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

Case Number: 10257 / 2022

In the matter between:

HUNTERS VALLEY HOMEOWNERS' ASSOCIATION **Applicant**

and

EQUESTRIAN VALLEY (PTY) LTD **First Respondent**

CITY OF CAPE TOWN **Second Respondent**

Coram: Wille, J

Heard: 7 March 2023

Delivered: 11 April 2023

JUDGMENT

WILLE, J:

Introduction:

[1] This is an application in which the applicant seeks an order compelling the first respondent to comply with specific conditions of the sub-division concerning certain farmland.[1] This development consisted of twenty-four erven. The first respondent was the developer of this farmland. The applicant is the homeowners' association to this development.

[2] The applicant seeks compliance with the alleged conditions regarding the potable water supply and the provision of sewerage treatment and a disposal

[1] The 'conditions of subdivision' of Cape Farm 1373 - Rondeberg- (the 'development').

facility. The second respondent takes no part in these proceedings and abides by the court's decision.

Overview:

[3] It is the first respondent's case that it has complied with the conditions of the sub-division as evidenced by the compliance certificate issued by the second respondent.[2] Following such compliance, the first respondent has sold and transferred twenty-two of the twenty-four units in this development.

[4] The applicant's case is that the first respondent's duties and obligations relating to the provision of potable water and the sewerage system endured, notwithstanding the compliance certificate issued by the second respondent. This argument is raised some fifteen years since the water and sewerage systems were installed and nearly fourteen years after the compliance certificate was issued to the first respondent by the second respondent.

[5] Thus, the first respondent argues that any issues about the development's potable water and sewerage system can be solely attributed to poor maintenance by the applicant. It seems to be a common cause that this maintenance is the applicant's responsibility. Further, it is the first respondent's case that the application raises material disputes of fact between the parties, which the applicant should have anticipated, and cannot be resolved through an application procedure.

Consideration:

[6] The first respondent's core defence is that it has complied with its obligations regarding the provision of potable water and the sewerage system as required by the conditions of the sub-division. In support of this, the first respondent relies, among other things, on the compliance certificate issued by the second respondent.[3] The first respondent advances that the applicant misinterprets the meaning and effect of the compliance certificate.

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[2] On 28 May 2009.
[3] Issued in 2009.

[7] The second respondent recently, by way of a letter, clarified its position regarding the compliance certificate and confirmed compliance with the conditions of subdivision relating to the provision of potable water and the sewerage system. Their letter indicated that the consultant (at that time) had provided the second respondent with the confirmation that the water and sewer services were installed, which the second respondent accepted regarding all of the twenty-four erven.

[8] In addition, the court was invited to scrutinize the actual wording of the conditions of the sub-division and the compliance certificate. The wording references an adequate water supply to the second respondent's acceptance. The argument goes that the second respondent accepted the adequacy of the potable water supply when it issued the compliance certificate to the first respondent.

[9] A similar argument was advanced in connection with the sewerage system. It is the first respondent’s case that the compliance certificate confirms that the second respondent approved the first respondent’s fulfilment of its obligations regarding the sewerage system. They say this is why rates clearance certificates were issued for twenty-two of the twenty-four units in the development.

[10] By elaboration, the argument is advanced that because most of the development’s units have been transferred and registered, it can only mean that the requirements for potable water and sewerage were met before those transfers were registered. A control sheet kept at the instance of the second respondent features in these proceedings. The control sheet attached to the compliance certificate specifies that the requirements concerning: (a) the water services; (b) the sewerage, and (c) the solid waste had been complied with by the first respondent. The applicant argues that the approval under the compliance certificate was temporary and subject to final approval regarding the last remaining units in the development.

[11] If this argument were to be upheld, it would mean, among other things, that the first respondent would have to continually comply with the conditions of the sub-division even after the signing-off by the second respondent.

[12] This is in circumstances where the first respondent was obliged to comply with its obligations regarding potable water and sewerage before the transfer of any of the units in the development. As a matter of pure logic, these obligations could not have been temporary and endured to the detriment of the first respondent to the extent contended for by the applicant.

[13] Thus, the first respondent contends that if any problems currently exist with the adequacy of the potable water and the sewerage system, it is due to the applicant failing with its maintenance obligations imposed, among other things, by the constitution governing the applicant. On this, I agree.

[14] In addition, the applicant makes much of the fact that the first respondent has been involved in the maintenance of the water and sewerage systems at the development over several years since the issue of the certificate of compliance.

[15] The first respondent argues that this may be so, but this cannot be construed as creating any legal obligation on the first respondent to do so. On this, I also agree. Besides, the applicant seeks relief for compliance with the conditions of the sub-division concerning the provision of potable water and the sewerage system.

[16] After the issuing of the compliance certificate, the applicant's maintenance obligations in respect of the development came into being, including the maintenance of the potable water and the sewerage system. This is how practically most developments work. These obligations were created by the conditions of the sub-division and are in line with the constitutional imperatives of the development, which imposed wide-ranging additional obligations on the applicant.

[17] To the extent that the development's water supply and sewerage system deteriorated, it is argued by the first respondent that this is attributed to the applicant and its members not adequately maintaining such systems as required. Of some significance to me are the delays at the instance of the applicant. These are: (a) thirteen years have passed since the compliance certificate was issued, and (b) fifteen years have passed since the water and sewerage systems were installed before raising the alleged non-compliance. In addition, the applicant has relied on historical water quality tests to support its case in the application.

[18] The first respondent argues that this indicates that the applicant knew that any problems with the potable water and sewerage systems were of its own making in failing to maintain same properly. By elaboration, it is contended that the applicant has accordingly failed to prove on a balance of probabilities, facts, which in terms of substantive law, establish the right relied upon.[4] On this, I also agree. To attempt to bolster their argument, the applicant seemingly primarily relies on the fact that the first respondent is still required to and has yet to be able to obtain approval for the transfer of the remaining two units in the development.

[19] This may be so, but this need for further approval is separate from the alleged first respondent's duties to provide potable water and a sewerage system. This latter approval was signed-off and given more than a decade ago. The argument goes that the first respondent's application for clearance regarding the last two units in the development triggered this application.

[20] The applicant contends that a damages claim in due course will not afford it with the protection it seeks at this moment in time. However, it is evident from the papers that the applicant's application for final clearance is inextricably linked to issues relating to streetlighting and has no bearing on the water or sewerage issues.

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[4] *Fairhaven Country Estate (Pty) Ltd v Harris* 2015 3 All SA 618 (WCC).

[21] Moreover, numerous disputes of fact arise from the papers presented in this matter. This bears further scrutiny. It is hotly disputed whether or not the first respondent has complied with the conditions of the sub-division. This is even though a compliance certificate has been issued to the first respondent. The applicant concedes to some of the disputes contended for by the first respondent, but advances that the first respondent failed to answer most of the applicant's allegations, alternatively, has supplied untenable answers.

[22] However, upon analysis, the first respondent's version does not amount to an uncreditworthy denial. I say this because the first respondent submits that it has complied with its duties as required by the conditions of the sub-division. This shield is supported by documentation, most notably the compliance certificate issued by the second respondent to the first respondent. The compliance certificate stands, and the applicant has not sought to review the legality or otherwise of the compliance certificate.

[23] The first respondent's allegation that it has complied with the conditions of subdivision in the circumstances can hardly be described as untenable. Thus, our jurisprudence dictates that a final order cannot be granted in these circumstances. The applicant denies that it could have anticipated the disputes of fact arising in this unfortunate matter. This is against the canvass of the compliance certificate issued by the second respondent more than a decade ago. In addition, the applicant has not requested any referral to oral evidence on any of the alleged disputes of fact.

[24] Suppose there is no request for the hearing of oral evidence. In that case, a final order may only be granted if the facts, as stated by the respondent and the facts alleged by the applicant, that are admitted facts by the respondent, justify such an order.[5]

[25] No doubt there are exceptions to this rule or principle. Notably, a court may be satisfied that the respondent's version consists of bald or uncreditworthy

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[5] *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235.

denials, raising fictitious disputes of fact, or is so far-fetched, clearly untenable, or palpably implausible to warrant its rejection merely on the papers.[6] It is undesirable for a court to order a referral to oral evidence to resolve a dispute of fact of its own volition. Instead, this avenue should be sought through an application.[7]

[26] In addition, I am enjoined to dismiss an application if the applicant should have realized when launching the application that a dispute of fact, incapable of resolution on the papers, was bound to develop.[8] However, as alluded to earlier, the applicant has not requested that the matter be referred to oral evidence and has persisted with the contention that no material disputes of fact are present in the presented application.

[27] It would be remiss of me not to mention several interlocutory skirmishes between the applicant and the first respondent. Most of these skirmishes were resolved by the most likeable counsel for the parties, save for the issue in connection with specific expert evidence and some correspondence in addition to that. The first respondent argued that it will be prejudiced if such evidence is permitted because the first respondent has yet to have an opportunity to engage its expert to challenge the findings of the applicant's expert.

[28] This argument may be valid, but nothing material turns on these findings as they do not take the matter further. I say this because they were prepared years after the first respondent had complied with its obligations in terms of the conditions of the sub-division and are, in addition, now primarily historical.

[29] Finally, the applicant raises a constitutional argument. The applicant relies on alleged constitutional rights to dignity, a safe environment and sufficient food and water. The first respondent squarely denies this and submits that the applicant, in any event, has failed to follow the correct procedure required to

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[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C.
[7] *Joh-Air (Pty) Ltd v Rudman 1980 (2) SA 420 (T)* at 428–9.
[8] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 & 1168.

raise the constitutional issue. No procedural notices were filed in this connection. Accordingly, I believe this was merely a belated afterthought by the applicant to bolster its case in advancing an explicit right to support the relief for which it contends.

Obiter:

[30] The applicant submitted that the first respondent's obligations concerning the development were premised upon a strict interpretation and compliance with a Municipal Planning By-Law.[9] This subordinate legislation seems to have been promulgated a few days before the Spatial Planning and Land Use Management Act.[10] The latter came into operation on 1 July 2015. The subordinate legislation was promulgated on 29 June 2015.

[31] This notwithstanding, considering the various provisions in both these interventions, it is hard to discern how they will find application assuming that the compliance certificate was issued more than a decade ago under the then Land Use Planning Ordinance.[11]

Conclusion:

[32] For all these reasons, to be able to sell units in the development, the first respondent was required to comply with the conditions of subdivision imposed by the second respondent. This it did, and after the second respondent issued a compliance certificate, the first respondent proceeded to sell the vast majority of units in the development and transferred the same to their new owners. What remains is that the first respondent now wishes to obtain the necessary approvals from the second respondent to sell and transfer the last remaining units in the development.

[33] In my view, any issues in connection with certain streetlighting that may delay further approval do not affect the validity of the original sign-off of the

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[9] Section 35 of the Municipal Planning By-Law, 2015.
[10] Act 16 of 2013 ('SPLUMA').
[11] Act 15 of 1985 ('LUPO').

development's potable water and sewerage requirements following the compliance certificate issued by the second respondent to the first respondent.

Order:

[34] For all these reasons, the following order is granted, namely that:

1. The application is dismissed.

2. The applicant shall be liable for the costs of and incidental to this application (including the costs of the interlocutory applications) on the scale between party and party, as taxed or agreed upon.

E. D.WILLE

Cape Town