IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NO: 7689/2006

In the matter between:

KHYBER ROCK ESTATE EAST HOME OWNERS ASSOCIATION Applicant

and

09 OF ERF 823 WOODMEAD EXT 13 CC Respondent

JUDGMENT

SPILG AJ

1. On 18 May 2007, I granted the following order :

> *"1. The Respondent is interdicted from continuing any building construction work on the property, Unit 7 of Khyber Rock Estate East Development, until approval of the drawings for the proposed alterations and additions to its unit have been obtained from the trustees of the Applicant. The Respondent provides drawings of any proposed alterations and additions of the unit in compliance*
>
> *with the guidelines set out in the minutes of the meeting of the trustees of the Applicant dated 3 December 2005 in respect of the proposed alterations and additions at that unit, within two months of the date of this order.*
>
> *2. In the event of the Respondent failing to comply with the order set out in prayer 1, the Respondent shall demolish all construction work at the unit which had been executed during March and April 2006 to the extent that it exceeds the extent of the work described*

in the guidelines set out in the aforesaid minutes of 3 December 2005 and to remove the building materials and rubble caused by the demolition work.

3. The Respondent pays the costs of the application on the party and party scale, including the reserved costs of 7 April 2006 and 10 May 2006."

2. Here follow my reasons for granting the order.

3. The Applicant is a homeowner's association incorporated in terms of Section 21 of the Companies Act No. 61 of 1973. The Applicant acts through its trustees whose powers include the management and control of the business and affairs of the association.

4. The Respondent is a close corporation which owns one of the 12 freehold residential units within the cluster development. It has two members, one of whom, Ms Seymour, is a trustee of the Applicant.

5. Between October and November 2005, the Seymours proceeded to effect additions and alterations to their property. It is common cause that the Respondent did not obtain the prior approval of the Applicant's trustees to effect the work. This is in breach of Article 48 of the Memorandum of Association, which provides that no person shall "*… commence with the*

construction of any building or structure, or any additions or alterations thereto unless he has submitted to the Trustees, for examination and approval or refusal, such plans for such building, structure, alteration or addition as are required in terms of the By-Laws of the Local Authority having jurisdiction over the Township, and any such additional plan or information relating to the proposed building, structure, alteration or additions as the trustee may require".

6. The Respondent was notified of its failure to comply with Article 48 and was required to desist with its alterations. In response, on 1 November 2005, Ms Seymour indicated what they planned to construct but no drawings of the proposed alterations were submitted. On 14 November 2005, the Respondent advised that it proposed to add a second storey. All the other units are single storey residences. At a general meeting on 23 November 2005, Ms Seymour explained her reasons for the proposed alterations. The managing agent indicated to the meeting that in terms of the house rules, all 12 owners had to agree to any proposed building alteration whilst the Articles stated that any building alteration must be approved by the trustees, and that the Articles, being the Constitution of the homeowners association, would take precedence. It was resolved that the issue of the alterations would be resolved at a trustees meeting on 3 December 2005 which would be dedicated to considering the

Respondent's proposed plans.

7. At the meeting of 3 December 2005, the Respondent advised that its architect had still not finalised the drawings. Both members of the Respondent were present at the meeting as was the chair, vice chair and another trustee. The minute of the meeting indicates that there was agreement on acceptable guidelines for alterations to three of the walls. The minute of the meeting records that Ms Seymour agreed to provide to the trustees plans with clear specifications once approved by the municipality. This is disputed by the Respondent. For reasons which appear later, it is irrelevant whether the Seymours agreed to the Applicant's guidelines. They were bound by the decision taken.

8. In March 2006, the Seymours resumed with their building operations. The trustees contended that no drawings for the proposed alterations and additions had been submitted to them for approval and that the construction undertaken would not be in accordance with the guidelines set out at the meeting of 3 December 2005. As a consequence, the Applicant's attorneys addressed a letter to the Respondent on 3 March 2006 advising of the breach and that the Respondent should cease all building work and submit a full plan of the proposed alterations and additions to the trustees for approval. In reply, attorneys representing the Respondent advised that the Respondent would continue with the building

work based on drawings of the alterations and additions that were said to have been approved by the municipality and which it was alleged had been approved by members of the Applicant. The drawings bore the signature of some members of the Applicant.

9. It is however clear that the drawings approved by the municipality did not relate to the alterations that the Seymours were actually undertaking, nor intending to effect.

10. On 7 March 2006, the Respondent undertook to stop construction of the perimeter wall, to lodge approved building plans with the trustees and should approval not be forthcoming, to seek appropriate relief. There were a number of similar undertakings given by the Seymours during March 2006. However, despite these undertakings, the building work was resumed in early April. Prior to the resumption of building, the Respondent made formal written representations on 8 March 2006. The Seymours also lodged a set of plans stating that these were approved by the council. The document concluded that the Respondent sought the "…. *approval and/or comment of the trustees in terms of Rule 48".*

11. The drawings of the proposed alterations and additions were then submitted by the Applicant to an independent qualified architect. The architect also visited the cluster to familiarise himself with the complex and

the property concerned. The architect then submitted a written report containing his comments to the proposed alterations and additions together with his proposals. He stated that it was unclear from the plan what was still to be done, that the site development plan was in conflict with the house plan, that it was not possible to identify from the house plan what the Seymours proposed to build, that the plan was in any event inaccurate, and that in his opinion, the proposed structure was not in harmony aesthetically with the complex. The architect proposed that the Respondent should submit a proper and correct drawing and identify what other changes needed to be effected in order to be in conformity with the rest of the complex.

12. A formal response by the Applicant to the Respondent's representations was signed by the chair of the homeowners association on 14 March 2006 and was approved at a meeting on 15 March 2006. Mr and Ms Seymour were present at this meeting and were formally given the approved written response. The response was detailed and concluded by declining permission under Rule 48 as read with the house rules, requiring any building to be in conformity with the guidelines recorded in the minute of 3 December 2005, and requiring the demolition of construction that had already been completed.

13. On 24 March 2006, the Respondent's attorneys addressed a letter to the

Applicant contending that its decision to disallow the building plans was invalid for a number of reasons, which foreshadowed the defences raised in this application. The Respondent then appointed new attorneys who addressed a letter to the Applicant on 31 March 2006. The letter repeated the Respondent's averment that the objection to the building plans was invalid, called on the Applicant to comply with its own rules and advised that in the meantime the Respondent would proceed to complete the works in accordance with what it contended was the permission obtained on 3 December 2005 and that it "*… will suspend any building works that will violate this permission (i.e. of 3 December 2005) until your client had complied with its own rules and regulations within a reasonable time*".

14. At a special trustees meeting held on 4 April 2006, the trustees concurred that the works differed not only from the plans approved by council (and which had still not been approved by the homeowners association) but also differed from the terms of the agreement reached on 3 December 2005 where the guidelines were set out as to what would be acceptable. Ms Seymour could not attend this meeting. During the course of the meeting, doubt was expressed regarding the accuracy of certain measurements. The trustees then proceeded to the Seymours' residence and took physical measurements of the external areas and recorded their findings.

15. Pursuant to their inspection, the trustees unanimously decided that the

structure as it stood "… *severely defaces the aesthetics of the complex and that legal proceedings should be instituted"*. It was also decided that the entire structure was to be removed and that the Respondent follows the correct procedures as set out in the minute of 3 December 2005 before the trustees would permit any new construction.

16. The Applicant brought an urgent application and on 7 April 2006 an interim interdict was ordered by agreement between the parties. In terms of the order, the Respondent was interdicted from continuing building construction work pending the finalisation of the application.

17. The Respondent then filed its answering affidavit in which it contended that there were material disputes of fact which could not be resolved on affidavit, and in line with **Plascon-Evans Paints v Van Riebeeck Paints** 1984 (3) SA 63 (AD) at pages 634E – 635C argued that the Applicant could not demonstrate sufficient undisputed facts to support the relief sought.

18. The Respondent also contended that the Applicant, on its own version, had failed to comply with the proper procedures before it took the decision not to approve the building plans.

19. I will assume that the orders sought are of final effect and therefore the **Plascon-Evans** principle applies. Nonetheless, the Applicant was only

obliged to show that the Respondent had breached a rule governing the inter-relationship between homeowner members as determined by the Memorandum of Association and that the decision it had taken was one it could competently make.

20. The only dispute of fact that would be relevant is the contention that the signatures appended to the drawing by all but one of the trustees amounted to an acceptance by the trustees of the plans.

21. Mr Van Vuuren on behalf of the Applicant drew my attention to the case of **Hoosen & Others NNO v Deedat** 1999 (4) SA 425 (SCA) at paras 22 and 23. Whilst a neighbour may sign off a plan, this does not mean that he necessarily does so also in his official capacity. In order to sign off a plan in his official capacity, a trustee must properly inform himself of the issues which affect the complex as a whole and not simply have regard to his or her inter-personal relationship with the Respondent. In order to be properly informed, a trustee must ordinarily make a decision in committee with the benefit of debate. His decision must consciously have regard to the dictates of the Memorandum of Association and the long term interests of the members. Otherwise the trustee will have failed to apply his mind to all the relevant issues. Whilst it may be possible to impute acceptance by a person both in his individual and official capacity, this is not one of those cases. The circumstances of obtaining the signatures, the subsequent

conduct and the considerations that must weigh with a trustee when taking a decision in conformity with the Memorandum militates against the signatures amounting to consent by the trustees after deliberation as is implicit in Rule 48. It is unnecessary to then consider the question of whether the drawing itself as signed by neighbours was the one which the Respondent was utilising to effect the changes or whether the alterations and additions were being constructed in conformity with a municipal approved plan.

22. Once it is found that the Applicant through its trustees had not approved the plans and had reached the decision that the construction was not in accordance with what it had been prepared to approve, then it followed that the Respondent had breached a rule governing the inter-relationship between the residents as determined by the Memorandum. The Respondent was then obliged to make out a case which could support in law the setting aside of the trustees' decision. Such a case could only be formulated on one of the accepted grounds of review. No such case was made out. I set out my reasons in the following paragraphs for characterising the matter in this way and in reaching my conclusion.

23. The nature of the relationship established between homeowners (i.e members) in a townhouse complex under a Memorandum of Association to which each subscribes constitutes an agreement in terms of which each

homeowner submits contractually to the decisions of a body of elected trustees to whom they have conferred the right and power to make binding decisions on matters that affect their relationship inter se or which generally affects their complex.

24. The Memorandum of Association confers on the trustees a broad range of powers and duties for the orderly administration, control and good governance of the complex. This includes maintaining and preserving the specific character of the development. It is the characteristics of a cluster development that make it desirable. Those who buy into the complex not only have a legitimate expectation, but a right under the Memorandum, to insist on the retention of those characteristics. This is evidenced by a number of provisions.

25. Insofar as maintaining the character of the complex is concerned, the Applicant's Memorandum of Association empowers the trustees, subject to any restriction imposed or direction given at a general meeting, to make rules in regard to the "*… standards and guidelines for the architectural design of all buildings and outbuildings, structures of any nature and all additions and alterations to any such buildings, outbuildings or structures erected or to be erected in the Township, and in particular to control the design of the exterior of such buildings, outbuildings or structures in the*

materials and colours used on such exteriors to ensure an attractive, aesthetically pleasing character to all the buildings in the Township" (my emphasis).

26. The trustees also have similar powers to make rules in regard to the siting of all buildings, outbuildings, structures of any nature and all additions and alterations to them and to make rules in regard to the standards and guidelines for the design of all structures, including sidewalls.

27. In terms of Article 8.2, the trustees are empowered to take certain steps to enforce the rules so made. One of the powers is to institute legal proceedings for "*… the enforcement of any of the rights of the association*". (again my emphasis). I have already mentioned Articles 18 and 48 which relate to the approval of plans before any alterations or additions may be effected.

28. Moreover, under Article 46, the trustees may serve notice and take such steps as may be specified in the notice to remedy any steps taken by a member that has resulted in a home's appearance becoming unsightly.

29. In my view, a reading of the Memorandum indicates that the decisions of the trustees are intended to be binding on all. It is also evident that a constant challenging through courts of law of the trustees' decisions was

not envisaged. It would undermine the structure of the relationship which is founded on a balance between individual home ownership and the inter-dependent relationship necessitated by the communal structure of a cluster development. Unit members cannot be expected to fund litigation every time one of its members disagrees with a decision that is taken by the trustees which is within their powers. Secondly, trustees perform their functions voluntarily and are not obliged to be legally qualified. They are appointed as the peer group arbiter of what is acceptable within the framework of the Memorandum and the house rules.

30. The Memorandum, whether independently or considered against the realities of the composition of homeowners associations and the expectations of unit holders that the decisions of trustees be respected, impliedly envisages that the trustees' decisions are final and not subject to ordinary judicial challenge.

In this case, the homes in the cluster development were designed and constructed in the same way, painted in the same colour and provisions in the Memorandum of Association were clearly directed to maintaining the complex's existing characteristics and aesthetics. It was not intended that a court of law should involve itself in second guessing the appointed trustees of the homeowners.

31. In such cases, a Court will not interfere with the decision made by that body save under recognised grounds of judicial review as applied to voluntary associations whose members have bound themselves to its rules which include the conferring of decision-making functions on an elected body of trustees. See eg **Turner v Jockey Club of South Africa** 1974 (3) SA 645B – 647A; **SA Medical & Dental Council v McLoughlin** 1948 (2) SA 355 (AD) at 393, 406 and 410 and **Marlin v Durban Turf Club & Others** 1942 AD 112 at 125 – 126.

32. The grounds of judicial review are restricted to whether the tribunal was competent to make the decision and whether it complied with the requirements of procedural and substantive fairness which effectively is limited to whether the procedure or decision taken was tainted by irregularity or illegality - unfairness per se is not enough. See : **Bel Porto School Governing Body & Others v Premier, Western Cape & Another** 2002 (3) SA 265 (CC) at paras 85 to 87.

33. The traditional common law grounds of review of a voluntary association tribunal were said to include illegality, procedural unfairness and irrationality. Prior to the constitutional dispensation, the ambit of these (i.e. in respect of voluntary associations) had been settled in cases such as **Theron en Andere v Ring Van Wellington van die NG Sending Kerk in**

Suid-Afrika en Andere 1976 (2) SA 1 (A) at 10B-F, 14C - H and 20D – 21C and those which followed. See the reference to **Theron** in **Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others (Treatment Action Campaign & Another as *amici curiae*)** 2006 (2) SA 311 (CC) at para 104.

34. The Promotion of Administrative Justice Act No. 3 of 2000 in its terms applies to administrative action on the part of an organ of state or a juristic person exercising a public power or performing a public function. Accordingly, trustees of homeowners associations do not fall within the purview of PAJA. Nonetheless, Section 39(2) of the Constitution requires a Court, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights. PAJA is an expression of the provisions of Section 33 of the Constitution and is considered to be a codification of the grounds of review of public administrative bodies. See : **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others** 2004 (4) SA 490 (CC) at para 22.

In **Pharmaceutical Manufacturers Association of SA & Others : In re : Ex Parte application of President of the RSA & Others** 2000 (2) SALR 674 (CC) at para 45, the Court referred to administrative law and the Court's power of review as an incident of the separation of powers built on

constitutional principles. The Court however stated that : "*Even if the common-law constitutional principles continue to have application in matters not expressly dealt with by the Constitution (and that need not be decided in this case) the Constitution is the supreme law and the common law, insofar as it has any application, must be developed consistently with it, and subject to constitutional control*". In **Bato Star** at para 22, the Constitutional Court again commented that the "*… extent to which the common law remains relevant to administrative review will actually be developed on a case-by-case basis as the Courts interpret and apply the provisions of PAJA and the Constitution*". In **New Clicks** (above) at para 436, the Constitutional Court referred to the undesirability of developing two parallel systems of law relating to the judicial review of administrative action.

35. **Theron's** case had already confirmed that a reasonableness test based on rationality was a competent basis under the common law powers to review decisions of voluntary associations. c/f ***New Clicks*** at para 104. It seems to me then that the common law, in relation to voluntary associations, had already developed a ground of review that included unreasonableness, in the sense that the decision could not reasonably be supported by the evidence (see also **Prince v President of the Law Society, Cape of Good Hope & Others** 1998 (8) BCLR 976 (C) at p 994). There therefore

appears to be no difference in principle for present purposes between common law grounds of review in relation to voluntary associations and the grounds of review provided for in PAJA.

36. Accordingly and as I understand it, a Court will only interfere with the decision of the trustees of a homeowners association where that body has failed to comply with the natural justice requirements of legality, procedural fairness and reasonableness; the latter, in the sense of a rational connection existing between the facts presented and the considerations that were applied in reaching the conclusion. See : **New Clicks** (above) at para 104; **Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration** 2007 (1) SA 576 (SCA) at paras 29 to 32 and **Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa** 2004 (3) SA 346 (SCA) at para 20.

37. The Respondent has made out no case in law or fact that would found a basis for judicial review of the trustees' decision save for the argument that the trustees' deliberations were tainted with procedural irregularity. I proceed to deal with that issue.

38. The Respondent relies for its contentions on Article 18.4 of the Memorandum which requires that all plans for additions and alterations "…

shall be submitted by the Trustees to the architectural review committee and the trustees shall not approve any plan in terms of Article 48 below unless such plan shall first have been approved by the architectural review committee".

39. The architectural review committee is identified in Article 18.2 as a body comprising two trustees, such other members as the trustees may determine from time to time and, should the trustees regard this as necessary, a practising professional architect.

40. It was argued by Mr Ferreira that the failure to comply with these requirements was fatal to the application.

41. My principal difficulty with this submission is that if Article 18.4 is peremptory, then the Respondent is unable to proceed with any alterations until there has been compliance with its provisions. This is by reason of Article 48 to which I have already referred. Accordingly, if the Respondent is correct, then its relief is limited to compelling the trustees to appoint such a committee. The Respondent may not act in disregard of Article 48 read with 18.4.

42. In my view, the procedure that was in fact adopted by the trustees in coming to their decision is not fatal, even though it does not comply with

the provisions of Article 18.4. This is because the purpose of the appointment of an architectural review committee and the mischief it seeks to prevent was not compromised by the procedure that was in fact adopted.

43. The procedure that was adopted by the trustees met the exigencies which arose both because the Respondent had failed to submit plans timeously and because it was necessary for the trustees to set the guidelines as they were entitled to do. More significantly, the procedure that was adopted ensured that each of the objectives that underlie the establishment of an architectural review committee was respected.

44. I discern these objectives to be the following. Firstly, to facilitate the delegation by the trustees sitting in full committee of their functions to a smaller subcommittee which may engage an outside independent architect and to enable that person to have a direct say in the decision of the subcommittee before it is referred to the full board of trustees. Secondly, a dedicated architectural review committee better ensures that the plans will be carefully scrutinised and comprehensively appraised whereas the general body of trustees may not deliberate as carefully. Finally, it ensures that the role of those responsible for approving is clearly distinguished from any subjective personal relationship they may have with any particular homeowner when asked if they have any personal objections to proposed building plans. In this regard, whilst it is apparent that the

subcommittee does not have to be possessed of specialised knowledge (since the appointment of a qualified architect is a matter of discretion which may legitimately take into account cost implications to the members), the existence of such a subcommittee dedicated to consider as a panel any proposed building works emphasises the obligation to objectively ascertain whether or not the proposal complies with the provisions of the Memorandum and the house rules.

45. In the present case, each of these elements were satisfactorily provided for in the procedure actually adopted. An independent architect went through the plans and his documentation confirms that he gave careful consideration to them. He did not usurp the function of the trustees since he made no decision for them but only commented and made proposals. The documentation also reveals that before taking their decision and providing comprehensive reasons, the trustees carefully considered the relevant documentation, the representations of the Seymours and the comments and proposals of the architect. They also independently raised concerns which they then rationally addressed after taking measurements pursuant to an onsite inspection. Whilst it is correct that the Respondent sought and obtained individual signatures from neighbours, including from all but one of the elected trustees, this was effectively remedied, and had no adverse consequences for reasons I have already dealt with.

46. The legal principle is well settled that in the case of voluntary associations, and provided there is no public interest issue involved, strict compliance with all procedural rules is not required if the complaining party is not prejudiced. See : **Theron** (above) at p 31A and 44H to 45A, **Rajah & Rajah (Pty) Ltd & Others v Ventersdorp Municipality & Others** 1961 (4) SA 402 (A) at 407H to 408A subject to the public interest limitation confirmed in **National Union of Textile Workers v Textile Workers Industrial Union (SA) & Others** 1988 (1) SA 925 (A) at 940B-C. c/f also **Steenkamp NO v Provincial Tender Board, Eastern Cape** 2007 (3) SA 121 (CC) at para 60.

47. Whilst it is desirable for an architectural review committee to consider any plans which may be presented in pursuance of my order, I am satisfied that the non-appointment in the past was not prejudicial to the Respondent and therefore has no adverse legal consequences to the relief sought by the Applicant.

48. The Applicant sought costs on the scale as between attorney and client. This was not vigorously pursued in argument before me. The provisions of the Memorandum of Association entitle the Applicant to recover all costs that may be incurred in litigation on an attorney and client scale. The Court nonetheless retains a discretion.

49. Neither party characterised the issue as one that limited the Respondent's ability to contest the decision of the trustees to grounds of judicial review as explained in the *Jockey Club* cases to which I have referred. While the case of **Body Corporate of the Laguna Ridge Scheme No. 152/1987 v Dorse** 1999 (2) SA 512 (D) confirmed that in the case of sectional title units, the decision of the body corporate could only be challenged on established grounds of review as set out in **Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another** 1988 (3) SA 132 (A) at 152A-D, the Court was not asked to question its application as both parties accepted that the decision could only be challenged on grounds of review presumably by reason of the provisions of the prevailing Sectional Titles Act No. 95 of 1986 or its predecessor No. 66 of 1971.

50. I have not been able to find any case dealing with the status of a decision made by trustees of a homeowners association. I am therefore loathe to order costs in conformity with the provisions of the Memorandum of Association although I would not have hesitated to do so had there been direct authority. It ought not to be incumbent upon members of a cluster complex (whether it comprises a few units where the individual burden of attorney and client costs to each member is extensive or a large cluster development), to normally bear any legal costs in supporting the decision of the trustees, once it is clear that the decision of trustees is effectively

final and only challengeable on limited grounds of review.

51. In my view, a fair and proper order in these circumstances is that the Respondent pays the costs on the party and party scale.

Judgment Date: 14 August 2007

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