks to enforce. If that right arises out of annexure “I”, and annexure “I” falls away, the right also falls away. The Respondent further submitted that in their counter application, they sought for the court to declare the amended constitution and annexure “I” to be invalid.

[71] With regard to prayer 2 of their counter application, they submitted that if the 2021 constitution falls away, the previous 2008 constitution would be valid, in terms of which the Applicant relies for their relief sought. The respondent submitted that they have also prayed for similar relief in terms of the 2008 constitution to be granted.

[72] With regard to prayer 3 of its counter claim, the order directing the First Respondent to submit an application for the subdivision of Erf 3[...], is being sought by them via a court order and not the Applicant. In other words, that they have consented to the subdivision of Erf 3[...] without the Applicant seeking such relief from the court.

Costs

[73] Respondent submitted that there is no reason why costs should not follow the result. Furthermore, they submitted that the applicant asked for attorney and client costs, whereas they seek costs on the main and counter application the same costs on scale C.

Analysis and Relevant Case Law

[74] Many issues were raised by the parties in their papers as well as during arguments. The court is cognizant of the principle that parties entering into contracts freely should be held in terms of their contracts. The question is whether the Applicant has made out a case that the amendments to the 2008 Constitution are unlawful and therefore, the 2021 constitution is null and void.

[75] Points in limine raised by Respondents will first need to be dealt with before the court can consider the merits of both these applications.

The Non-joinder argument

[76] Section 97 of the Deeds Registries Act provides as follows':

“(1) Before any application is made to the court for authority or an order involving the performance of any act in a deeds registry, the applicant shall give the registrar concerned at least seven days’ notice before the hearing of such application and

such registrar may submit to the court such report thereon as he may deem desirable to make.”

[77] With regard to the non-joinder of the Hessequa Municipality and the Registrar of Deeds, it is common cause that prior to the commencement of the proceedings the Applicant brought an application on 28 November 2024 to join both the Registrar of Deeds and the Hessequa Municipality as parties to the application. In addition, the Hessequa Municipality filed a notice to abide to this Court’s decision. The Respondents further did not persist with the issue of non-joinder of Tiasolve (Pty) Ltd. Accordingly, the issue of the non-joinder of the Hessequa Municipality and Registrar of Deeds and Tiasolve (Pty) Ltd is thus moot and need no further consideration by this Court.

Which Constitution is extant argument

[78] The Respondents allege that the version relied upon by the Applicant in their founding affidavit is false and that based on this the application of the Applicant should be dismissed. However, it is not as easy as it sounds. In order to determine whether the 2008 Constitution was properly amendment we will first have to look at the relevant terms of the Constitution.

Clause 5.2 – States that “Elke lid is geregtig op een stem vir elke erf wat hy in die ontwikkeling besit, Eienaarskap van ‘n erf in onverdeelde aandele stel slegs een lidmaatskap daar, welke lidmaatskap verteenwoordig word deur individu ingevolge die bepalings van klousule 9.11 hiervan.”

Clause 6.5.3 - “n Kworum vir die hou van Bestuursvergaderings is (1) meer as die helfte van die totale aantal bestuurslede, afgerond tot die naaste boonste heelgetal indien die aantal ‘n ongelyke aantal is.”

Clause 6.5.4 – Kennisgewings van vergaderings van die Bestuur geskied aan die lede van die Bestuur by die adresse waarvan hulle die Vereniging kennis moet gee.

Clause 6.5.6 – Bestuursvergaderings geskied met kennisgewing van nie minder as 21 (een en twintig) dae.

Clause 6.5.7 – Alle besluite van die Bestuur word by wyse van meerderheidsbesluit geneem onderhewig daaraan dat 'n skriftelike besluit, onderteken deur al die lede van die Bestuur net so geldig is asof dit op 'n vergadering aan die Bestuur geneem is.

Clause 15 - SPESIALE BESLUITE

15.1 Nieteenstaande enige iets tot die teendeel in hierdie Grondwet, maar onderhewig egter aan die bepalings van Klousule 11.7 hierbo, moet enige besluit van die vereniging:-

15.1.1 wat tot gevolg het dat enige gedeelte van hierdie Grondwet gewysig of herroep word; of

15.1.2 wat wenslik die finansiële eiendomsbelange van enige lid sal benadeel. Aangeneem word deur nie minder as 90% (negentig present) van die totale aantal lede.

15.2 Nieteenstaande enige ander bepalings –

15.2.1 is geen besluit waarkragtens die oprigting van enige structure op die gemeenskaplike eiendom gemagtig word afdwingbaar indien dit nie gepaardgaan met die voorafgaande skriftelike toestemming van die persoon of persone wie se eiendomme negatief daardeur geraak kan word nie;

15.2.2 word geen besluit aangeneem wat enige beperkende titelvoorwaardes van enigeen van die erwe wysig of skrap nie.

15.2.3 Reels hierkragtens uitgevaardig sal gewysig word slegs by wyse van 'n Spesiale Besluite.”

[79] It is not in dispute that a number of 99 out of the 153 erven referred to in the draft new constitution were present at the meeting of 12 November 2021, either physically or by proxy. Out of the 99 votes 82 votes belonged to the Respondent Trust. In terms of clause 15.1.2 of the 2008 Constitution in order to lawfully and validly carry the proposed motion to accept the amended Constitution, a number of 139 votes (erven) were required in favour thereof.

[80] The minutes of the meeting speaks for itself at no stage during the deliberations was any mention made of Erf 3[...] to be transferred to the Applicant as

common property. The amended Constitution sent to the Municipality was unlawfully done as the Applicants by their own version admits that the amendments were not done at the meeting to insert Erf 3[...] but that it was unilaterally done by the Municipality. It is therefore apparent that the insertion of Erf 3[...] in the amended Constitution was not done by any resolution or voting process of the members or owners of the properties in the development as required in terms of the 2008 Constitution. Clause 15.2.1 and 15.2.2 of the 2008 Constitution expressly states that no decision where any structure may be erected on the common property or amendments which may affect the title deeds of any person, may be taken without the prior written consent of persons whose properties might be negatively impacted by such a decision being taken.

[81] It is therefore my considered view that it might be that the meeting held on 12 November 2021 was not in accordance with clause 15 of the constitution, that the amendment of the Constitution was done only to transfer 5 specifically mentioned erven 3[...], 3[...], 3[...], 2[...] and 2[...] and not Erf 3[...]. I pause to mention that it is apparent that not all the members whose properties were to be affected by any amendment that had to be taken at the meeting was also not present as only 149 members were present either personally or represented by proxy.

[82] For these reasons I take the view that the Applicant has no right to the transfer of Erf 3[...] to him. Additionally, there is a bona fide dispute of fact here that can only be resolved by leading evidence so that this issue can be properly ventilated.

The Oudekraal principle

[83] In a voluntary association, the members bind themselves to act in a particular manner in their relationship with each other in relation to the objects of the association. This principle is explained in the well-known constitutional case of ***Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC)*** para 75, as follows:

“The rule of law requires that no power be exercised unless it is sanctioned by law, and no decision or step sanctioned by law may be ignored based purely on a contrary view. It is not open to any of us to pick and choose which of the otherwise

effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set aside, so we may validly escape their binding force.”

[84] It is apparent that from this extract, that the Homeowner’s Association established by a constitution must make and obey decisions in terms of the law (‘constitution’). As a matter of logic, the Applicant first have to comply with the rules and regulations as set out in the 2008 Constitution in order for the 2021 Constitution to become legal and binding on all members. Even if it is said to have complied, its decision is not what the issue is here which is apparent from the papers but rather that of the Municipality which was taken after the fact.

The Arbitration Clause argument

[85] The Arbitration clause at clause 16 of the 2008 Constitution reads as follows:
“In geval van enige geskil tussen (a) enige van die Lede (b) enige van die lede en die ontwikkelaar en (c) enige van die lede en die vereniging in verband met die uitleg of die toepassing van hierdie Grondwet of die Reels, word sodanige geskil deur arbitrasie besleg. Die arbiter is ‘n onafhanklike persoon waarop die partye ooreenkom, by versuim, waarvan die persoon benoem word deur die voorsitter van die Prokureursorde van die Kaap die Goeie Hoop of sy regopvolger. Die arbiter geregtig om die geskil te besleg ooreenkomstig dit wat hy as reg en billik beskou in ooreenstemming met die doelstellings van die vereniging. Die besluite van die arbiter is finaal en bindend vir die partye.”

[86] It is apparent from this arbitration clause that no reference is made to the Homeowner’s Association as a member, it merely refers to ‘lede’ which if translated means a member in terms of clause 5 of the said Constitution. The Homeowner’s Association is a stand-alone organization which is consistent of the members of this development, although it has authority in terms of both constitutions to institute proceedings and act as a juristic legal person and litigate on its own. Hence this arbitration clause cannot apply to the Homeowner’s Association. The arbitration clause goes further to explain the extent of what can be referred to the arbitration.

That is whether the constitution is applicable, how it is applicable or any interpretation to the rules which are attached to the constitution.

[87] The Respondents in turn wish for the proceedings to be stayed. This argument is flawed as it is common cause that no such application for a stay of proceedings by the Respondents was made to this Court to exercise its discretion in terms of section 6 of the Arbitration Act 25 of 1965. Moreover, there is no notice by the Respondents to amend their notice of motion or founding affidavit which contains no averments to that effect. It merely state that the arbitration clause is binding in the 2008 constitution.

Respondents' Counter Application

[88] The respondents have brought a counter application to declare 2021 constitution null and void in that the 2008 constitution is still in effect. They further seek this court to direct that the First Respondent may lodge an application for the subdivision of Erf 3[...] in the Aloe Park Housing Development within 90 days of this order. However, in their heads of argument the Respondent has at length gone into arbitration and has requested a stay of this proceedings.

[89] It is important to note, in their founding papers that this was not the relief that they have sought before this court.

[90] The original 2008 constitution did not provide for the subdivision of Erf 3..., nor did it stipulate what would happen in the event that this Erf should be subdivided. At the special general meeting the developer and the Trustees suggested amendments to the 2008 Constitution, presumably to address the omission of Erf 3... being declared as common property. The minutes of the meeting reflect that 149 members were present, but nowhere on the resolution attached to the minutes dated 12 November is there any mention that Erf 3... were either to be transferred to the Applicant for maintenance or upkeeping, the only erven that are specifically mentioned is 3..., 3... and 3..., 2... and 2..., thus if it is my considered view if it were meant for 3... also to have been declared common property it would have specifically noted. Nowhere in their resolution which is confirmed by the minutes of the meeting was Erf 3... declared as common property.

[91] I agree with the Applicant that where an administrator has made a decision and a party considers it unlawful and unreasonable that party has to apply to court for judicial review in order to have that decision set aside, however in this matter it is not the decision of the administrator that has to be considered, but that prima facie from the papers whether the Applicant has made out a case for the this court to grant a declaratory order and declare Erf 3[...] as common property in the Aloe Park housing development.

[92] I have considered the various authorities referred to by the Applicant, which although I agree with them, I have a view that they are all distinguishable from the facts of this case. From the papers it is clear that this court cannot grant such an order as there various disputes of fact raised by both the Applicant and the Respondents in their papers.

Conclusion

[93] Based on the evidence in the papers before this court I am not satisfied that either the Applicant or the Respondents have proven necessary conditions exist for them to be granted declaratory relief by this court. The issues raised by both parties raises various material disputes of fact which can only be properly resolved in action proceedings.

Order:

[94] It is for all theses reasons, that the following order is issued in connection with the main application and the counterapplication thereto, namely;

- 94.1 That the main application is dismissed.
- 94.2 That the counter application is dismissed.
- 94.3 Each party is ordered to pay their own costs.

MTHIMUNYE AJ
JUDGE OF HIGH COURT

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