IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

17/05/2019
DATE

SIGNATURE

CASE NO: 1776A/17

NEW INVEST 263 (PTY) LTD — **APPLICANT**

And

INVESTEC LTD — **1ST RESPONDENT**

STANDARD BANK LTD — **2ND RESPONDENT**

BODY CORPORATE TUSCAN ON VAAL — **3RDRESPONDENT**

RAND WATER — **4TH RESPONDENT**

EMFULENI MUNICIPALITY — **5TH RESPONDENT**

THE REGISTRAR OF DEEDS — **6TH RESPONDENT**

JUDGMENT

KHUMALO J

[1] The Applicant, New Invest 263 (Pty) Ltd seeks a declaratory order in the following terms:

[1.1] That the immovable properties of the Applicant described *infra* may be alienated in terms of the Alienation of Land Act, 1981 (Act 68 of 1981) ("the Act") in separate parts;

PART 1

[1.1.1] A unit consisting of:

(a) Section no, 2 as shown and more fully described on Sectional Title Plan No. SS799/2002 in the scheme known as TUSCANY ON VAAL in respect of the Land and buildings situated at Portion 6 of the Farm Northdene 589, Local Authority EMFULENI LOCAL MUNICIPALITY of which section the floor area, according to the said Sectional PLAN IS 168 square metres in extent; and

(b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

HELD BY DEED OF TRANSFER NO. ST145369/06

[1.2] and an exclusive use area describe as Yard Y2 measuring 355 (THREE HUNDREND FIFTY FIVE) square metres, being as such a part of the common property, comprising the land and the scheme known TUSCANY ON VAAL, in respect of the land and building or buildings situate at PORTION 6 OF THE FARM NROTHEDENE 589 LOCAL AUTHORITY EMFULENI LOCAL MUNICIPALTY, as shown and more fully described on Sectional Plan No> SS 375/2003 HELD BY DEED OF CESSION SK 084635.

PART 2

[1.3] A Unit consisting of:

(a) Section No. 3 as shown and more fully described on Sectional Title Plan No> SS799/2002 in the scheme known as Tuscany on Vaal in respect of the land and building/ buildings situated at Portion 6 OF THE FARM NORTHEDENE 589, REGISTRATION DIVISION IQ, PROVINCE OF GAUTENG, Local Authority: EMFULENI LOCAL MUNICIPALITY, of which Section the floor area, according to the said Sectional Plan is 168 (ONE HUNDREND SIXTY EIGHT) square metres in extent; and

(b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan;

HELD BY DEED OF TRANSFER NO. ST142656/2002 - **ST153316/2005**

[2] Both properties described in part 1 and part 2 and referred to as Section 2 and 3, respectively, are owned by the Applicant, a private company with a sole director, Zack Aiden van Heerden. Section 3 is also known as Unit 7A and Section 2 as Unit 7B.

[3] The Applicant purchased the (2) two Units (that henceforth I refer to as 7A and 7B) separately from two owners. On 6 June 2005 it purchased Unit 7A from Mr G P Argirakis and took transfer on 24 November 2005. A year later on 15 August 2006 it purchased 7B from Tuscany on Vaal 7B (Pty) Ltd that was represented by Mr Donovan Drew and took transfer on 3 November 2006. The Applicant therefore holds separate Title Deeds for each of the Units that are located in one free standing building that is divided into 2 separate Units.

[4] A mortgage bond is registered on each of the two Units. Investec Bank Ltd, cited as the 1st Respondent, is the holder of a bond on Unit 7A that Applicant registered in 2005, whilst Standard Bank, cited as the 2nd Respondent, is the holder of the bond on Unit 7B registered in 2006. Both mortgagees have issued a writ of execution against the mortgaged Unit. The Applicant and the mortgagees had sought to alienate the Units separately in terms of the Title Deeds Applicant holds. The Registrar of Deeds is an interested party who is to give effect to the order sought by the Applicant and therefore cited as the 6th Respondent. None of these Respondents opposes the Application.

[5] The Units form part of a Sectional Title Scheme of a residential estate known as the Tuscany on Vaal that falls within the Emfuleni Local Municipality ("the Municipality"), the 5th Respondent, and within the Vaal River Complex as per s 29 (3) of the Development Facilitation Act 67 of 1995 ("the Development Act"). In terms of s 29 (3), Rand Water, the 4th Respondent, is responsible for, *inter alia*, the approval of the development of habitable buildings or structures and **the plumbing facilities below the flood control line of the Vaal River** like the Tuscany on Vaal. Therefore Rand Water's approval is required prior to any construction, development or otherwise, within the Vaal River Complex.

[6] Rand Water and the Body Corporate of Tuscany on Vaal, the 3rd Respondent, which is the controlling body in the Sectional Title Development Scheme, are against the alienation of the two Units on their separate titles, insisting that until or unless the titles are consolidated and the Units sold as one property under one title deed, they would not approve their alienation. Rand Water insists that the building is non-compliant with the plans that it approved, and that the changes made in respect of the building were without the necessary written consent and therefore contrary to the Development Act. They therefore deem such transfer would be illegal.

[7] The Municipality is not opposing the Application.

Factual Background

[8] The Tuscany on Vaal estate is located against the banks of the Vaal River on Portion 6 of the Farm Northedene 589. The latter was rezoned as an accommodation establishment for (15) fifteen residential dwellings in a Sectional Title Scheme in terms of the Gauteng Removal of Restrictions Amendment Act of 1997 on approval by Emfuleni Local Municipality and Rand Water on 2 July 2002 in accordance with the Vaal River Complex Regional Structure Plan of 1996. The Rand Water simultaneously approved the Tuscany on Vaal Development plans to

build above the Flood Control Line nine (9) standalone residential buildings/dwellings to the developer of the scheme, one Mr Dolf van der Merwe (who has since passed away) ("the developer") in accordance with Annexure "C" of the Guide Plan for the Vaal River Complex.

[9] The development took off and the residential buildings were subsequently all built accordingly, except for the second residential building, which is Section 3. It was built as a single building but separated into two residential Units (7A and 7B) that shared a common interior wall. The developer registered the two Units in his certificate of registered sectional title at the Deeds Office as separate residences being Section 2 (7B) and Section 3 (7A), in accordance with s 11(1) (a) of the Sectional Title Act 1971. The developer thereafter sold each of the Units to his successor's in title who are different owners, and registered accordingly under their different titles. Section 2 (7B) was sold to Mr Drew's Tuscany on Vaal 7B (Pty) Ltd held under ST142657/2002 and Section 3 (7A) to Mr G P Argirakis under ST142656/2002 accordingly at the Deeds Office. The Applicant subsequently bought and took transfer of 7A from Argirakis in 2005 and 7B from Drew in 2006 held by Deed of Transfer ST153316/2005 and ST145369/06, respectively.

[10] On 30 June 2006 the Emfuleni Municipality approved modified/additional building plans that accord with the division of Section 3 into two separate residential Units 7A and Section 2 7B in the Tuscan on Vaal subsequently submitted by the developer. The additional plans were not submitted to Rand Water for further approval/endorsement. Subsequently the developer attempted to register a 9th residential building, it was opposed by Rand Water on the basis that permission was only granted for the building of only nine (9) residential buildings /Units in the scheme but as a result of the separate Units in the second building, the 9th building was going to be registered as the 10th Unit, contrary to the approved plan. According to Rand Water the number of Units approved to be built above the Flood Control Line in the development was reached. It was the first time a challenge was raised since the registration of the scheme in 2002 and the beginning of all the problems.

[11] On an attempt to find a way for the 9th building/dwelling to be registered, the developer and the estate agent negotiated a sale between the owners of the 2 Units, for one of them to buy the other's Unit. The negotiations culminated in the Applicant buying Unit 7B from Mr Drew's Tuscan on Vaal 7B and taking transfer on 3 November 2006. The developer incentivised the deal for Mr Drew to sell by paying Drew a further amount of R100 000.00 over the purchase price to compensate for the costs Drew paid on taking transfer when he purchased his Unit. The estate agent and the developer were of the opinion that the two Units could be easily converted into one residence and be registered as one Unit by demolishing the common wall, whereupon the scheme would be in compliance with the plans of the scheme approved by Rand Water to be able to register the 9th dwelling as the 9th Unit. Applicant proceeded with the conversion for the use of the Units as one residence, but he never correspondently converged their titles.

[12] It was only until 2015, nine years after the purchase of Unit 7B, when the Applicant tried to sell the two Units that the Body Corporate's estate agent told the Applicant's Van Heeden that he cannot sell the Units separately as per their titles but will have to consolidate them. On enquiry from Rand Water he was told that a total of 9 Units were approved above the 1975 Food Control Line in accordance with the Site Development Plan (SDP) and any

changes to the approved SDP required Rand Water's approval, which include changes to the number of Units, (which approval the developer was supposed to have obtained).

[13] Applicant in January 2017, 14 years after the developer's registration of the sectional title register (which included the two Units in the second building) launched and proceeded with this Application for a declaratory order to sell the two Units separately as per their original titles since 2002. In the meantime the 1st and 2nd Respondents, Investec and Standard Bank, the execution creditors of both Units were on January 2017 to sell in execution the Units on their separate titles.

[14] In opposing the application, the Body Corporate in its Answering Affidavit deposed to by Mr Allen van der Merwe, a trustee of the Body Corporate since 2003 and an owner in the scheme since its registration in 2002, alleges that the contract concluded by the Applicant and Mr Drew's Co in 2006 states clearly that the parties were also to enter into a final sectional title contract, which contract was to facilitate the consolidation of the two Units both physically, utilised as one, and by registration in one title. Mrs A Van Heerden, a director of the Applicant was aware that the sale was facilitated for that purpose. He said it was therefore expected that on taking transfer of 7B, the Applicant will proceed with the consolidation of the two Units as one residential building/dwelling and their registration under one title, the burden is as a result on the Applicant to register the consolidation at the Deeds Office.

[15] According to the Body Corporate the Applicant proceeded to physically consolidate the two Units into one residential dwelling in contemplation of such consolidation. The common wall between the Units was demolished, one entrance door closed, one of the garages converted into a living room and a guest toilet installed. Unit 7A and 7B were to function as one residential Unit. As a result the water and electricity account of the two Units was consolidated into one bill. The common area levies were to be calculated for nine residential arrears, instead of 10. However Applicant never implemented the consolidation of the titles or the Units to one dwelling.

[16] The Body Corporate's contention on the order as sought by the Applicant is that such order would perpetuate the non-compliance with the permission granted by the Rand Water for only 9 residential buildings that were to be erected in the scheme and prejudice the owners of the properties in the Tuscany on Vaal in their future dealings with the relevant planning authorities, specifically Rand Water has already delayed the approval of certain proposed building plans until the properties comply with certain necessary requirements. (for example, the registration of the 10th dwelling denied). It will also perpetuate the non-compliance by the Applicant with the undertaking it took to consolidate the properties into one title thus confirm an illegal registration. The scheme would further continue to fall foul of the permission granted by Rand Water.

[17] The Body Corporate has indicated that it will nevertheless be amenable to an order sought by the Applicant if the order is granted on the basis that the Units can be alienated separately once Applicant at his own costs had obtained a written approval of the 10th Unit on the Tuscan on Vaal sectional scheme from Rand Water and the Municipality, by no later than twelve (12) months from the date of the order, which costs include the cost of obtaining the relevant approvals including but not limited to the costs of any applications, environmental impact assessments and new building and sectional scheme plans.

[18] Alternatively, failing the above, the Applicant be ordered to notarially tie the two Units in the Deeds Registry and make such physical alterations necessary to comply with the requirements of the 4th Respondent. All costs still to be paid by the Applicant.

Rand Water's Opposition

[19] Rand Water on the other hand opposes the Application on the basis that since the approval of the 9 dwelling/Units which were subsequently all erected it has not received an application for any other plans for approval in respect of Tuscan on Vaal Sectional Title Development nor any notification, correspondence or application for alterations or additions to the number of the 9 dwelling Units in the approved plans.

[20] Further it argues that any changes, modifications or alterations to the approved plans which changes includes the number of dwelling/ units, must be submitted to it for consideration and further approval. It stated that it expected the construction of the 9 dwellings to be in compliance with the approved plans. Any construction, alteration or change or modifications effected contrary to the approved plans therefore illegal and must be modified to comply with the approved plans.

[21] It has noted that modification plans were submitted to the Municipality, and based on the Municipality's approval, Applicant caused the registration of two separate units in the same building, when approval was supposed to be also sought from Rand Water prior to modification and registration taking place. Consequently, in the absence of its written consent the subdivision is illegal and the registration of the two units is invalid and should be set aside. The allegations are made notwithstanding the documentary evidence showing that the Units were registered separately in 2002 and the referred modification plans submitted in 2006 by the developer. Applicant bought 7B from the developer's successor in title, Drew's Co on a separate title. Applicant did not cause any registration.

[22] Rand water further alleges that it was advised, in a meeting held on 19 June 2016 where all the parties were represented, that the Applicants' Units were built as speculation units which should not have been registered separately. The Applicant bought the other Unit from Mr Drew with the knowledge and undertaking that the two units will and must be consolidated as one dwelling unit whereby the boat house could be sold separately. The transfer costs of the agreement were paid for by the developer. The Applicants modified the two units accordingly however failed to proceed with the consolidation application. It indicated that the offer to purchase any of the Units should be subject to the consolidation of the two units into a single title. (The allegations that Applicant bought 7B from Drew are then contrary to the allegations that Applicant registered the two separate Units in the same building.

[23] It is also alleged that the relief sought by the Applicant amounts to condonation of an illegal act which the court cannot do, arguing that the sale of illegal structures to innocent members of the public cannot be justified. The illegality arises from the contravention of the provisions of 2.2 of Annexure C.

[24] Rand Water further alleges that subsequent to the meeting the Applicant submitted subdivisions plans on or about 24 January 2017 which Rand Water did not approve as it considered them to be inconsistent with the approved site plans. It recognises only one

dwelling unit in that residential building and opposes the sale of the illegal separate Units and seeks that Applicant rectifies the contravention. The Applicant submitted the subdivision plans after the fact and seemingly after further modifications effected to consolidate the two units.

Applicant's Reply

[25] In reply to the Body Corporate allegations the Applicant briefly highlighted that the erection of the 10th dwelling exceeded the 9 Units approved in the Site Development Plan, and not the separation of the second or third units. The building of the last 7 Units by the developer, following the completion of the second residential building which comprised of two Units held in two separate title deeds constituted a clear contravention of the Tuscan on Vaal scheme, which allows only 9 Units.

[26] **It is correct to regard the second residential dwelling as one building/Unit and not two in that regard only 9 residential dwellings buildings exist.**

[27] According to Van Heerden, he was not aware that the reason the developer and the estate agent approached it to buy Section 3 was so **that the developer can comply with the approved plans for the scheme.** At the time, in 2006 all 10 Units were built. Applicant expressed an interest to buy 7B provided it would be allowed to break the common interior wall and use the two dwellings as one. Consolidation was discussed only in that context and not for purposes of registering the two Units as one. It was also not explained that such consolidation would enable the developer to comply with the approved scheme and if they did, a benefit then could have been negotiated for the Applicant to the extent that the developer make a contribution towards payment of the purchase price and pay for the process of consolidation. It believes that it was not in the benefit of the developer to mention that he was benefitting from the consolidation and purchase of Drew's Unit.

[28] He says neither the final sectional title contract as referred to in the agreement with Mr Drew nor any other written agreement between the Applicant and the developer or the Body Corporate regarding consolidation exists. He argues that the problem was caused by the developer by building the 10th Unit and not because of his failure to register a consolidation. The problem should therefore be resolved by the Body Corporate and not by him.

[29] The Applicant denies that a case has been made for the order sought by the Body Corporate.

[30] In respect of the allegations by Rand Water the Applicant submits that the fact that the scheme contravenes the provisions of Annexure "C" in that it sought to register 10 instead of 9 buildings/ Units does not render the sale of any of the Units prior thereto illegal. The approved plans of 9 dwellings include Section 2 and 3 and therefore 2 and 3 are not illegal. The registration of Sections 2 and 3 does not constitute "subdivision" as alleged by Rand Water.

[31] Furthermore he points out **it is also common cause that the two Units had already been registered separately prior 2006, which is since 2002 and t**he alleged irregularity obviously caused by the developer. However seems the Body Corporate and Rand Water nevertheless expect the Applicant to rectify the irregularity at its own expense. Applicant alleges that it seems Mr Drew and the Applicant were misled by the developer in 2006, with

the knowledge of van der Merwen when it was not divulged to them that they have purchased properties which should not have been registered separately in order for them to make an informed decision as to how to resolve the issue. Instead Applicant was coerced to buy Mr Drew's property so that he can be made to assume the responsibility of rectifying the developer's fault by consolidating the properties at his expense.

[32] Van Heerden denies that he attended the meeting of 19 June 2016 and therefore does not know who are the parties referred to by Rand Water, what was discussed or decided at the meeting. He also has never submitted any subdivision plans and if they do exist he suspects that they emanated from the developer or the Body Corporate and the plans must have applied to the situation before he and Mr Drew bought the respective properties.

Drew's Affidavit

[33] In addition to all the disputed facts regarding what transpired between the Developer, the estate agent, Mr Drew and the Applicant, Mr Drew has filed an Affidavit alleging that he and Mrs Anthea Van Heerden, a director at the Applicant were approached by the developer and the Estate Agent, who informed them about Rand Water's approval of only nine Units and the developer building of nine freestanding buildings utilised as residential units but one of the building was divided into two units being 7A and 7B. They also indicated that in order to comply with building permission, Unit 7A and 7B has to be consolidated into one Unit. They proposed that either of them buy the other's Unit and consolidate the two Units into one, which could easily be consolidated by breaking down the shared wall between the Units. **It was also explained that after the consolidation, an application will have to be made for the properties to be registered as one unit**.

[34] Mr Drew says as a consequence a sale agreement was entered into and the Applicant purchased Unit 7 B and its boat house from him for a sale price of R2 Million Rand. At all material times before the conclusion of the agreement he believed that it was an understanding by all the parties involved in the transaction that the owner had to buy out the property from the other in order to have the property physically consolidated and the consolidation registered at the Deeds Office, **so as to comply with the site development plan**. It was made very clear by the developer that such consolidation was to be registered and the new owner of the consolidated unit was to see to such consolidation.

[35] **Mrs Van Heerden** who is alleged by Mr Drew to have been present in the meeting, as a director of the Applicant where they were informed of the non-compliance of the development and the need for consolidation filed an affidavit in response to Mr Drew's Affidavit **denying that she was ever present in that meeting**. She alleges to have had dealings with the developer only in respect of the transfer of the boat which she was trying to pressurise him to speed up.

Outlook on issues to be decided

[36] The Applicant is seeking in effect an order declaring that the consequences that flows from ownership of each of the Units on its own title are not up for challenge, including the right to sell each of the Units on its own title. Either because, inter alia,

[36.1] the scheme was in compliance in that nine buildings/residence were sanctioned by Rand Water and nine were built in the first phase and registered in 2002, thereafter sold to different buyers from whom the Units were later bought by the Applicant in 2005 and 2006. The 10th Unit sought to be registered in 2006 by the developer was indeed non-compliant, therefore illegal, alternatively that;

[36.2] The titles of the Applicant in 2005 and their predecessors were obtained on an assumption that the scheme compliant and legal, the validity of its registration since then having been never challenged, to be set aside and/or the subsequent approval by the municipality of additional plans in 2006 never having been set aside as invalid, therefore the question that arises is;

[36.2.1] whether the titles registered against the Units on an assumption that scheme in compliance, are legal?) what is the legitimacy validity of the acts consequent from the alleged illegal act? (alleged invalid separation)

ANALYSIS

Body Corporate's Opposition

[37] It is imperative to first address the Body Corporate's opposition and the order it prays should be granted in the alternative to Applicant's declaratory order. I do not understand that to be a cross- application or that the Body Corporate has the standing to petition such an order from the court. It has indicated that it is amenable to Applicant being granted the order it seeks if it is made conditional to the Applicant obtaining an approval from the authorities at its own costs for the registration of the 10th Unit. It is not explained why Applicant who was not the developer of the scheme should be saddled with the scheme's responsibility to register the 10th Unit and the costs thereof, in the process rectifying the schemes falling foul with Rand Water's approval by exceeding the 9 units. The developer had the two Units in one building registered separately in his certificate of registered sectional title prior to the Applicant acquiring ownership of both Units from the developer's successors' in title. The Body Corporate subsequently took over the responsibilities of the developer when the last of the 9 Units were sold.

[38] Remarkably, the Body Corporate conceded in its heads of argument that it lacks any standing to seek such a relief. This was however regrettable since it puts the alleged motive of the Body Corporate's opposition of the Application under suspicion.

[39] It is also significant that the Body Corporate mentions that in 2006 Rand Water opposed the registration of the 9th building on the basis that the scheme exceeds the number of Units approved as 9 Units have been registered already, and not that Rand Water or the Municipality demanded that the two Units in the second building be consolidated as they were illegally registered. However, the Body Corporate reveals that it was the developer's idea, (who was looking for a way to get to register the 9th building as the 9th Unit, even though effectively his 10th Unit) that Unit 7A and 7B, the two Units in Section 2 and 3 be consolidated. Hence the developer approached the owners offering an incentive for Mr Drew to offer his property for sale to the Applicant. So the question of consolidation of the Units was never brought up due to illegal registration having been alleged.

[40] The words incorporated in the Applicant's and Mr Drew's Offer to Purchase (OTP) that reads: "the final sectional title contract to be signed by both parties on acceptance hereof" are alleged to indicate the purpose of the agreement that obligated or burdened the Applicant to consolidate and register the Units under one title. No such a contract was concluded. The wording on its own does not mean anything as it does not indicate for what purpose (the terms and conditions) was the final contract to be signed. If such intention was discussed and clear to both, one would expect it to be stipulated in the OTP as a condition of sale. Its omission in a written contract is not explained.

[41] Furthermore, it does not make sense that not only the Body Corporate but also Rand Water endeavour to rely on this alleged undertaking or fictional obligation, to coerce the Applicant to consolidate his titles and to challenge the intended sale of the Units from their separate titles. The contract was concluded between the Applicant and Drew. Obviously the Body Corporate cannot acquire any legal standing from these meaningless words even if it is agreed that the words amount to an undertaking (which it is not). It is also of interest that since the conclusion of the contract in 2006, there is no indication of the Applicant having been called upon or any steps taken to hold him to the illusory undertaking until 2015 when Applicant put the Units on the market.

[42] Additionally, the Body Corporate had on its own proclaimed the separate registration of the two Units in one building (by the developer) to have been illegal and to have resulted in the whole scheme falling foul of the development plan, which it insisted that such illegality cannot be perpetuated, and to be the reason for its opposition of the Applicant's Application. Curiously, the Body Corporate was however amenable to let the situation it alleges to be illegal to be perpetuated in the instance the Applicant obtains on its behalf, from the Municipality and Rand Water, at Applicant's cost, the approval for the Body Corporate to register the 10th Unit. This indicates that the Body Corporate is not sincere in its opposition of the Applicant's Application but more concerned in getting its 10th Unit registered, using the situation of the Applicant's separate titles (which it caused) as a scape goat. It does not believe in the authenticity of its opposition. Besides it is the scheme, by extension the Body Corporate that has been found to fall foul with the Development Plan by attempting to register a 10th Unit and now inexplicably it implores the court to put the responsibility of obtaining the required approval on the Applicant.

[43] The Body Corporate's opposition of the declaratory order is also clearly duplicitous and more self-serving if considered from the submissions made in its heads of argument. It lacks the commitment it prophesies, to enforce the rule of law but only intends to attain the registration of its 10th Unit. It suggests in its heads of argument that the Applicant may also apply for the extension of the sectional title scheme, a responsibility of the Body Corporate that has taken over the control of the scheme from the developer. So the Body Corporate seeks to exonerate itself from falling foul with the law or incurring costs for getting the 10th Unit registered by coercing the Applicant to consolidate its titles or apply for approval or an extension of scheme. If it is illegal for the developer to have registered the two Units separately in 2002, the Body Corporate unfortunately assumes the responsibility for developer's non-compliance. Its challenge must therefore be treated with utmost circumspection. Applicant has a clear right emanating from his ownership to alienate his property from their title. The Body Corporate has not made a case for the court to restrict his competence to dispose (sell and pass ownership) his Units as per their separate titles.

[44] As indicated, the Body Corporate carries accountability for both acts that are criticised and are supposedly regarded to be non-compliant by Rand Water. In respect of the deemed undertaking the Body Corporate lacks the *locus standi* as correctly argued by the Applicant as it is not a party thereto. In *Merafong v Anglogold Ashanti* 2017 (2) SA 211 [27] Cameron J acknowledging the conclusion in Oudekraal that an unlawful act can produce legally effective consequences stated that:

> "This is because, unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exist as a fact and may provide the basis for lawful acts pursuant to it. This leads to a logical corollary, which this court recognised in *Giant Concerts* that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands."

Hence the central conundrum of the *Oudekraal*, that an unlawful act can produce legally effective consequences, is constitutionally sustainable and indeed necessary.

[45] The Applicant has also argued that the alleged undertaking is nevertheless not in writing and seeks to alienate land, contrary to the provisions of s 2 (1) of the Alienation of Land Act No 68 of 1981 as read with the definitions of "alienate" and "land" referred to in s 1(1) of the Land Act. I do not think the argument is necessary or needs any further consideration.

Rand Water's Opposition

[46] Rand Water's premise for its contention is fatally flawed. It alleges that the Applicant's separate registration of the two units was in error and that the Applicant ought to have submitted the plans to it for approval prior to their registration which it did not. As pointed out Applicant had nothing to do with the registration or the so called subdivision of Section 3 into 2 Units. As a result Rand Water's insistence on that ground that Applicant is responsible and therefore has to consolidate the 2 Units is ill advised.

[47] Similarly, Rand Water's argument that the subsequent approval by the Municipality of the modified plans submitted by the Applicant in 2006 did not validate the separation/subdivision as it lacked its endorsement or approval, may be relevant against the scheme/Body Corporate but not against the Applicant since it is the developer that applied for approval of the SDP, erected the buildings in the Tuscany on Vaal Development Scheme and was responsible for the initial registration of the Units that is alleged to have been erroneous. The developer also submitted the modified plans. Ineptly Rand Water does not mention either the developer or the Body Corporate, the body and person legally responsible for the scheme's compliance with the development plan.

[48] Rand Water has failed to establish that the Applicant had immediate connection or obligation as regards compliance with the development plan or consequent registration of the two Units. At the time Applicant and Drew's Co bought and took transfer of Unit 7A and 7B, the alleged illegal or erroneous registration had already taken place in 2002 when the certificate of registered sectional title in respect of the 2 Units were issued to the developer under separate titles ST142657/2002 and ST 142656/2002. Coercing the Applicant to address

the developer's alleged non-compliance cannot be the right way out, to afford the scheme to deal with developer's transgression.

[49] Applicant and Drew were evidently innocent buyers, following the Developer's alleged erroneous act. So, if the titles of their Units are regarded as questionable due to their first registration, then even Drew's sale of Unit 7B to Appellant should be regarded as illegal no matter what was envisioned of the transaction. The illegality cannot be recognised only when the Units are now to be sold from Applicant's titles.

[50] Challenges are therefore very enormous as, factually, the 2nd building exists with 2 sectional titles Units that was from the first registration of the sectional title development by the developer registered separately and thereafter sold and transferred in terms of those separate titles to his successors in title who later sold to the Applicant. As indicated the Units are bonded to separate banks who have issued writs of execution. As a result the question of the alleged illegality of the initial registration of the Units is not the only disturbing issue but their subsequent registrations (consequent acts), what is their legal status (what determines their validity is it their factual existence or rather the validity of their initial registration?

[51] The enquiry to establish what is a justified outcome was expressed in different terms by Howie P and Nugent JA in *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA), which is whether the validity of the consequent acts depends on the validity of the initial act or merely on its factual existence. Taking into consideration the tension between the values of legality and that of certainty. It was pointed out that the value of certainty would usually support the view that factual existence is enough, whilst the rule of law 'dictates that the coercive power of the state cannot generally be used against the subject unless the initiating act is legally valid: see para 37. This would be more relevant in criminal matters

[52] The decision I am requested to pronounce upon as broadly is, whether the consequences that flow from owning each of the Units on its own title can be up for challenge, including the freedom to do as one pleases with his own property (like the Applicant or the banks intention to sell such a property on its own title) as a result of its first title. It is also important to recognise that since the alleged irregular registration in 2002 and or since 2006 when the alleged non-compliance became apparent, there was no attempt at all by either Rand Water or the Body Corporate to get a court order to set aside the registration of the Units, that exists as a fact, and or by Rand Water to contest the subsequent approval by the Municipality of the modified plans. Instead separate sales and transfer of the registration of the Units by the developer to different owners following the alleged erroneous registration were allowed to happen and recognized without a challenge by both Rand Water and the Municipality.

[53] In *Oudekraal* it was held that until the administrator's approval (and thus all the consequences of the approval) was set aside by a court, it existed in fact and it had legal consequences that could not simply be overlooked. The court went further and stated that:

> "The proper functioning of a modern state would considerably be compromised if all administrative acts could be given effect to or ignored depending upon the view the subject took of the validity of the Act in question. No doubt it was from this reason that our law had always recognised that even an unlawful administration act was

capable of producing legally valid consequences for so long as the unlawful act was not set aside; see para 26; *Nzimande v Nzimande* 2005 (1) SA 83 (W) para 48.

[54] It was also enunciated that the rule of law dictates that a public authority could not justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act: It was required to take action to have it set aside at least. So while a void administrative act is not an act in law, it is, and remains an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second. It was therefore concluded that if the validity of consequent acts is dependent on no more than factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court; see Oudekraal [31] at 243H -244 A/B.

[55] In *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) para 23, it the court also alluded to the fact that so long as an administrative decision or act has not been set aside, an organ of state may not raise its invalidity as a defence to proceedings against it to enforce that decision. Relying on the invalidity of an administrative act as a defence against its enforcement, whilst it has not been set aside, dubbed a collateral challenge, was also censured.

[56] The process here has gone so far that there are mortgage bonds registered over the two Units. Rand Water has done nothing following the initial registration that it now alleges was irregular but allowed further transfer registrations of the two Units to different owners without challenge barring only the refusal to grant approval for the registration of the 10th Unit, six years later and on the basis that there are 9 Units already registered as in accordance with its approval and registration of another Unit will exceed the number approved.

[57] It therefore seems the problem of Rand Water is not about the number of buildings/dwellings or structures erected in the development but the disproportion between the registered Units and the number of buildings/dwellings approved due to the one building being subdivided into two Units each held by its own title. Hence the Applicant is being forced or coerced to consolidate the two titles. It is however not correct that the status of the Units affect the integrity of the development as the number of structures/buildings built accords with the number approved. The fact that one building is used as two residences does not convert it into two structure or to an additional building. Rand Water's argument about its statutory obligation to regulate and preserve the Vaal River and prevent pollution in the River Complex is therefore off the mark in this context as the 9 buildings approved above the 1975 Flood Control Line is what has been built. I do not see how the Flood Control Line or Rand Water's Constitutional obligation to provide clean water is negatively affected.

[58] It is therefore significant that the number of buildings that were erected accord with the number duly approved by Rand Water to be constructed on the rezoned land. It seems the alleged non- compliance is in relation to the ownership and usage of the building that has been divided into two resulting in 9 titles being registered disproportionate to the number of buildings approved.

[59] Rand Water as the Body Corporate espouses the same sentiments that the honourable court cannot condone an illegality, saying the sale of Applicant's Units on their separate title would be a sale of illegal structures to innocent members of the public and cannot be justified. If the Units are regarded to be illegal structures because the Developer failed to conform to the approved plans, it means the Body Corporate sold illegal structures. The Applicant and Drew's ownership would also be tainted with illegality, which will cascade to the transfer of Drews' Unit to the Applicant. However as concluded the registration of the two Units on their separate titles by the Deeds Office stands as legal until it has been set aside by the court of law.

[60] The Body Corporate now stands in the developer's stead. Applicant's right or freedom to alienate cannot be stifled by what is deemed to have been the developer's transgressions. Indeed the approval of the Municipality was obtained after the registration of the Units and their transfer to the Applicant's predecessor in title and Drew's Co was already effected. Such plans were not submitted to Rand Water for endorsement, so according to Rand Water the Municipality approval was insufficient if not endorsed by it. However it also goes that the approval was never withdrawn or set aside and therefore stands. So it is inappropriate and illogical to allege that the Applicant was required to have submitted alterations to the plans in terms of Annexure "C" to Rand Water prior the separate registration of the Units.

[61] Under the circumstances the Applicant as a holder of valid separate title deeds to the two Units that it seeks to alienate separately has made a case for the declaratory order he prays for in his notice of motion.

[62] I therefore make the following order:

[1.1] That the immovable properties of the Applicant described *infra* may be alienated in terms of the Alienation of Land Act, 1981 (Act 68 of 1981) ("the Act") in separate parts;

PART 1

[1.1.1] A unit consisting of:

(a) Section no, 2 as shown and more fully described on Sectional Title Plan No. SS799/2002 in the scheme known as TUSCANY ON VAAL in respect of the Land and buildings situated at Portion 6 of the Farm Northdene 589, Local Authority EMFULENI LOCAL MUNICIPALITY of which section the floor area, according to the said Sectional PLAN IS 168 square metres in extent; and

(b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan.

Held by Deed of Transfer T145369/06

[1.2] and an exclusive use area describe as Yard Y2 measuring 355 (THREE HUNDRENDFIFTY FIVE) square metres, being as such a part of the common property, comprising the land and the scheme known TUSCANY ON VAAL, in respect of the land and building or buildings situate at PORTION 6 OF THE FARM NROTHEDENE 589 LOCAL AUTHORITY EMFULENI LOCAL MUNICIPALTY, as shown and more fully described on Sectional Plan No> SS 375/2003 HELD BY DEED OF CESSION SK 084635.

PART 2

[1.3] A Unit consisting of:

(a) Section No. 3 as shown and more fully described on Sectional Title Plan No> SS799/2002 in the scheme known as Tuscany on Vaal in respect of the land and building/ buildings situated at Portion 6 OF THE FARM NORTHEDENE 589, REGISTRATION DIVISION IQ, PROVINCE OF GAUTENG, Local Authority: EMFULENI LOCAL MUNICIPALITY, of which Section the floor area, according to the said Sectional Plan is 168 (ONE HUNDREND SIXTY EIGHT) square metres in extent; and

(b) an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan;

HELD BY DEED OF TRANSFER NO. 42656/2002 & T153316/2005

1.2 The 3rd and 4th Respondent to pay the costs of the Applicant

N V KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

On behalf of Applicant: **A FF ARNOLDI SC**
FJ LABUSCHAGNE

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