IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 12490/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

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

(3) REVISED. ✓

8/11/19 .....

DATE SIGNATURE

In the matter between:

THE BODY CORPORATE
GLEVERA CARENET HOME — APPLICANT

And

GLEVERA INVESTMENTS (PTY) LTD — 1ST RESPONDENT
CARENET PROPERTIES (PTY) LTD — 2ND RESPONDENT
CARENET LODGE UNIT
DEVELOPMENT (PTY) LTD — 3RD RESPONDENT

JUDGMENT

Fabricius J,

[1] In these proceedings the Applicant seeks an order that the First, Second and Third Respondents' personal rights as registered in the Title Deed of every sectional title unit in the retirement village, are hereby deregistered *in toto* from all future registered Title Deeds of such units from the date of this order by the deletion of certain headings and the substitution thereof with others. One of such clauses is the fact that the First Respondent was granted a pre-empted right to purchase a particular unit at the same price and conditions contained in any offer made to the owner thereof. Also, another condition was that any alienation of a unit by the owner or his successors in title would be subject to a levy of 10% of the re-sale price to be paid to First Respondent, but that 2% of such amount to be paid to the stabilization fund of the Body Corporate.

An interdict was also sought against the First Respondent relating to the issue of parking on the common property.

[2] The Second Respondent is not before the Court.

[3] The *locus standi* of the Applicant was challenged.

[4] It is common cause that the First Respondent is one of the owners of a unit in the Home. The Founding Affidavit says very little (if anything) about the basis upon which Applicant's *locus standi* is founded. No details are given of the particular owners of the various units, nor of their age, nor of their ability or inability to safeguard their rights as owners in their own name. It will hereunder become apparent why I mention this topic at this stage.

See: ***Improved (Pty) Ltd v National Transport Commission 1993 (3) SA 94 AD at 107C to H.***

[5] Upon reading the affidavits as a whole, it appears that Applicant relies on a lapse of a reason for the restrictive conditions in the Title Deeds of the relevant units of the Home as a cause of action to remove the condition from the Title Deeds. The reasoning in the Founding Affidavit was that the restrictive conditions were registered against the Title Deeds in consideration for the maintenance, management and upkeep of certain facilities installed at the Home. Insofar as the 8% levy was concerned, which accrued to the First Respondent when units were re-sold, served, according to the Applicant, as reciprocal consideration for the maintenance, management and upkeep of the Home, which has now become obsolete for reasons not attributable to the Body Corporate.

[6] Respondents' version was different, and it was stated that the 8% levy was not payable as reciprocal obligation at all, but for the establishment of the facilities of such, and that the personal rights in terms of which levies must be paid to Respondents were converted into real rights upon registration.

[7] It was contended on behalf of First Respondent that before I deal with *locus standi* certain considerations in law were relevant thereto, and had to be considered. These were the following:

1. Registration of servitudal rights and obligations results in the creation of real rights in property. The relationship between owners of affected units in respect of rights and obligations so registered and beneficiaries is contractual. It is not the function of Courts unilaterally and without the consent of all affected parties to make or break contracts. Insofar as Title Deed conditions were concerned, the refusal to consent by a single affected property owner is fatal to any such application at common law for the alteration or removal of such Title Deed condition. The objector does not even have to motivate his objection. The registration of a servitude in the Title Deed of a servient tenement constitutes a servitude in law.

   See: ***Malan v Ardconnel Investments (Pty) Ltd 1988 (2) SA 12 AD at 37G.***

Personal rights, known as *iura in personam ad rem acquirendum*, with a few exceptions, give rise only to personal rights which are converted into real rights by registration. Real rights are stronger than personal rights.

See: ***Landbank v Factaprops 2016 (2) SA 477 GP at par. 17***; and ***Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd 2003 (2) SA 253 (SCA) at par. 6.***

2. Courts do not have any independent or overriding power to delete or curtail restrictive conditions in Title Deeds on good cause shown, because constrictive conditions impose registered rights which are contractual and servitudal in character.

In ***Ex parte Rovian Trust (Pty) Ltd 1983 (3) SA 209 D and CLD at 212H to 213B,*** the following was said in this context: "Upon registration these rights become real rights and their operation is extended to the successor of the original contracting parties, regardless of whether they were aware of the existence of these

conditions or not. ... The third parties in whose favour the condition was originally imposed, or their successors in title are qualified to enforce the terms of the servitude against the offending owner of the servient tenement ... The Court is not empowered to interfere with these rights by deleting the restrictive conditions of its own accord. The most a Court can do is to declare that these rights, for some extraneous reason, no longer exist. Any means by which rights are extinguished in law would qualify as a sufficient extraneous reason. The Court exercises no discretion, it functions solely as a body of enquiry. One such extraneous reason may be that the right has been terminated by bilateral consent; another is that it has been waved unilaterally. But of course only the holder of the right can agree to cancel or can waive it. If the right is enjoyed by more than one person, each holder must consent to its deletion before the Court can make a declaration to that effect."

This passage was quoted with approval in ***Ex parte Saiga Properties (Pty) Ltd 1997 (4) SA at 716 ECD at 718C to D.*** The Court in ***Frantrade Nineteen (Pty) Ltd and Others v Realty Corporation of South Africa Ltd and Others***, per Twala J (case no. 20400/2018), a judgment delivered on 22 February 2018, also refers to this passage with approval at par. 18. Furthermore, in ***Ex parte: Whitfield*** and similar applications: ***In re: Removal of Restrictive Conditions of Title [2017] GOL 37697 (ECP),*** the Full Court also referred to the first mentioned decision and held that it has been long settled that the High Court has no inherent jurisdiction to remove, vary or suspend a restrictive condition of title to land. The rationale lies in the nature of a restrictive condition which, in its essence, is a form of contractual stipulation in terms of which a transferor of land regulates the exercise of the transferees' dominium over the property. Such conditions are in the nature of servitudes. Given the nature of the conditions of title, and the rights that are thereby conferred, they cannot be removed,

varied or suspended except with the consent of all (I underline) of the parties whose rights and interests are regulated thereby.

[8] If circumstances change for whatever reason, with the result that servitudes become *contra bonos mores*, there is an onus upon a party claiming the removal of the servitude to prove that enforcement would be against public policy.

See: ***Bedford Square Properties v Erf 179 Bedfordview 2011 (5) SA 306 (SCA) at par. 10 and 13.***

It will become apparent hereunder why I refer to the question of public policy in the present context.

Applicant's *locus standi*:

1. **The Founding Affidavit:**

[9] The Founding Affidavit was made by the chairman of the Applicant who relied on a resolution of the trustees to approach this Court in order to obtain relief

for the removal of the conditions imposed by the developer as contained in the title deed of each unit in the Sectional Title Scheme, and to replace the same with conditions imposed by the Body Corporate. He was also authorized to obtain an interdict relating to parking rights. He describes that Applicant's Management Rules were amended in terms of the provisions of s. 10 of the ***Sectional Title Scheme Management Act 8 of 2011*** which provides for such, subject to the approval of the Chief Ombud. No approval of the Chief Ombud is annexed to the Founding Affidavit. These management rules were amended by a vote of 84.5% of homeowners calculated both in value and in number on 29 July 2017. The point being made in the Founding Affidavit in this context is that the Amended Management Rules of 2017, (even absent the consent of the Chief Ombud), is in line with the present functioning and administration of the Applicant, and therefore the conditions contained in the title deeds were obsolete.

[10] As far as the interdict concerning the parking issue is concerned, it was merely stated that the Applicant and owners would suffer irreparable harm in the event that the First Respondent exercises certain rights pertaining to parking on the common property. The requirements for a final interdict from the point of view of any individual owner of a unit were not dealt with.

[11] In the Replying Affidavit, reference is made to the Minutes of the Annual General Meeting held on 29 July 2017. I have referred to the fact that a quorum of 84.5% was present in person and by proxy. As regards the proposed changes to the existing Management Rules it was stated that a unanimous resolution was required for these changes to be made with reference s. 10 (a) of the said ***Sectional Title Scheme Management Act***. In the context of *locus standi* of the Applicant, I was referred to the following clause under par. 10 of these Minutes: "These changes will be the first step to get the Rules in line with the current management of Glevera and in line with the ***Sectional Titles Scheme Management Act*** and to change the Title Deeds

of each unit to delete the 8% of the re-sell price payment to the developer and the 2% of the re-sell price to Glevera Home Body Corporate". It further appears that after voting the proposed amendments to the Management Rules were unanimously approved. That means that some 15% of the present owners of units did not consent to the changes sought in respect of their own Title Deeds, even assuming that those Minutes introduced in the Replying Affidavit conferred *locus standi* on Applicant.

[12] Nothing else is said about the *locus standi* of the Applicant in these proceedings in the Founding Affidavit. In particular, no reference is made to any of the following:

1. Details of the individual owners pertaining to their ability or inability, to themselves launch relevant proceedings in their own names;
2. Any reasons why they cannot represent themselves;
3. Any debate at all about public policy considerations, and any debate at all as to why some 15% of the owners should be bound merely by a majority

decision on a topic or aspect that pertains to their own rights of ownership and the exercise of such rights.

[13] As said, the First Respondent raised the point *in limine* relating to Applicant's *locus standi* on the following basis:

1. First Respondent was a "developer" as defined in the context of the provisions of s. 2 (7) (e) of the said ***Act*** 8 of 2011, a "special resolution" as defined, was required. During argument however it was conceded that First Respondent was no longer a developer.
2. If the Minutes of the Annual General Meeting held on 29 July 2017 conferred *locus standi* on Applicant, not all the owners consented to the change in their own Title Deeds as required by common law.

The Replying Affidavit:

[14] I have mentioned that the Minutes of the meeting held on 29 July 2017 were annexed. It was further stated that the Applicant is liable for the facilities in the

Sectional Title Scheme that is contemplated in s. 2 (7) (c) of the ***Sectional Titles Scheme Management Act 8 of 2011*** and in that regard it was submitted that the Applicant was the owner of the facilities and the common areas, and that the Applicant was therefore the only instance that could calculate levies in respect of those, and decide how these levies would be raised. With reference to First Respondent's attempt to make out a case in the Answering Affidavit that it was entitled to recover certain costs through particular conditions contained in the Title Deeds, it was now stated that this was not allowed by the ***Sectional Titles Scheme Management Act 8 of 2011,*** nor the ***Older Persons Act 13 of 2006***, nor the ***Housing Development Schemes For Retired Persons Act 65 of 1988***, nor any other relevant ***Act*** or law. Such condition in the Title Deed was therefore unlawful and unreasonable, and the Applicant had an obligation to bring this application to prevent further impropriety. This fell squarely under the said provisions of s. 2 (7) (c) of the ***2011 Act***. It is clear that this was the first time that these considerations relating to the mentioned Statutes were raised in the affidavits,

especially the reference to the ***Older Persons Act of 2006.*** An "older person" is defined as a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older. From the affidavits one cannot glean what the age of the owners of the units is. It is clear from s. 3 of the ***Act*** relating to its implementation, that it must be implemented by all organs of State rendering services to older persons. The Applicant is obviously not an organ of State. Inasmuch as this ***Act*** is however applicable to the present proceedings, Applicant did not rely upon any identifiable section thereof, or even mention it in the Founding Affidavit, and that issue was therefore obviously not addressed in the Answering Affidavit. It is therefore difficult to glean, upon a mere reading of the ***Act***, on which basis it would provide the Applicant with *locus standi* to delete conditions in Title Deeds on behalf of individual owners of units who did not all consent thereto, for whatever reason. Mere age can obviously not be a factor in this context.

Applicant's argument regarding *locus standi*:

[15] Mr Venter on behalf of Applicant firstly argued that having regard to the definition of "developer" in s. 2 (7) (e) of the ***1986 Act***, it is clear that First Respondent was not a developer anymore in that any s. 25 right, as he put it, had lapsed. He was merely the owner of a unit in the Scheme. He also argued that more than 75% of owners were present at the relevant Annual General Meeting, and that in any event 75% approval was not required inasmuch as s. 2 (7) of the ***Act*** authorized the Body Corporate to litigate in its own name. I have already mentioned that First Respondent does not rely on any right as a "developer" so defined.

When asked where the consent of all of the owners of the unit appeared, as required by the common law authorities that I have mentioned, I was referred to the decision in ***Linvestment CC v Hammersley and Another 2008 (3) SA 283 SCA at par. 31***. The issue in that appeal was whether the owner of a servient tenement could, of his own volition, change the route of a defined right of way registered against the Title Deeds of his property. It is clear from that paragraph that the Court was of the view that the interests of justice

required a change in our established order on the particular subject. It was said that "the alleged enforcement of a servitude when the sanctity of the contract or strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on one of them, seems to be indefensible. Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must be now satisfied in a different environment. ... Why should a present owner on no rational ground, be entitled to rely on his *summum ius* derived from the alleged sanctity of a contract or a grant of prescriptive acquisition to which he was not privy. Properly regulated flexibility will not set an unhealthy precedent or encourage abuse. Nor will it cheapen the value of a registered title or prejudice a third party". It was ultimately held in line with international legal development of an extensive nature in this respect, and in the circumstances falling within the problem posed by the stated case before the Court, that the law be developed to ensure that injustice would not result. It is however clear from the facts of the case that it is to be distinguished from the present facts in a number of material respects:

1. The relevant conditions sought to be deleted were agreed to between the developer and the purchaser of each unit.

2. The payment of 2% of the selling price of each unit resold would be for the benefit of the Body Corporate. It appears from the Replying Affidavit that the value of a unit varied from R750 000 in 2012, to R1.1 million in February 2013 by way of example, probably depending on the size of the unit. Unit number 86 was for instance transferred twice between April 2012 and September 2014, once for about R580 000 and on the second occasion for R800 000.

3. In the present proceedings, the Court was also not asked to develop the common law on grounds which had to be specifically stated in my opinion, and therefore this whole topic was not dealt with in the affidavits.

[16] Before a Court proceeds to develop the common law, it must determine exactly what such is, consider the underlying reasons for it, and enquire whether it offends anything contained in the ***Bill of Rights*** and thus requires

development. The Court must then also consider how it is to be developed and take into account any wider consequences.

See: ***Mighty Solutions v Engen Petroleum 2016 (1) SA 621 CC at par. 39.***

On the present facts, I deem it wholly inadvisable and in fact wrong not to follow the decisions that I have mentioned, which require that consent of all of the owners of the relevant units in this particular case be obtained. Mr Venter further relied on public policy considerations in this context when asked on which basis I should not follow the authorities that I have mentioned. In his submission, the public policy considerations were that contractual terms would now exist in perpetuity and be rigidly enforced for the benefit of one party. On the facts as I have said, it is not so, having regard to the 2% payment to the Body Corporate which is in many instances obviously quite substantial. He added that in this instance the Body Corporate was acting in terms of the provisions of s. 5 (2) of the ***Older Persons Act*** which stated that the rights of older persons must be protected however subject to any lawful limitation. As I have said, I do not even know the ages of the owners of the units in this

particular case, nor why each particular owner cannot protect his own interest if so advised. The limitation was imposed by contract when the unit was purchased, and by itself is not unlawful. Mr Venter also referred me to the decision of ***Barkhuizen v Napier 2007 (5) SA 323 CC at par. 29***. The appeal concerned the constitutionality of a time-limitation clause in a short term insurance policy which clause was obviously inserted into the particular policy document unilaterally. In par. 29 the following was said: "What public policy is and whether a term in the contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the ***Bill of Rights***. Thus a term in the contract that is inimical to the values enshrined in our ***Constitution*** is contrary to public policy and is, therefore, unenforceable". Mr Venter did not rely on any specific right in the ***Bill of Rights*** contained in the ***Constitution***, but on the ***Older Persons Act*** as I have said. His ultimate submission by way of a conclusion was that although there was no consent by

all persons to the deletion of the restrictive clauses, such clauses were against public policy and could therefore be deleted.

[17] As I have attempted to point out, this is not their case pleaded by the Applicant in the Founding Affidavit. Neither the topic relating to public policy considerations, nor the applicability of the ***Older Persons Act,*** as granting *locus standi,* was ever relied upon in the Founding Affidavit. No mention was made in the Founding Affidavit that owners as a whole, or certain owners or individual owners, were so disadvantaged that they could not exercise their own rights as owners in this context, and that the Body Corporate was therefore by way of necessity almost, entitled to exercise their property rights on their behalf. It also did not matter whether the First Respondent was a developer or not, in that he was an owner of a unit and objected to the deletion of the particular clauses. I agree with Mr Van der Berg on behalf of the First and Third Respondents that on the present facts, I cannot rely merely on vague public policy considerations, ignore the common law decisions that I

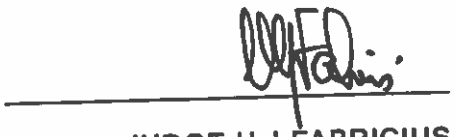
have mentioned, and ignore the rights of owners and those of the First Respondent. I agree with his submission that what the Applicant required from me, only during argument however, was that I create new law based on public policy considerations, merely to provide the Body Corporate with *locus standi,* when no case was made out why the individual owners could not act in their own name on the present facts. I agree that it would not be proper to do so and, otherwise than in other proceedings before me in the past, there was no prayer that I develop common law in this context as provided for by the provisions of s. 8 (3) of the ***Constitution***.

[18] Having regard to all of the above considerations, arguments and authorities, I am in agreement with the arguments presented on behalf of the First and Third Respondents that the Applicant has no *locus standi* in these proceedings. Lastly, useful reference can be made to the decision of ***Bredenkamp v Standard Bank 2010 (4) SA 468 SCA at 477 to 478***, where certain of the considerations referred to in the ***Barkhuizen*** decision *supra*,

were discussed. One such a material consideration appears, as I have said, in par. 29 where the important fact was noted that the Court had not been asked to develop the common law. Quite apart from that, there is no reliance on any right contained in the ***Bill of Rights*** as I have said, nor was it stated in the Founding Affidavit what the deficiencies in the common law were that needed to be developed, and how and to which extent, it had to be developed merely to protect the alleged rights of one litigant. In my view, these types of considerations cannot simply be presented to a Court during argument. They have to be fully and properly pleaded. They are not merely points of law that could justifiably be varied and debated during legal argument on the basis that a proper and sufficient basis had been laid for such in the pleadings/affidavits.

[19] The result is the following:

The application is dismissed with costs.



JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 12490/2018

On behalf of the Applicant: Adv P. A Venter

Instructed by: Vogel Inc.

Counsel for the 1st & 3rd Respondents: Adv J. P. van den Berg

Instructed by: VZLR Inc.

Date of Hearing: 31 October 2019

Date of Judgment: 8 November 2019 at 10:00