



Republic of South Africa

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

Case number: 8175/2020

Before: The Hon. Mr Justice Binns-Ward

Hearing: 11 March 2021

Judgment: 15 March 2021

In the matter between:

RACING PARK DEVELOPMENT OWNERS' ASSOCIATION

Plaintiff

and

CAPE KILLARNEY PROPERTY INVESTMENTS (PTY) LTD

First Defendant

HOUSING DEVELOPMENT AGENCY

Second Defendant

JUDGMENT

**(Delivered by email to the parties' legal representatives and by release to SAFLII.
The judgment shall be deemed to have been handed down at 10h00 on
15 March 2021.)**

[1] This matter concerns an application by the plaintiff to amend its particulars of claim. The application was opposed by the first defendant.

[2] The plaintiff, which is a property owners' association constituted in terms of s 29 of the (since repealed) Land Use Planning Ordinance 15 of 1985 by virtue of a condition of subdivision imposed in terms of s 42 of the Ordinance, instituted action against the first defendant, which was the developer of the subdivided land, claiming the following relief:

1. An order declaring the transfer of Erven 35163 -3574 Milnerton, Erf 35148 Milnerton and Erf 38368 Milnerton on 8 February 2019 to be contrary to the Plaintiff's Constitution and the title deeds of the Erven and (sic) invalid;
2. An order directing the First and Second Defendants to take all steps necessary to reverse the transfer of Erven 35163 -3574 Milnerton, Erf 35148 Milnerton and Erf 38368 Milnerton to the Second Defendant;
3. Costs of suit;
4. Further and/or alternative relief.

The development in issue exists on formerly agricultural land that was subdivided at the instance of the first defendant for development as an industrial estate.

[3] The second defendant, which is a national public entity established as a juristic person in terms of s 3(1) of the Housing Development Agency Act 23 of 2008, purchased part of the subdivided land from the first defendant and took registered transfer thereof. It is reportedly currently engaged in the process of applying for the rezoning of such land for housing development.

[4] The substantive allegations in the plaintiff's original particulars of claim go as follows:

4. The plaintiff was established when Cape Farm no. 215 "Doornbach" at Potsdam Road in Cape Town was subdivided for the purposes of developing an industrial park. The plaintiff has a Constitution, a copy of which is attached marked "**POC1**".
5. The First Defendant was the developer of the industrial park and remains an owner of erven within it.
6. In terms of the Plaintiff's Constitution:
 - 6.1 membership of the plaintiff is compulsory for every registered owner of an erf in the development; and
 - 6.2 a member is not entitled to sell or transfer an erf within the park unless it has first obtained the Plaintiff's written consent.
7. In terms of the title deeds in respect of all of the Erven in the park:
 - 7.1 no erf shall be transferred without the written consent of the plaintiff.

8. In or about August 2019, the First Defendant sold Erven 35163 -3574 Milnerton, Erf 35148 Milnerton and Erf 38368 Milnerton to the Second Defendant without the Plaintiff's written consent.
9. On 28 September 2018, also without the written consent of the Plaintiff, the First Defendant signed a power of attorney pursuant to which transfer of above erven to the Second Defendant was registered on 8 February 2019.
10. The title deeds to the above erven are attached and marked "**POC2**".
11. Given that the transfer of the above Erven to the Second Defendant occurred without the written consent of the Plaintiff, it is entitled to a declaration that such transfers were done contrary to the Plaintiff's Constitution and the title deeds applicable to the Erven and are invalid and, further, to an order directing the Defendants to take all steps necessary to reverse the transfers.

[5] The first defendant delivered a notice of exception to the particulars of claim. The plaintiff reacted to the notice of exception by giving notice, in terms of rule 28, of its intention to amend the particulars of claim in the following respects:

1. By adding the following at the end of paragraph 5:

'... and is, as such, bound by its Constitution.'

2. By deleting paragraph 7 thereof.
3. By replacing paragraphs 9 – 11 thereof with the following paragraphs:

*'On or about 30 November 2018, Mr Morris Rubin, apparently representing the First Defendant, signed a consent and acceptance of conditions, purportedly on behalf of the Plaintiff, to allow for the transfer of the above erven to the Second Defendant. A copy of the purported consent and acceptance of conditions are (sic) attached and marked "**POC 2**" and "**POC3**".*

To the knowledge of both Mr Rubin and the First Defendant, neither of them was authorised to sign the consent and acceptance of conditions, alternatively, neither Mr Rubin nor the First Defendant could honestly have believed that they were authorised to sign the consent and acceptance of conditions.

In signing the consent and acceptance of conditions under these circumstances, Mr Rubin and the First Defendant acted fraudulently and with the intention to induce the Registrar of Deeds to register the transfer of the above erven to the Second Defendant.

*The Registrar of Deeds was so induced and, on 8 February 2019, transfer of the above erven was registered. A copy of the Deed of Transfer is attached and marked "**POC4**".*

By reason of the fraudulent conduct described above, the plaintiff is entitled to seek an order reversing the transfer to the second defendant of Erven 35163 -3574 Milnerton, Erf 35148 Milnerton and Erf 38368 Milnerton.'

6. By deleting prayer 1 thereof (sic).

The application currently before the court was brought after the first defendant indicated that it objected to the proposed amendment.

[6] The ‘consent’ and ‘acceptance of conditions’ referred to in the passages quoted above are concerned with clause 5.5 of the plaintiff’s constitution, which provides as follows:

A member shall not be entitled to:

5.5.1 sell or transfer an erf unless it is a condition of the sale and transfer that:

5.5.1.1 the transferee agrees in writing to become a member of the Association and to be bound by the provisions of this constitution;

5.5.1.2 the registration of transfer of that erf into the name of the transferee show ipso facto constitute the transferee as a member of the Association;

5.5.1.3 the member first obtains the written consent of the Association which consent shall be given provided the transferee of such erf agrees in writing to become a member of the Association and to be bound by the constitution of the Association and provided further that the member has paid all levies and any other amounts owing by such member (where applicable) in terms of this constitution as at the date of registration of transfer of the earth to the transferee.

[7] It is evident from the tenor of the proposed amended particulars of claim that the plaintiff appears to contend that the mere occurrence of the alleged misrepresentation by Mr Rubin or the first defendant resulted ipso facto in the consequent transfer of the erven to the second defendant being vitiable at its instance.

[8] The affidavits exchanged in the current application indicate that there is a dispute concerning whether the first defendant had been entitled to make the representations that it did to the registrar of deeds. The dispute is centred on whether or not there had been an effective amendment of the plaintiff’s constitution to take away the originally built-in paramountcy of the developer in the Association’s decision-making processes. It would obviously not be appropriate to purport to determine that dispute in the context of considering the proposed amendment of the plaintiff’s particulars of claim and I shall accordingly proceed on the assumption, without making any finding to that effect, that Mr Rubin or the first defendant did wittingly mispresent to the registrar that the plaintiff had consented to the transfer of the erven to the second defendant. It bears noting, however, that it has not been alleged that the second defendant was in any manner party to the alleged fraud or that it has done the plaintiff any wrong.

[9] The first defendant submits that the claim that the plaintiff seeks to advance in the proposed amended particulars of claim is not a viable claim. It points out that the levies and

other amounts due by it to the plaintiff had been paid when transfer of the properties was effected, and that the second defendant has been discharging its obligation as a member of the plaintiff association by the paying the Association's levies on the erven since it took transfer of them. It also points out that, in terms of clause 3.1 of the deed of sale concluded between itself and the second defendant, the erven were sold subject to all the conditions mentioned in the title deeds and 'subject to all such other conditions ... as may exist in regard thereto, including the provisions of any applicable town planning scheme'. The first defendant drew attention to the fact that the approval of the subdivision in accordance with general plan 5491/2006 was subject to the condition that the erven therein not be transferred without the written consent of the owners' association of which the transferee and its successors in title would become a member. It contends, and I did not understand the plaintiff to assert anything to the contrary, that, having regard to the provisions of clause 5.5.1.3 of its constitution, the plaintiff would therefore not have been entitled to withhold consent for the transfers. It follows, so contends the first defendant, that the plaintiff has not sustained cognisable harm as a consequence of the alleged misrepresentation and no practical object would be served by granting the plaintiff the relief it seeks in terms of the proposed amended particulars of claim; for any reversal of the transfer would have to be followed by a fresh transfer.

[10] The first defendant avers that the action is not bona fide and that the reversal of the transfer of the erven to the second defendant is being sought for an ulterior purpose, namely, to collapse the latter's pending application to the local authority for the rezoning of the acquired property; for it is only its registered ownership of the property that gives the second defendant standing to make the application. It does not appear to be disputed that the plaintiff association is in fact opposed to the second defendant's rezoning application.

[11] As I understood his argument, Mr *Melunsky* SC, who appeared for the first defendant, submitted that a viable claim was not made out in the proposed amended particulars of claim because it lacked any allegation that the plaintiff's situation had been adversely affected by the alleged fraud and also failed to contain any allegation that might sustain the conclusion that the transfers were voidable merely by reason of the alleged misrepresentations. (It bears stressing in this regard that this is *not* a case of one party to a contract alleging that it was induced to enter into the agreement by the fraudulent misrepresentation of the other party.) The essence of the argument, as I understood it, was that the proposed amended particulars of

claim failed to show that any right of the plaintiff had been affected in a manner that would justify the remedy that is sought.

[12] Counsel referred, in support of his argument, to the Constitutional Court's judgment in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28 (29 November 2012); 2013 (3) BCLR 251 (CC), in which it was held that an 'own interest' (as distinct from class interest) litigant has 'no broad or unqualified capacity to litigate against illegalities. Something more must be shown'.¹ Mr *Melunsky* acknowledged that *Giant Concerts* concerned a question of the litigant's standing to challenge an administrative decision under the Promotion of Administrative Justice Act 3 of 2000, but he argued that the principle underpinning the Court's reasoning was equally applicable in the current case; namely, that the courts should not be required to deal with abstract or hypothetical issues,² or matters in which the claimant did not demonstrate 'sufficient interest' in the relief sought. He contended that that principle was of general application.

[13] Mr *Melunsky's* argument was well made in my judgment. Indeed, the reasoning in *Giant Concerts* that he sought to apply was made in the context of an observation by the Court in that case that 'constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct'. Standing in the current case, which is own-interest litigation in a private law context, would, on the basis of the aforementioned observation, fall to be assessed less generously than it would be in constitutional own-interest litigation.

[14] The following summary of principle by Cameron J in para 41 of his judgment in *Giant Concerts* is plainly of general application:

...

5. Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.
6. Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed.

¹ In para 35.

² Cf. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) in para 165 (cited in *Giant Concerts* in para 37).

(Footnotes omitted.)

[15] The nature of the relief sought by the plaintiff in terms of the amended particulars of claim is interdictory in character. The plaintiff seeks a mandatory interdict against the defendants; a remedy where positive conduct on the part of an alleged wrongdoer is required to terminate continuing wrongfulness.³ Recognition of the legal character of the remedy brings to mind Innes CJ's famous analysis, often cited in connection with questions of standing,⁴ in *Dalrymple and Others v Colonial Treasurer* 1910 TS 372. The learned chief justice explained that, in addition to proving the infringement of a right, it was necessary, in order to obtain interdictory relief, also to establish 'an injury sustained and continuing or apprehended'. He illustrated how the incidence of that principle 'runs through the whole of our jurisprudence', observing further '[i]t is not confined merely to the civil side: it is of equal force in regard to criminal procedure. Just as no man can claim damages in a civil action unless he has himself been injured, so no man may institute a private prosecution unless he has been specially affected by the crime. And the rule applies to wrongful acts, which affect the public, as well as to torts committed against private individuals'. The same goes for a case based on fraudulent misrepresentation. Unless resultant prejudice, actual or potential, can be shown by the claimant, there is no viable basis to prosecute it.

[16] The plaintiff's proposed amended particulars of claim allege the infringement of a right, but they do not contain any allegation of resultant harm. And certainly not any that would support the interdictory relief prayed for.

[17] In the result, the application is dismissed with costs.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Plaintiff's counsel:

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³ Cf. *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at para 159.

⁴ Cf. e.g. *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124 (26 September 2018); 2019 (3) SA 451 (SCA) in para 7-8.

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