



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO: 3563/2021

In the matter between:

CHARTRO PROPERTIES 9 (PTY) LTD

Applicant

And

**MARINA MARTINIQUE HOME OWNERS
ASSOCIATION**

First Respondent

**RICHOIL INVESTMENTS 8 (PTY) LTD
(IN LIQUIDATION)**

Second Respondent

**THE BODY CORPORATE OF ARUBA BREEZE
(SECTIONAL TITLE SCHEME 403/2007)**

Third Respondent

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
.....
DATE	SIGNATURE

JUDGMENT

NONCEMBU J

[1] The applicant, in its amended notice of motion, is seeking relief on the following terms:

“1. That it be declared that the First Respondent consented to the Applicant effectively consolidating (through whatever means necessary) part of the current Erf 1310 and part of current remainder of Erf 1021, after the moving of the road from the South Eastern border to its North Eastern border, with Erf 1315, to enable the Applicant to construct parking bays thereon for use by the Sectional Title owners in the Aruba Breeze Sectional Title Complex;

2. That it be declared that the First Respondent’s cancellation on 28 April 2015 of the First Respondent’s consent given to the Applicant in respect of the consolidation of Erven 1310 and 1315 Aston Bay, Kouga Municipality, is unlawful, is null and void;

3. *By declaring that the consent of the First Respondent as described above is extant, valid and binding and that such prohibits the First Respondent from taking any steps to impede and/or frustrate the process to achieve such;*
4. *The First Respondent be ordered not to levy any separate levies in respect of Erf 1310, Aston Bay, Kouga Municipality;*
5. *That the First Respondent be ordered to take all reasonable steps to assist the Applicant in consolidating Erf 1310 and 1315, Aston Bay, Kouga Municipality, or to have same notarially linked;*
6. *That the First Respondent be ordered to pay the costs of this application.”*

[2] I deem it apposite, as a point of departure, to look into the history of the matter to give proper context to the application, which is highly opposed by the first respondent.

[3] The application was first launched in December 2021 by the applicant where it sought relief in terms of the prayers 1 to 3 as contained in the original notice of motion.¹ The first respondent, in opposing the matter, delivered its answering affidavit on 11 March 2022. The applicant delivered a replying

¹ These mainly entailed prayers 2, 4 and 5 as re-numbered in the amended notice of motion.

affidavit on 14 April 2022, thereafter took no steps to bring the matter to finality by applying for a date of hearing.

[4] Seeing no movement on the part of the applicant, the first respondent ultimately had the matter set down for hearing, initially on 13 April 2023 and by agreement moved to 20 April 2023. On 27 March 2023 the applicant delivered a notice of its intention to amend the notice of motion. This amendment, though not strongly opposed, was not by agreement, but the matter was argued on the basis of both the amended and the original notice of motion, in anticipation of the envisaged amendment.

THE FACTUAL BACKGROUND

[5] The facts of the matter are largely common cause. The first respondent is the Marina Martinique Home owners association NPC, a home owner's association with its primary object being 'to represent the interests of its members as a collective and to do all things necessary to preserve, maintain, improve, and protect the Marina in the interest of its members and in so doing to undertake the proper management of the association.'²

² Record: p 13 para 5, et al.

[6] The objects and powers of the first respondent are contained within its Memorandum of Incorporation and include under clause 4.2.3, the power to manage all services forming part of the Marina Martinique, including roads.³

[7] The Marina Martinique is a development which was established as a separate township (the Marina) by the subdivision of the original Erf 856 Aston Bay. It constitutes a cluster housing scheme arranged around canals.⁴ The individual cadastral erven within the Marina were uniformly zoned for single residential purposes except for the area that was rezoned for sectional title apartments. When the subdivision establishing the Marina was given effect to by the initial transfer of individual erven to buyers; the roads, open spaces and canals were transferred to Kouga municipality. It was however, a condition of the approval of the subdivision establishing the Marina that initially the developer and thereafter the first respondent would be responsible for constructing and maintaining them.⁵

[8] The applicant was the developer of Aruba, such development being erf 1315 and situated in Marina Martinique.⁶ During 2005 the applicant became the

³ Record: p 158, Annexure "AA1".

⁴ Record: p 122, para 5 AA.

⁵ Record: p 122, para 6 AA

⁶ After having acquired a number of erven in the Marina, which included erven 1306 to 1310 during the first half of 2005, the applicant took steps to establish the third respondent (The Body Corporate of Aruba Breeze). To that end, on 19 September 2005, erven 1306 to 1309 were consolidated as erf 1315 Aston Bay in terms of Consolidation Title T75489/2005 (the CCT) in the name of the applicant. On 21 June 2007 the CCT was endorsed to reflect that erf 1315 was subject to a development scheme registered in a sectional title register "which land and building(s) are known as Aruba Breeze".

registered owner of erf 1310 situate at the Marina Martinique.⁷ The intention of the applicant was to incorporate erf 1310 into erf 1315 with the ultimate goal that erf 1310 would become part of Aruba and carports would be built thereon which would, after the consolidation of the erven, serve the sectional title units on erf 1315.

[9] As erf 1310 and 1315 were not contiguous to each other, as they were separated by a road, the planned incorporation of erf 1310 for the purpose of constructing carports for use in Aruba would require a series of sub-divisions and rezoning's primarily due to the fact that the road portion, and all roads in the Marina Martinique, were constituted as erf 1021 and owned by Kouga Municipality.⁸

[10] This meant that, from a practical viewpoint, to give effect to the applicant's intended development of erf 1310 to supplement and serve Aruba, the portion of the road (a portion of erf 1021) would have to be moved from its current position between the boundaries of erven 1310 and 1315 on the South Eastern edge of erf 1310, to its North Eastern edge.⁹

⁷ Record: p 16, para 17 FA.

⁸ The road in question had not yet been constructed at the time.

⁹ Record: p 17, para 23 FA.

[11] The applicant submitted an application for the rezoning and subdivision of the affected erven and same was formally approved by the first respondent on 26 July 2005. Various approvals were also obtained for the rezoning and subdivision as required by the Land Use Planning Ordinance, 1985 (LUPO).

[12] Whilst the above was underway, in April 2008 the first respondent issued summons in the magistrates' court in Humansdorp against the applicant in respect of certain service charges and levies pertaining to erf 1310. This action was defended by the applicant on the basis that the first respondent had consented to the consolidation of the erven 1310 and 1315 and furthermore, that the first respondent was in fact recovering service charges and levies as if the erven had already been consolidated.

[13] This action became part of a settlement in a subsequent High Court action between the first and the second respondents. A settlement agreement incorporating both actions was made an order of court on the following terms¹⁰:

“IT IS ORDERED (by agreement)

1. *That the Defendant [Richoil] pay to the Plaintiff [first respondent] the sum of R 250 000 which amount is payable within 7 days of the date of*

¹⁰ The court order was dated 5 September 2011.

this order whereafter interest shall accrue at the prevailing prescribed legal rate until date of payment.

2. *That in respect of erf 1428 the Defendant [Richoil] as from 1September 2011, pay the normal levies associated with a single residential erf.*

3. *That in respect of erf 914 the Defendant [Richoil] shall:*

3.1 pay levies from 1 September 2011 on the basis of the levies and availability fee payable in respect of the two units on a general residential erf, for a period of 2 years or until the Defendant [Richoil] submit its development plans to the Plaintiff [respondent], whereafter levies will be calculated in accordance with the proposed development.

3.2 After the aforementioned period of 2 years if the Defendant [Richoil] has not completed its development, the Defendant [Richoil] will thereafter pay levies on the basis of a development comprising 4 units together with the availability fee, and will continue to do so until it submits its development plans to the Plaintiff [respondent], whereafter the levies will be calculated on the basis of the actual units to be developed.

4. *That it is recorded further that in the Magistrate's Court matter between the Plaintiff [first respondent] and Chartpro Prop 9(Pty) Ltd [the applicant,] being case no. 272/08 in the Magistrates Court,*

Humansdorp the parties are agreed that the aforesaid payment of R250 000 includes payment in respect of that matter and that matter too is hereby settled.

5. *That in respect of erven 1310 and 1315 the parties agree that these erven have been consolidated and will in future be treated as such with no separate levies applicable to the individual erven.*
6. *That it is recorded by the parties that G Olivier, the representative of the Plaintiff herein, is also authorised to represent Chartpro Prop 9 (Pty) Ltd [the applicant] herein and agrees to this order as an authorised representative of both the Plaintiff and Chartpro Prop 9 (Pty) Ltd [the applicant].*
7. *That the Defendant [Richoil] pay the Plaintiff's[first respondent's] costs of suit in this matter on the High Court scale as taxed or agreed and the Plaintiff's[first respondents] costs in the Chatpro Magistrates' Court matter on the appropriate Magistrates' Court scale as taxed or agreed."*

[15] It is the applicant's further contention that an implied / tacit term of the order was that:

15.1 The first respondent would do all that is necessary to assist the applicant in whatever was required to have erven 1310 and 1315 consolidated; and

15.2 That the treatment of the said erven as effectively consolidated erven by the first respondent entailed that nothing would be done which would hamper the applicant's rights to have them effectively consolidated."¹¹

[16] In a period of over a year later, on 18 October 2012, the first respondent's attorneys addressed correspondence to the then applicant's attorneys, wherein the applicant was put on terms; *inter alia*, to submit a progress report on the status of the consolidation application within 7 days, failing which the first respondent would cancel the agreement granting consent to the consolidation.¹²

[17] In response to the above correspondence, the applicant's attorneys informed the first respondent's attorneys that they were '*now proceeding with the consolidation and are attending to the signature of the relevant documents*'. Of noteworthy, is the fact that from the latter part of 2010 the first respondent was represented by Mr Heunis who is also the deponent to the answering affidavit.

[18] On 27 October 2014 the first respondent's attorneys addressed another letter to the applicant's attorneys once again putting the applicant on terms similar to the letter sent in October 2012. The only difference between this

¹¹ Record: p 23, paras 39 and 40 FA.

¹² Record: p 130, para 39 AA.

letter and the 2012 one being that the 2014 letter referred to the agreement granting consent as having been entered into 3 years ago. According to the applicant this coincided with the time period within which the High Court order was granted.

[19] With no response to the above correspondence received from the applicant, the first respondent purported to cancel the agreement on 28 April 2015, making reference to the October 2014 letter.

[20] Subsequent to the purported cancellation, the first respondent proceeded to construct a service road on the portion between erf 1310 and 1315. It is the applicant's contention that this affected the consolidation process.

[21] On 3 July 2015 the applicant's attorneys addressed correspondence to the first respondent indicating that the consolidation process originally envisaged could not have proceeded and that the process would have had to follow that of a notarial tie in due course. This requirement (of a notarial tie) had been communicated to Heunis before the High Court order dated 5 September 2011.

[22] On 15 June 2017, the applicant's then attorneys wrote to the first respondent submitting that the construction of the road as well as the purported cancellation were unlawful.

[23] On 16 July 2020 the first respondent contended that the applicant was in arrears with payments for levies relating to erf 1310, and subsequently, issued summons for payment of such levies.

THE APPLICANT'S CASE

[24] As can be gleaned from the founding affidavit, and as it crystallised in argument at the hearing, the applicant's case is that the first respondent unconditionally consented to the effective consolidation of the aforementioned erven, which consent was made an order of court in terms of the settlement agreement on 5 September 2011. Furthermore, the applicant contends that in terms of the aforementioned court order, the first respondent agreed not to service separate levies in respect of erf 1310 as the two erven would in future be treated as consolidated, thus indicating that consolidation had not taken place at the time.

[25] The applicant contends further, that implicit in the above order, the first respondent agreed to do whatever is necessary to assist the applicant in ensuring

the aforementioned consolidation, including a notarial tie, and not to do anything to interfere with the said consolidation.

[26] Based on the above, it is the applicant's contention that the first respondent's cancellation of its consent is therefore unlawful, null and void. This, the argument goes, remains the position as the court order still stands and is binding until set aside by a competent court of law.

[27] On the other hand, the case advanced by the first respondent in reply is that the consent was conditional and that the applicant having failed to comply with such conditions, specifically, the requirements as provided for in terms of LUPO,¹³ the consent lapsed in 2010, 5 years after it was given. The first respondent contends thus, that the cancellation was superfluous as the consent had already lapsed by that time.

[28] As regards the agreement contained in the court order, the first respondent argues that it was synallagmatic, and with no payment having been received from or on the part of the applicant in terms thereof, it is not open to the applicant to seek to enforce the first respondent's contended obligations in terms thereof. With no payment having been received in terms of the applicant's

¹³ The Land Use Planning Ordinance, 1985, which was applicable at the time (has since been repealed) and required, *inter alia*, that the sub-division and rezoning be confirmed within 5 years of the approval, failing which such approval would be deemed to have lapsed.

obligations in terms of the agreement, the argument goes, paragraph 5 of the court order could not be triggered.

[29] As a further ground for the opposition of the applicant's case, the first respondent also raised the non-joinder of the Kouga municipality. It is contended in this regard, that the grant of the order sought will have a direct impact on the basis upon which the applicant will implement the consolidation, in particular, the requirement to move the road, and accordingly the interests of the municipality (as the owner of the roads). The submission therefore is that the municipality has a direct and substantial interest in the relief sought by the applicant, as such, the court cannot hear the matter in its absence. I deal with this later in the judgment.

THE ISSUES FOR DETERMINATION

[30] In my view, whilst the triable issues are centred around whether or not the first respondent gave an unconditional consent to the applicant for the consolidation of the aforementioned erven; and whether or not such consent is valid and extant, the crux of the matter turns on the interpretation to be accorded to the court order of 5 September 2011. This is also what triggered the amended relief as sought in the amended notice of motion.

[31] Furthermore, this court is also required to make a determination on whether or not the non-joinder of the municipality is dispositive to the case of the applicant.

INTERPRETATION OF THE COURT ORDER

[32] The applicant has referred this court to a plethora of cases pertaining to the interpretation of the court order.

[33] As a starting point, it is apposite to look at the current position of our law as has become settled in this regard. This was set out as follows in *Natal Joint Municipal Pension Fund v Endumeni*:¹⁴

“Interpretation is the process of attributing meaning to the words used in a document, albeit legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions and the like of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all the factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the

¹⁴ 2012 (4) SA 593 (SCA) at para 18.

document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[34] This was expounded upon by Wallis JA when he stated:¹⁵

“Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at the perceived literal meaning of those words, but considers them in the light of all relevant admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is ‘essentially one unitary exercise’.”

[35] Wallis JA also stated:¹⁶

¹⁵ In *Bothma-Batho Transport (Edms) BPK v Bothma en Seun Transports (Edms) Bpk* 2014 (2) SA 494 at para 12.

¹⁶ In *Comwezi Security Services (Pty) Ltd & Another v Cape Empowerment Trust Limited* (759/11) [2012] ZASCA 126 (21 September 2012).

“ In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another.¹⁷ Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity,¹⁸ there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision. It is therefore relevant to an objective determination of the meaning of the words they have used and the selection of the appropriate meaning from among those postulated by the parties.”

[36] It was also noted in the applicant’s heads of argument that our courts have emphasized that contracts are to be interpreted “...in accordance with sound commercial principles and good business sense so that it receives sensible application”.¹⁹

[37] A further submission in the applicant’s heads was that in commencing at the “starting point”, namely the words of the contract, a court must bear in mind that:

“It is a good and sound general rule in jurisprudence that one who reads a legal document, whether public or private, should not be prompt to

¹⁷ *Shill v Milner* 1937 AD 101 at 110-111; *Shacklock v Shacklock* 1949 (1) SA 91 (A) at 101; *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) at 12F-H. (759/2011) [2012] ZASCA 126 (21 September 2012).

¹⁸ Formerly it was said that ‘background circumstances’ were always admissible to provide context, but ‘surrounding circumstances’ could only be considered if there was ambiguity. That distinction was swept away in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.

¹⁹ *Hyprop Investments v Shoprite Checkers* (315/10) [2011] ZASCA 51 (30 March 2011) at para 12.

ascribe – should not, without necessity or some sound reason, impute – to his language tautology or superfluity and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.”²⁰

[38] This position was reaffirmed by Unterhalter AJA in *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd & Others*²¹, where he said:

“Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings’ consent was indeed required. The much-cited passages from Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined as

²⁰ Portion 1 of 46 *Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd & Others* 1984 (1) SA 61 (A) at 70 C – D.

²¹ 2022 (1) SA 100 (SCA) at para 25.

Endumeni emphasized, citing well-known cases, ‘[t]he inevitable point of departure is the language of the provision itself.’

[39] With regards to court orders, the Constitutional Court added to the foregoing in *Eke v Parsons*²² where the court stated:

“[29] Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

*“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”*²³

[30] This is equally true of court orders following on settlement agreements, of course with a slant that is specific to orders of this nature:

‘The Court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement. . .

²² 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).

²³ Making reference to *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (*Finishing Touch 163*) at para 13. See also *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

*The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the ‘genesis of the transaction’ or its ‘factual matrix’. Its aim is to put the Court ‘in the armchair of the author(s)’ of the document. Evidence of ‘surrounding circumstances’ is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible only in the case where evidence of the surrounding circumstances does not provide ‘sufficient certainty’.*²⁴

[40] Having due regard to the background above, it is the applicant’s submission that the underlying dispute between the applicant and the first respondent that preceded the court order related to the payment of separate levies in respect of erven 1315 and 1310, which aspect formed a part of the consent to the ‘consolidation’ and governed the consequences of such consent. I do not think that such can be gainsaid.

[41] It is the further argument of the applicant that the reference in paragraph 5 of the court order to the erven having been consolidated, was not intended to refer to an actual consolidation, but rather to an agreement to consolidate them. This, it is said, is underscored by the fact that the order specifically records that

²⁴ With reference to *Engelbrecht and Another v Senwes Ltd* [2006] ZASCA 138; 2007 (3) SA 29 (SCA) at paras 6-7.

the erven ‘will in future be treated as [consolidated] with no separate levies applicable to the individual erven.’

[42] It was further argued on behalf of the applicant that the reference to individual erven and to the future treatment thereof as being consolidated, as well as the correspondence that was exchanged between the parties subsequently where it was clear that all parties were aware that no actual consolidation had occurred, as well as from the events set out in the answering affidavit by Heunis, supports a construction that the parties in fact were recording the first respondent’s agreement to the planned consolidation, which both parties at that stage knew involved a notarial tie.

[43] The submission here was that the existence and validity of the consent at the time when the court order was agreed, was a *sine qua non* to settling the dispute concerning the payment of separate levies. That on a proper interpretation of the court order considering all relevant material available as per the approach to the interpretation of court orders, that the court order either affirmed and/or constituted a recordial of the consent and /or agreement of the first respondent to the effective consolidation of the relevant erven for the purposes described.

[44] In conclusion in this regard, the applicant submitted that it cannot be gainsaid, at the very least, that the court order unequivocally records the rights and obligations of the parties insofar as the raising of separate levies on the erven is concerned, and that the first respondent does not have an entitlement to charge separate levies in respect of erf 1310 for so long as the court order remains.

[45] On the latter, I cannot perceive of any other possible interpretation to be ascribed to the court order, given the status thereof as was well articulated in *Eke v Parsons* referred to *supra*. I fail to see how it can be gainsaid that the manifest purpose of the order (as a starting point), discernible from the language used in the order itself, was to regulate the future conduct of the parties in respect of the raising of separate levies for the relevant erven.

[46] In fact, the first respondent did not attempt to gainsay the above argument, but argued that the agreement contained in the order was synallagmatic, and given that the payment of R250 000 which included the amount due by the applicant in outstanding levies, was never received, the obligations contained therein on the part of the first respondent were never triggered.

[47] This argument however, is flawed and cannot be sustained. ‘The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, “a matter judged”).²⁵ It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order.’²⁶

[48] The language used in the order and the surrounding circumstances make it very clear that the first respondent accepted that the court order settled the underlying dispute between the parties which, as its origin, emanated from outstanding levies. The agreement and the subsequent court order resolved the issue of outstanding levies, which was closely tied to the raising of separate levies for the relevant erven. This aspect therefore became *res judicata*, there was thereafter no *lis* between the parties in this regard.

[49] This is further fortified by the fact that when no payment was forthcoming from the second respondent in terms of the court order, the first respondent took steps against the second respondent to enforce payment in

²⁵ The principle is that generally parties may not again litigate on the same matter once it has been determined on the merits.

²⁶ *Eke v Parsons supra*, at para [31].

terms of the order. It is that enforcement process that culminated in an application for the liquidation and the ultimate liquidation of the second respondent.

[50] For the first respondent to now argue that its obligations in terms of the court order were never triggered is both fallacious and untenable.

[51] With regards to the interpretation of the court order as contended by the applicant, the argument on behalf of the first respondent is that its representatives, specifically, Heunis, took the applicant's assertion that the consolidation had been given effect to at face value and assumed its correctness in agreeing that separate levies would not be raised.

[52] The subsequent conduct of the parties however, seem to indicate otherwise. What is demonstrable from their conduct is that the parties took the same approach with regards to the contended for interpretation of the court order regarding the consolidation, ie. (that the erven would in future be consolidated). In addition to the actual wording of the order which states that in future the erven will be treated as consolidated with no separate levies applicable to the individual erven, subsequent correspondence from the first respondent's attorneys seem to affirm this interpretation.

[53] In the letters dated 18 October 2012 and 24 October 2014 from the first respondent's attorneys, as well as the response thereto from the applicant, it is patently clear that the first respondent was aware that consolidation had not taken place at the time of the court order, hence the applicant was put on terms to finalise same. The subsequent conduct of the first respondent therefore does not support the contention that it was under the belief that consolidation had taken effect at the time of the order. This is further supported by the fact that it is not disputed by the first respondent that Heunis (its representative) had been made aware before the court order, of the fact that a notarial tie would be needed.

[54] In the circumstances therefore, I can find no other possible interpretation to be ascribed to the court order than that asserted to by the applicant. In the premise therefore, I find that the court order either affirmed and/or constituted a recordial of the consent and /or agreement of the first respondent to the effective consolidation of the relevant erven for the purposes described.

[55] Court orders granted by a competent court, including the making of settlement agreements into orders of court, are binding until set aside by a

competent court.²⁷ The court order in *casu* was never set aside or rescinded, as such remains extant, valid and binding.

[56] The first respondent's contentions on consent having lapsed seem to conflate the approvals by the municipality, which pertain to the subdivision and the rezoning of the erven in question, and therefore subject to the provisions of LUPO, with the relief being sought by the applicant which pertains to the first respondent's consent to consolidation and the treatment of the relevant erven as consolidated. These are two distinct aspects. That this is the case is also apparent from the answering affidavit deposed to by Heunis where he states at paragraph 21 '...In providing its consent to the application for subdivision and rezoning, **the First Respondent's Board also consented to the aforesaid consolidations (although it was not necessary for the Applicant to obtain the municipality's approval therefor)**' (Emphasis intended). The latter consent, which Heunis categorically states did not require the approval of the municipality, is what constitutes the applicant's cause of action in the matter.

NON-JOINDER OF THE KOUGA MUNICIPALITY

²⁷ *Department of Transport v Tasima* 2017 (2) 622 (CC) paras 179 – 183; *Victoria Park Rate Payers Association v Greyvenouw CC* [2004] 3 All SA 623 (SE) para 23.

[57] On a similar vein, far from it being a dilatory defence, the issue of non-joinder does not arise as the relief sought by the applicant relates to the consent of the first respondent to consolidation and the issue of separate levies being raised. It does not relate to any aspect which concerns the subdivision and rezoning as that is a separate aspect that the applicant would have to deal with as and when it becomes necessary. At this stage therefore, the interests of Kouga Municipality are not affected.

[58] having conclusively decided the issue of the interpretation to be ascribed to the court order, I therefore do not find it necessary for me to deal with the issue of the implied terms of the order. Suffice it to say that, having found that a valid consent to consolidation exists, which consent was affirmed and/or recorded in the court order in terms of the settlement agreement, it follows therefore, and implicit therein that the first respondent would be obligated not to do anything to frustrate such a process. I am however not convinced that such extends to a positive obligation on the part of the first respondent in ensuring that such consolidation is effected.

CONCLUSION

[59] As earlier indicated, the matter was argued on the basis of the amended notice of motion by both parties. Furthermore, given that the first respondent

shifted its reliance on the cancellation of its consent in its answering papers, to the lapsing thereof, it therefore became necessary for the applicant to amend its notice of motion. There is therefore no reason why the application for the amendment of the notice of motion should not be granted.

ORDER

[60] In the premise, I make the following orders:

- (a) The application for the amendment of the notice of motion is hereby granted.***

- (b) It is declared that the first respondent consented to the applicant effectively consolidating (through whatever means necessary) part of the current Erf 1310 and part of current remainder of Erf 1021, after the moving of the road from the South Eastern border to its North Eastern border, with Erf 1315, to enable the applicant to construct parking bays thereon for use by the Sectional Title owners in the Aruba Breeze Sectional Title Complex;***

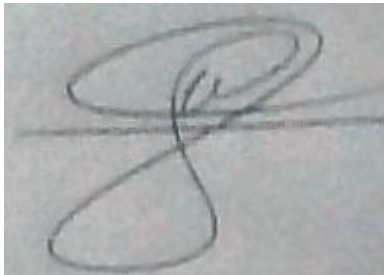
- (c) It is further declared that the first respondent's cancellation on 28 April 2015 of the first respondent's consent given to the Applicant in respect of the consolidation of Erven 1310 and 1315 Aston Bay, Kouga Municipality, is unlawful, is null and void;***

- (d) It is further declared that the consent of the first respondent as described above is extant, valid and binding and that such prohibits***

the first respondent from taking any steps to impede and/or frustrate the process to achieve such;

(e) The first respondent is ordered not to levy any separate levies in respect of Erf 1310, Aston Bay, Kouga Municipality;

(f) The first respondent is ordered to pay the costs of this application.



V P NONCEMBU
JUDGE OF THE HIGH COURT

APPEARANCES

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Counsel for the applicant : Adv J Nepgen

Instructed by : Lex Icon Attorneys

Gqeberha

Counsel for the first respondent : Adv J Richards

Instructed by : Rushmere Noach Incorporated
Gqeberha

Date of hearing : 20 April 2023

Date judgment delivered : 26 September 2023