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

Case number: 12508/2015

In the matter between:

HERMANUS BEACH CLUB HOMEOWNERS' ASSOCIATION	First Applicant
JAN NICO MAREE	Second Applicant
MARTHINUS JACOBUS STRUWIG	Third Applicant
v	
HERMANUS BEACH CLUB HOMEOWNERS' ASSOCIATION	
(Association incorporated under s 21) (Reg no 97/17908/NPC)	First Respondent
OVERSTRAND MUNICIPALITY	Second Respondent
THE PROVINCIAL MINISTER OF LOCAL GOVERNMENT,	
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	Third Respondent
THE PREMIER OF THE WESTERN CAPE	Fourth Respondent
THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
HERMANUS BEACH CLUB ERF 1187 BODY CORPORATE	Sixth Respondent
HERMANUS BEACH CLUB ERF 1188 BODY CORPORATE	Seventh Respondent
HERMANUS BEACH CLUB ERF 1189 BODY CORPORATE	Eighth Respondent
HERMANUS BEACH CLUB ERF 1190 BODY CORPORATE	Ninth Respondent
HERMANUS BEACH CLUB ERF 11892 BODY CORPORATE	Tenth Respondent
HERMANUS BEACH CLUB ERF 1194 BODY CORPORATE	Eleventh Respondent
HERMANUS BEACH CLUB ERF 1196 BODY CORPORATE	Twelfth Respondent
MARY-ANNE CRONJE	Thirteenth Respondent
PHILIPPUS CRONJE	Fourteenth Respondent

17th FLOOR NO. 13 CC Fifteenth Respondent

HERMANUS BEACH CLUB HOMEOWNERS ASSOCIATION

NPC: REG NO. 1997/013952/08 Sixteenth Respondent

Coram: Justice J Cloete

Heard: 21 June 2018

Delivered: 3 September 2018

JUDGMENT

CLOETE J:

Introduction

[1] This application pertains to a dispute between property owners in a seaside development known as the Hermanus Beach Club. It is a residential development which includes 300 sectional title units (in 7 body corporate schemes) as well as 24 seafront freehold erven ("the beach houses"). The development has common property, facilities and services.

[2] More particularly, the first applicant ("HOA") is the homeowners association which was formally established in June 2011 for the beach house owners of which 22 such owners are its members, including the second applicant ("Maree") who owns House 12 and the third applicant ("Struwig") who owns House 15 through the vehicle of the Phoenix Trust.

[3] The applicants are at loggerheads with the first respondent ("MHOA") which was established in 1997. The applicants contend that they are not, and cannot be compelled to become, members of the MHOA and that therefore the MHOA has no authority to object to or veto plans for alterations and/or extensions to their properties. The MHOA maintains that they are, and that it thus has every right to do so.

[4] This application was launched 3 years ago in July 2015 at a time when more extensive relief was sought. Over the subsequent period much of what the parties agree to be *'planning chaos'* in relation to the development has been put in order and most of the factual and legal issues have been resolved.

[5] The only remaining sticking point for purposes of the current application is whether or not the applicants are obliged to be members of the MHOA. This forms the crux of the relief contained in Part C of the amended notice of motion[1] as well as the counter-application. The parties agree that Parts A and B of the amended notice of motion should be granted by consent.

Factual matrix

[6] The facts relevant to the issue in dispute, which are now largely common cause, are as follows.

[7] In the early 1990s Stocks and Stocks Ltd ("the developer") commenced with the Hermanus Beach Club development. It engaged Macro Plan Town and Regional

1 It is dated 6 September 2017 and was further amended during argument by the insertion of *'or veto'* after the words *'object to'* in prayer 3.

Planners (Macro Plan) and the first layout plan was approved on 13 March 1995 for the proposed development of 150 single residential units.

[8] In April 1995 Macro Plan submitted an amended layout plan which provided for the development of more affordable units with an increased density. Due to the increase in density Macro Plan motivated a *'different ownership principle…for example sectional title or separate title with a homeowners association'.* The development comprised of common amenities and services and common property which were to be the responsibility of the *'body corporate'*.

[9] It was also proposed that the beach house erven would constitute a *'group housing scheme where development guidelines will have to be approved for the units prior to the approval of any building plans by the local council… and will thus have to be represented by a homeowners association which will form part, together with all other body corporates, of the larger body corporate responsible for the entire development'.* Put differently, the idea was that the body corporates of the various sectional title schemes, together with the beach house homeowners association, would be represented on the umbrella *'body corporate'* which the parties accept to have been the conceptual predecessor to the MHOA.

[10] After various other steps were taken the local authority approved building plans and building commenced. It is now common cause that, despite the approval of building plans, no site development plan was ever approved for the development, including the beach houses, and that the establishment of a home owners association for the beach houses was also not imposed by the local authority as a planning condition.

[11] The majority of the beach houses were sold between February 1996 and April 1997. The inaugural meeting of the MHOA was held on 24 May 1997. On 22 August 1997 a beach house homeowners association, a section 21 company which is cited as the 16th respondent was registered, but none of the beach house owners ever became members and it existed on the side-lines, as it were, without ever being active. The only minute which the MHOA was able to find of a purported meeting of this association is unsigned.

[12] The MHOA was incorporated, also as a section 21 company, on 23 October 1997. As appears from its memorandum and articles of association, its main business is typical of master homeowner's associations in developments and includes aspects such as provision of security, recreational facilities, general maintenance and upkeep.

[13] Its main business also includes, in respect of Hermanus Beach Club:

> *'2.1 To act as the supreme authority managing and controlling all residential housing developments…*
> *2.5 To control, promote and maintain architectural, aesthetical, and environmental standards…'*

[14] The membership clause in its articles of association provides that each of the body corporates and the *'Cluster Association'* shall be members of the MHOA. The Cluster Association is defined as *'the Home Owners Association established or to be established in respect of the Cluster Portions'.* Those portions are the beach houses. The Cluster Association, once established, was entitled to nominate two directors to serve on the board of the MHOA, as was each body corporate.

[15] The same clause provides that cluster owners shall be members of the MHOA until such time as the Cluster Association is established and admitted as a member of the MHOA.

[16] The articles also authorise the MHOA to exercise certain powers in the furtherance of its business to control, promote and maintain architectural, aesthetic and environmental standards. Its directors are permitted to *'make rules providing guidelines'* for architectural design, subject to the memorandum and articles and any restriction imposed or direction given at a general meeting. If such rules are made at a general meeting, or by the directors and thereafter ratified at the next general meeting, they become binding on all members and are thus enforceable.

[17] Some of the beach houses have, over the years, been severely damaged by sea or storm surges. Six are double-storey and 18 are single-storey. Another surge occurred in 2008 which caused extensive damage mostly to single-storey houses and jeopardised the safety of their residents who could not take refuge on an upper level.

[18] Up until the end of 2008 building plans were approved for the enclosure of balconies in sectional title units, extensions on ground floor level for single-storey beach houses, and extensions on first-storey level for two of the double-storey beach houses. These were permitted with the approval of the MHOA as well as the local authority.

[19] During 2009 a dispute arose when some owners of single-storey beach houses wished to raise their homes by adding a first floor, amongst others for safety purposes. Some property owners to their rear claimed that the *'development rights prohibited first storey extensions'*. The local authority was approached and it advised the MHOA to prepare

and submit architectural guidelines to *'address development rights to control development and architectural style within the complex'.* These were to include guidelines for the entire development and not only the beach houses.

[20] Mr Andrew Greeff, an architect, was appointed for this purpose. He compiled a first set of development rules for the MHOA dated 1 March 2010 which in essence permit no external extensions including that *'existing roof height is maximum height'.* The applicants regard this set of rules as oppressive and selfish, claiming that it effectively condemns the beach houses to the mercy of storm surges. Greeff thereafter compiled a second set of development rules for the HOA which, it contends, are far more reasonable, but were not acceptable to certain other property owners in the development. On 18 October 2011 the local authority's Portfolio Committee: Infrastructure and Planning, concluded that:

> *'There is a major debate within the complex about the legality of the* [MHOA]. *Various opinions have been provided to the Municipality in this regard by some freehold erven owners and also the* [MHOA]. *This issue can be debated, but finality can only be reached if the issue is resolved in-house or by a decision of Court. If the Municipality supports the viewpoint of one group in the debate, it will be foreseen to choose such group's "legal opinion". In the interest of all property owners within the complex it is therefore the opinion that the in-house problems and functions of the* [MHOA] *and other proposed home owners associations must be resolved before any applications for additional rights can be considered.'*

[21] As I understand it, since then the local authority has not been prepared to consider any plans submitted by owners until there is a single, agreed development plan for the entire Hermanus Beach Club in place. Maree has been trying to get the MHOA to agree to his proposed extensions and alterations since 2009, and Struwig since 2013.

[22] In terms of clause 3.2.3 of the MHOA's memorandum the beach house owners cumulatively constitute one member for voting purposes or put differently, each owner has a 1/24th share of the membership of one member of the MHOA. This is irrespective of whether they belong to a homeowners association or not.

[23] Each of the 7 body corporates which represent the sectional title holders are members in their own right. On each occasion when the beach house owners put their proposals for extension and/or alteration on the table they are outvoted.

[24] Moreover the MHOA has refused to accept the constitution of the HOA since it was established in June 2011, as a consequence of which it has not become a member of the MHOA.

Further consequences of planning chaos

[25] For purposes of this application the parties accept that the deeds of sale for the initial purchasers of the beach houses all contained a clause 28 in which the purchaser agreed that he would automatically become a member of the MHOA (still to be established) upon registration of the property into his name; that this condition would be registered against the title deed so as to bind him and his successors in title; and that he would not, without first obtaining the written consent of the MHOA, effect any exterior alterations or extensions to the house or other buildings erected on the property.

[26] One of the first beach house owners was a Mrs Elizabeth Oelofse who sold to Maree in 2008. Maree's deed of sale did not contain a clause 28 or its equivalent and there is no condition imposed in respect thereof in his title deed.

[27] Maree provided a copy of the title deed of House 2, owned by the Lavaline Trust, which contains notarial deed of servitude no K1014/97. The servitutal condition is peculiarly worded. It reads as follows:

> *'The property shall not be transferred into the name of any person, close corporation, company or trust, unless it is proved to the Registrar of Deeds having jurisdiction in respect of the property, by way of a clearance certificate issued by the Hermanus Beach Club Home Owner's Association that:*
>
> (a) *The transferee of the property has bound himself to the terms and conditions that will apply to the membership of the Hermanus Beach Club Home Owner's Association.*
>
> (b) *The Transferee is a member of the Hermanus Beach Club Home Owners Association or will on registration of transfer of the property become member of the Home Owner's Association.*
>
> (c) *That all money due by the transferor to the Home Owner's Association and Hermanus Beach Club Master's Home Owner's Association has been paid and all obligations and rules and regulations of the Hermanus Beach Club Master's Home Owner's Association has been observed.'*

[28] Maree also provided a schedule[2] setting out that of the 24 beach houses, 12 owners are bound by the same servitude as the Lavaline Trust and the other 12 are not bound by any servitude at all.

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2 This must be read together with paras 14 and 19 of Maree's affidavit and para 213 of the answering affidavit of Mr Victor Faria, the chairperson of the MHOA.

[29] Minutes of meetings produced by the MHOA reflect that from 1997 up until the 15th annual general meeting of the MHOA held on 29 October 2011 (i.e. some 24 years),[3] owners of the beach houses were elected to the board of the MHOA in their *'representative capacities'* of a homeowners association or the beach houses, and participated on the board on that basis. Furthermore, various owners of the beach houses also sat on the MHOA's building committee and, save for a brief period, the beach house owners paid, and continue to pay, levies to the MHOA.

[30] After the HOA was established in 2011 the beach house owners did not stop their participation in the MHOA.[4] They did so as individuals and/or representatives of *'the HOA'* or *'beach houses'*. It was only after this application was launched in 2015 that the owners ceased attending annual general meetings of the MHOA and participating in its board meetings (save for a Mrs Cronje, a co-owner of House 18, who attended the 2016 annual general meeting).

[31] The crux of the applicants' complaint is set out in the founding affidavit of Ms Caron Perkins, the chairperson of the HOA, as follows:

> *'43. Many of the owners of beach front properties bought their properties well before the* [MHOA] *came into being. It is true that we all realised that we were buying into a complex which had security and was maintained by a central organisation. We realised that there would be levies to be paid for such services, but we never intended to subject ourselves to an unreasonable "supreme authority" which could dictate fundamental and very important issues to us against our will. This was not part of the bargain we made…'*

3 No minute was produced for 2001.

4 The details are set out at paras 110 to 113 of Faria's affidavit i.e. the answering affidavit of the MHOA.

[32] Perkins is one of the beach house owners (House 4) who is not bound by the servitude. As previously stated, nor is Maree, and neither is Struwig.[5]

Discussion

[33] It is convenient to first deal with the argument advanced on behalf of the MHOA.

[34] The latter acknowledges that the wording of the registered servitudes does not *'neatly accord'* with the development scheme and structure of the MHOA as it was established and developed. It is argued however that a tacit contract exists in terms of which the beach house owners agreed to become members of the MHOA because of the following.

[35] First, it was implicit in the initial approvals granted by the local authority that the development would necessarily require a body such as the MHOA to govern and regulate common property, even though this was not imposed as a planning condition, and nor was compulsory membership thereof by owners, whether individually or as represented.

[36] Second, the initial purchasers all accepted, in concluding their deeds of sale, that they would automatically become members of the MHOA once it was established. It was part of their bargain, irrespective of whether or not the envisaged servitudes were subsequently *'imperfectly registered'* or not registered at all. Subsequent purchasers, even absent a clause 28 or its equivalent, could have been under no illusion about what they were buying into, given the physical layout of the development in terms of common

5 According to Maree's schedule.

property and common facilities, in respect of which there would logically be both rights and obligations.

[37] Third, the wording of the servitudes, properly construed, can only mean that the owners concerned are bound to be members of the MHOA. Although it is conceded that there is no express contractual link contained therein, it is submitted that the link is established between the owners and the MHOA because the servitude provides that: (a) the owners must become members of the homeowners association; (b) for transfer to a successor in title, the homeowners association must certify that the transferor's levies are up to date and that he has observed the obligations, rules and regulations of the MHOA; and (c) the articles of the MHOA pertaining to membership support such an interpretation.

[38] Fourth, the ongoing participation, for the most part, of beach house owners in the MHOA, including payment of levies, can only be described as assent by conduct or inferred consent. Moreover they must have been aware of their obligation because that is the nature of the investment that they made.

[39] In short therefore the MHOA argues that the conclusion of the alleged tacit contract must be inferred. This means that its terms are also subject to the same process of reasoning. I have fundamental difficulty with this approach for the following reasons.

[40] The argument of the MHOA of necessity means that each and every current beach house owner tacitly contracted on exactly the same terms, despite differing: (a) deeds of sale; (b) title deeds; and (c) subsequent patterns of conduct. While the argument is based on four broad "legs" it is not possible to discern what precisely those terms are alleged to have been. Although the contention is that the original purchasers of the

beach houses contracted with the developer, the MHOA does not explain who subsequent owners, such as Maree and Struwig, contracted with.

[41] *Christie's Law of Contract in South Africa* sets out the requirements for a finding that there is a tacit contract as follows:[6]

> *'No similar reservation need be expressed about the requirements laid down in Wessels, which have frequently been quoted with approval.*
>
> *"Before a Court can find that there has been a tacit contract, it must be satisfied that the following requisites are present:*
>
> (1) *The person whom it is proposed to fix with a tacit contract must be fully aware of all the circumstances connected with the transaction.*
>
> (2) *The act must be unequivocal.*
>
> (3) *The tacit contract must not extend to more than the parties contemplated.*
>
> (4) *A tacit contract will be interpreted strictly not extensively, because a contract must be interpreted in favour of the person on whom it is sought to lay an obligation."* '

[42] The trite test for inferential reasoning set out in *R v Blom*[7] is that: (a) the inference sought to be drawn must be consistent with all the proven facts, and if it is not the inference cannot be drawn; and (b) the proven facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

[43] There is no persuasive evidence that the initial homeowners association (the 16th respondent) represented the beach house owners on the MHOA (the latter does not refute the allegation that none of the owners were ever members). It may be that some

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6 7th Ed, p102 and the authorities referred to at fn 616.

7 1939 AD 188.

beach house owners were under the mistaken impression that they represented other beach house owners in the business of the MHOA because they purported to act on behalf of the 16th respondent, but this does not assist the MHOA.

[44] The MHOA has not accepted the HOA as a member. The default position contained in the MHOA's articles is that all 24 beach house owners cumulatively constitute one member. While there may be some argument to be made that the initial beach house purchasers were contractually bound, in terms of their deeds of sale, to become MHOA members and thus observe its rules, those deeds of sale were concluded between them and the developers and not the MHOA. Moreover, that contractual term was never carried over into these purchasers' title deeds.

[45] It is common cause that the majority of the beach house properties were initially sold in 1996 and 1997. The schedule produced by Maree reflects that of the current 24 owners at least 5, including Maree and Struwig, appear to be second purchasers. Of these only one, a Dr Shah, who is the owner of House 6, has a servitude registered against the title deed to his property. Yet the MHOA contends for identical – but not clearly identified – tacit contractual terms for all 24 beach house owners, and in effect asks for an order that all of them are therefore members of the MHOA.

[46] Moreover none of the servitudes that were registered reflect that those owners would automatically become members of the MHOA. They were only obliged to become members of a homeowners association which in turn would represent them on the MHOA. That never happened. I cannot see how, in these circumstances, subsequent conduct of one or other beach house owner in relation to the MHOA can be said to indicate implied consent on the part of any other. To my mind, each owner's conduct

has to be considered separately in order to determine whether that owner's conduct is indicative or persuasive of implied consent. The MHOA has fallen short of producing enough evidence in this regard.

[47] The fact that levies have been paid by the beach house owners over the years is not, of its own, sufficient to prove an unequivocal intention on the part of each beach house owner that he considered himself to be a member of the MHOA and bound by its rules. Of course the MHOA is correct in asserting that anyone driving into the development must have understood that there was some sort of control. But that takes it no further.

[48] Maree and Struwig assert that there are no restrictive title deed conditions, registered servitutal rights or a homeowners association with a constitution which regulates height, nor a site development plan, which limit their rights. In this regard they rely on the full bench decision in *Gerstle v City of Cape Town*[8] where it was held that:

> *'[29] Furthermore, as Mr* Rosenberg*, who appeared together with Ms* O'Sullivan *on behalf of the first respondent, observed, while the appellants sought to rely on "two sacrosanct" principles which they contended informed the basis of the development, namely access to light and view as well to the beach, the developers had not imposed any legal limitations on the future development of the property in relation to the height of the first-row houses. Had the developers wished to restrict the building which could be undertaken in respect of the front row in order to protect the light and the view of the back row, there were a number of legal options open to them, including the imposition of a servitude, restrictions on the title deeds, a specific site development plan (of which there was none) which could have imposed a land use condition in terms of s 42 of LUPO, or the developers could have registered a homeowners association. Whatever intentions the developers might have professed, these were never translated into legal obligations.'*

8 2017 (1) SA 11 (WCC).

[49] When the factual context is taken into account, it is my view that their reliance is well placed. Insofar as the HOA is concerned, part of the relief sought in the counter-application is that the HOA is obliged to become a member of the MHOA *'on such terms as comply with the memorandum of incorporation and articles of association'* of the MHOA. To my mind, however, this is effectively asking the court to make a contract for the parties which is, of course, impermissible.

[50] In any event, when the MHOA was incorporated, the Companies Act 61 of 1973 was in force. Section 103 thereof provides as follows:

> *'**103 Who are members of a company***
>
> (1) *The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company upon its incorporation, and shall forthwith be entered as members in its register of members.*
>
> (2) *Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.'*

[51] Maree and Struwig maintain that their names were never entered in the MHOA's register of members. It would have been a simple matter for the MHOA to produce its register to refute this allegation. This was not done.

[52] As far as the new Companies Act 71 of 2008 is concerned, the applicants point out that the MHOA's memorandum of association is incompatible therewith and that no steps have been taken by the MHOA to render itself compliant. As previously stated, the current voting regime of the MHOA provides that all of the beach house owners, cumulatively, only have one vote, whereas s 1(7) of Schedule 1 of the 2008 Act

stipulates that *'each voting member of a non-profit company has at least one vote'.* In addition, the articles of the MHOA demand compulsory membership, while s 4(2)(b) of the same Schedule stipulates that the memorandum of incorporation of a non-profit company providing for membership *'must not presume the membership of any person, regard a person to be a member, or provide for the automatic or ex officio membership of any person'* on any basis other than lifetime membership awarded to a person on certain conditions. Although the MHOA argues that no reliance is placed on compulsory membership, given my findings, to my mind the effect of the orders which it seeks amounts to this. Section 4(2) of Schedule 5 of the 2008 Act gave non-profit companies such as the MHOA two years to file an amendment to its memorandum of incorporation to bring it in harmony with the Act. The MHOA does not dispute that this has not occurred.

[53] In *Walele v City of Cape Town and Others*[9] the Constitutional Court held, in the context of a review application, that a neighbour has no legitimate expectation to be heard prior to the approval of building plans. O'Regan ADCJ stated:

> *'[31] The purpose of zoning schemes and the Building Standards Act was aptly described by Lewis AJ in* Odendaal v Eastern Metropolitan Local Council:
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> > *(B)oth the Act and the [town-planning] Scheme are legislative instruments for ensuring the harmonious, safe and efficient development of urban areas. …Local authorities are given considerable powers under both Act and Scheme. Onerous duties are imposed on them by both instruments. The essential purpose of the powers afforded and the duties imposed is to ensure that the objectives of the legislative instruments are achieved; that there is a balance of interests within a geographical community. The local authorities are in effect the guardians of the community interest. They are entrusted with ensuring that areas are developed in as efficient, safe and aesthetically pleasing a way as possible. They are required to safeguard the interests of property owners in the areas of their jurisdiction. That is*

9 2008 (6) SA 129 (CC).

> *why the powers and rights of owners of immovable property are restricted. Power over one's property has never, under our legal system, been unfettered. The rights of an owner of land have always been limited by the common law in the interests of neighbours. But the rapid urbanization of countries worldwide and the inevitable need for regulation that has accompanied it has had the effect of restricting full dominium even further than the common law ever did.'*

[54] Having regard to my findings as well as what was held in *Walele* I am persuaded that the relief sought by Maree and Struwig is competent.

Costs

[55] Given the history of this litigation and the planning chaos of the development, it is my view that the appropriate costs order is the one that follows.

[56] **In the result the following order is made:**

1. **It is declared that the Overstrand Scheme Regulations promulgated in the Province of the Western Cape, Provincial Gazette Extraordinary number 7203 on 29 November 2013 which came into effect on 1 January 2014, apply to the development in the Overstrand Municipality known as Hermanus Beach Club;**
2. **It is declared that there is no legally binding site development plan applicable to the properties owned by the second and third applicants in the development known as Hermanus Beach Club;**
3. **It is declared that the first respondent has no right to object to, or veto, the building plans of the second and third applicants prior to the submission of such plans to the second respondent;**
4. **The first respondent's counter-application is dismissed;**

5. **The first respondent shall pay the costs incurred by the first, second and third applicants in respect of the drafting, service and filing of heads of argument, preparation for the hearing (including the hearing of the counter-application) as well as the costs incurred in the hearing of both the main and counter-applications, on the scale as between party and party, and including the costs of two counsel; and**
6. **Save as aforesaid, there shall be no order as to costs.**

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J I CLOETE