Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No: 2023/038695

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

12 April 2024 ________________
DATE SIGNATURE

IN THE MATTER BETWEEN:

WENDY POSTMA	**PLAINTIFF**
And	
EBOTSE GOLF AND COUNTRY ESTATE, HOMEOWNERS' ASSOCIATION	**FIRST DEFENDANT**
EKURHULENI METROPOLITAN MUNICIPALITY	**SECOND RESPONDENT**

JUDGMENT

SIWENDU J

[1] The court is asked to determine an exception raised by the first defendant against the plaintiff's particulars of claim.

[2] The plaintiff, Ms Wendy Postma (Ms Postma) is the owner of the property described as Erf No […], Rynfield Ext […] (the property). The property is in a gated residential golf estate, and forms part of a communal ownership scheme at Ebotse Golf & Country Club, (the Estate).

[3] The first defendant, Ebotse Golf & Country Estate Homeowners Association NPC (EHOA), is a not-for-profit company incorporated in terms of Section 21 of the Companies Act 71 of 2008. The purpose of EHOA is to administer and manage the communal interests of owners in the Estate. It determines the levies payable as well as the rights, and obligations of owners, and maintains communal property. The second defendant is the City of Ekurhuleni Metropolitan Municipality but plays no role in these interlocutory proceedings.

[4] Ms Postma purchased the property from Mr Vincent Cockbain on 27 March 2013. As a prospective owner in the Estate, she was required to be a member of the EHOA and comply with the provisions of the Memorandum of Incorporation (MoI), Estate Rules, and the Architectural Guidelines of the Association.[1]

[5] Ms Postma alleges that on or about 3 May 2020, the slope above the 12th Tee of the estate's golf course in front of her property failed and slipped, resulting in what was once a mild gradient slope on the common property, to become a sharp dangerous gradient. This caused a loss of approximately 72 meters squared of her property, which washed down the slope onto the common property of the Estate.

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[1] Clause 6 of the sale agreement incorporates the requirements as well as other obligations of purchasers.

[6] She claims that the gabion wall, which cost R450 000.00 to acquire and install, was destroyed by the slope slippage. Due to the damage caused, it was necessary to install a safety balustrade on the edge of the property to keep her family and visitors safe from the newly created steeper slope. The safety balustrade cost her R22,000.00 to install.

[7] Around July 2020 to September 2020, the EHOA built a retaining structure to remedy the situation. According to Ms Postma, the retaining structure had no foundation, and at the time of erection, cracks in the soil in front of the toe of the retaining structure were not filled. The absence of a foundation allowed water to enter the soil underneath the structure and cause a further slope failure.

[8] On or about January 2021, Ms Postma 's property experienced a second slope failure which aggravated the effects of the first slope. Concomitant soil erosion occurred, and a dangerous sinkhole formed in the front garden. Cracks in the house's structure widened and the swimming pool and front garden became too dangerous to use. She alleges that the EHOA placed sandbags at the toe of the retaining structure which did not remedy the problem. Erosion still occurred and soil washed out from underneath the retaining structure.

[9] In April 2023, she instituted an action against the EHOA and the Municipality. Ms Postma, claims that the slope failure was caused by the EHOA's failure to properly maintain and stabilise the common property by preventing soil erosion and slope slipping. She alleges that after the 3 May 2020-event, EHOA took insufficient steps to remedy the consequences and in repairing, stabilising, and maintaining the slipped slope. EHOA failed to maintain the common properly at a high standard or at all and provide and maintain civil services which includes storm water reticulation networks, which serve the erven and/or units in the estate.

The Cause of Action

[10] Ms Postma has premised her action on four claims based on (a) contract, being the agreement of sale, which she alleges was for the benefit of a third party, and (b) certain exemption clauses in the MoI and the Estate Rules. In the alternative to the contractual claim, (c) she brought a delictual claim, (d) and a claim based on the common law duty of lateral support. This judgment deals with the claims that are the subject of the exception.

[11] The contractual Claim 1 is premised on a breach of the sale agreement and the MoI. She avers that at the time of the conclusion of the agreement, she, and Mr Cockbain (the seller), intended that EHOA, would also enter into an agreement for its benefit. EHOA accepted the benefit by undersigning the Agreement of Sale on 28 March 2013 both as the "Developer" and the "Estate Agent".

[12] The sale agreement refers to Ebotse Golf and Estate (Pty) Ltd as the "Estate Developer." A commission of R43 320.00 was payable to the Estate Agent, described as "Ebotse Golf & Country Estate."

[13] It is sufficient for the purpose of the exceptions to state the alleged failures broadly since they are not in themselves the reason for excepting. It is alleged that EHOA was contractually bound to take preventative steps in stabilising and maintaining the slope at issue and provide related civil services and maintenance.

[14] Ms Postma seeks contractual damages for R11,000,000.00 (eleven million Rand) based on a depreciation in value by R 4000 000.00 from R 15 000 000.00 (fifteen million Rand). In the alternative, she says she suffered damages on R 3 000 000.00 for the first slope slip, and R 8 000 000.00 for the second slope slip and resultant sinkhole.

[15] Simultaneously with the contractual claim, Ms Postma seeks an interdict against the EHOA based on a continuous breach by the EHOA, which she claims causes irreparable damage to her property. The aim of the interdict is to prevent the risk of future damage to the property and harm to her the inhabitants of the property and visitors. She claims it is the only remedy available to her to prevent continuous harm by EHOA.

[16] A related component of her claim is directed at exemption clauses in the MoI and Estate Rules. Ms Postma asserts that the maintenance of the storm water system and common properties are fundamental to the sale agreement. An exemption of EHOA from liability and the exemption provisions should not apply to her claim. It is impermissible for EHOA “to exempt itself from non-compliance with a fundamental obligation."

[17] She pleads in the alternative that - to the extent that the exemption applies, the exemption clause is unreasonable, unfair, or unjust and in contravention of section 48(1)*(c)*[2] of the Consumer Protection Act 68 of 2008 (the CPA). It is also prohibited by section 51 of the CPA[3] as it defeats its purpose, has deceptive provisions, and deprives her of recourse under the CPA, amongst other contraventions. She seeks a remedy in terms of section 52(3) and (4) of the CPA[4]. In the event the Court finds that the exemption clauses apply to her claim, then the Court must find that EHOA was grossly negligent, largely on the same grounds alleged in Claim 1 concerning the breach of contract.

[18] Claim 3 is based on a delict, pleaded as the alternative to the contractual claims. It is alleged that EHOA, as owner of the common property, walkways, golf area and pathways, exercised its rights of ownership of its immovable

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[2] The section prohibits a supplier from requiring a consumer, or other person to whom any goods or services are supplied at the direction of the consumer—(i) to waive any rights; (ii) assume any obligation; or (iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition of entering into a transaction.

[3] The prohibition against defeating the purpose of the CPA include the waiver referred to above.

[4] Amongst the remedy a court may grant is to declare the contract unfair and unjust and order a restoration of the money or property to a consumer, amongst others.

property wrongfully and negligently and to the detriment of Ms Postma's use and enjoyment of her neighbouring immovable property. EHOA had a common law duty, to ensure that the slope on its property, does not collapse or erode to such an extent that it causes damage to, or destruction of, her neighbouring property.

[19] She seeks delictual damages computed on the same basis as in respect of the contractual damages sought in Claim 1. Similarly, as in respect of the contractual claim, she seeks the same interdict against EHOA on account of allegations of continuous action and inaction causing irreparable damage to the property.

The exception

[20] EHOA excepts to the particulars of claim on the following grounds:

i the claim based on contract, (the sale agreement), lacks the averments necessary to sustain a cause of action against it, alternatively the averments are vague and embarrassing.

ii A mandatory interdict to prevent future subsidence is bad in law. An order compelling the EHOA "to remedy and repair the damage to plaintiff's house, swimming pool and garden" is irreconcilable with the claim for contractual damages for the loss suffered because of the same damages which she asks the court to compel the first defendant to repair.

iii Properly construed, the exemption clauses merely prevent the Ms Postma from holding the EHOA liable for damages suffered by her, it does not exempt EHOA from the obligation to maintain the stormwater system and common property.

iv The CPA claim is predicated on the contractual obligation and has no application to the relationship between EHOA and Ms Postma. To the extent

that the sale agreement does not create the contractual relationship, the particulars of claim are bad in law.

- v In so far as the claim based in delict and that based on the duty to provide lateral support, both claims are accompanied by the mandatory interdict to prevent future subsidence. The interdictory relief, which is coupled with the prayer for an order to repair the damage to the property is irreconcilable with the claim damages for the loss suffered due to the same damages which she asks the court to compel the first defendant to repair. The claim is bad in law.

Analysis

[21] Ms Mouton (for Ms Postma) and Mr West (for EHOA) are in broad agreement about the purpose, approach and principles governing exceptions - which is to amongst others raise a substantive question of law which may have the effect of settling the dispute between the parties and or dispose of the case or a portion thereof in an expeditious manner.

[22] They accept that an excipient who alleges that a summons does not disclose a cause of action must show that upon any construction of the particulars of claim, no cause of action is disclosed. The court will accept, as true, the allegations pleaded by the Plaintiff to assess whether they disclose a cause of action manner.[5]

[23] As Mr West contended, the guidance by the Supreme Court of Appeal in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority*[6] is that an "exceptions should be dealt with sensibly. They provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility." I deal with each of the exceptions below.

Does the contractual claim disclose a cause of action against EHOA?

[5] *Merb (Pty) Ltd v Matthews* Case No 2020/15069 dated 16 November 2021

[6] 2006 (1) SA 461 (SCA) at paragraph 3

[24] Ms Postma alleges that EHOA was represented by a duly authorised person, Mr Cockbain, alternatively D. Harding, alternatively a representative unknown to her. She also alleges that the sale agreement was for the benefit of EHOA as a third party. Further that EOHA and the Developer, Ebotse Golf and Country Estate are the same.

[25] The averment that EHOA was a party to the sale agreement concluded with Mr Cockbain is not ascertainable from the sale agreement. Clause 1.22 of the sale agreement defines the parties to the sale as "the seller and the purchaser." The seller and the purchaser are in turn identifiable by reference to the offer. Contrary to her averment, the offer was not signed by EHOA or its representative. There is no reference from the sale agreement that Mr Cockbain acted in a representative capacity on behalf of EHOA. Further, the assertion that EOHA and the Developer, Ebotse Golf and Country Estate are the same is not borne out by the definition of these parties in the sale agreement.

[26] It is indeed so that in terms of Clause 6 of the sale agreement, as a new property owner, Ms Postma automatically became a member of the EHOA on registration of the transfer. In this way, Ms Postma undertook to be contractually bound by the Rule of the EHOA. A mere reference to the EOHA in the sale agreement, for purpose of ensuring her automatic membership does render EHOA a party to the sale agreement.

[27] Given the sale involves the alienation of land, regulated by the Alienation of Land Act 68 of 1981, the identity of the parties is an essential term of the contract[7]. Parole evidence is not admissible to vary the provisions of the sale agreement in so far as the identity of the parties to it.[8]

[7] Section 2 (1) states that no alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.
[8] *Mineworkers'Union v Cooks* 1959 1 SA 709 (W) 721 A

[28] It was submitted that the sale agreement read with the MoI were for the benefit of EHOA. However, the nature of the benefit bestowed and how it was intended that EHOA should be empowered to adopt and become a party to the contract is not pleaded.

[29] As I understand the argument, the "benefit" allegedly conferred on EHOA is premised on the obligation placed on Ms Postma to take up automatic membership in EHOA upon the transfer, pay levies and abide by the MoI, the Estate Rules and Architectural Guidelines.

[30] There is no express provision in sale agreement to support the construction advanced. Although the terms ensure that Ms Postma is deemed a member of EHOA it is difficult to see how the provision confers a benefit to EHOA other than merely safeguarding that new or prospective owners accept the obligation to be a member of EHOA and will abide by the Rules of communal living. The mere fact that the contract contains some benefit for a third party does not justify the conclusion that it is a contract for the benefit of that third party in the legal sense.[9]

[31] Lastly, it will be recalled that the rights and obligations under the sale agreement are not divisible in a *stipulatio alteri*.[10] Taken to its logical conclusion, the submission means is that EHOA would be a party to all other disputes which could arise in respect of the sale between Ms Postma and Mr Cockbain. The argument connotes that EHOA was more than a Homeowners Association looking after communal interests of all property owners in the Estate without pleading a basis to support this in the particulars of claim. The exception must be upheld. It fails both to disclose a cause of action and lack the necessary averment to sustain a cause of action.

The exemption clauses and the CPA

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[9] *Protea Holdings Ltd and Another v Herzberg and Another* [1982] 4 All SA 614 (C)
[10] *McCullogh v Fernwood Est Ltd* 1920 AD 204.

[32] The pleading based on the application of the CPA is predicated on EHOA being a party to the sale agreement. The second aspect in respect of the contractual claim involves the disclaimer in Clause 73 of the MoI, and Rule 11 of the Estate Rules.

[33] The application of the CPA is linked inextricably with the existence of the sale agreement between Ms Postma and EHOA. Moreover, it must be shown that EHOA was a supplier as contemplated in the CPA. As I have endeavoured to show, the pleading fails on the same basis as the contractual claim, since it does not reveal that EHOA was a party to the sale agreement.

[34] Next is the reliance based on the provisions of the MoI and the Estate Rules. It is claimed that certain clauses exempt EHOA from its obligations to maintain the stormwater system and common properties. The pleading falls to be read with Clause 4 of the MoI which states amongst others that:

"4.1 The main business of the Company is—

…….

4.1.2 to provide end maintain civil and electrical services (including streets, water, sewerage and storm water reticulation networks) which serve the erven and/or units situated in the Ebotse Golf & Country Estate, insofar as the local authority, for whichever reason, may not be liable for or obliged to provide and maintain such services…."

[35] On a plain reading, the averment is inconsistent with the provisions of the above clause. As in any event was contended by EHOA, the exemption clause/s merely prevent the Ms Postma from holding EHOA liable for damages suffered by her (in terms of the alleged subsidence). The provision does not exempt it from having to comply with an obligation to maintain the stormwater system and common property. For reasons set out above, the pleading and the submissions made must follow the same fate as the contractual claim. It both fails to disclose a cause of action and/ or lack the necessary averment to sustain a cause of action and is thus excipiable.

Is the mandatory interdict compatible with delictual and a claim for lateral support?

[36] As already alluded to above, Ms Postma seeks preventative interdictory relief simultaneously with each of her claims on the grounds that EHOA is in continuous breach which causes irreparable damage to property. She avers that an interdict is the only remedy to prevent continuous harm by EHOA's action and/or inaction. Ms Postma relies on the same facts in her claim in delict and the alternative claim for lateral support to seek relief for a preventative interdict. The requirements for an interdict are well known.[11] Although the interdict has different consequences for each claim, it is prudent to deal with the issues raised in composite. The ultimate result of the order sought, is to prevent, repair thus remedy the damage.

[37] The final interdictory relief is framed as follows:

"3.5.1 immediately, within one week of this Court order, take high standard temporary measures on advice of a specialist, to secure the slope in front of Plaintiff's home and the swimming pool and front part of her garden.

3.5.2 within three months of this Court order, take high standard permanent measures on both Plaintiff's property and on First Defendant's property to protect the Plaintiff's property, from further slope slipping between the Parties properties and from Plaintiffs property further damaging or collapsing.

3.5.3 to remedy and repair the damage caused by the slope's slipping and the storm water, including the sink hole and damage to Plaintiff's house, swimming pool, and garden,

3.5.4 to a high standard, re-instate all the land that has been lost by Plaintiff to First Defendant since 3 May 2020. In the alternative to Claim 3: D. CLAIM 4 against 1st Defendant.

[38] The difficulty with the interdictory relief as currently pleaded is it gives rise to a duplication of claims. As the Constitutional Court held in *Le Roux and*

[11] *Setlogelo v Setlogelo* 1914 AD 221 at 227

Others v Dey; Freedom of Expression Institute and Another as *Amici Curiae,*[12] the same conduct should not render a defendant liable for two causes of action. It is impermissible for her to seek both damages simultaneously with the preventative interdict with remedies in respect of the same property. The interdictory relief as currently framed is not compatible with the delictual claim for monetary damages. To this extent, the pleading is bad in law.

[39] In so far as the claim based on a common law duty to provide lateral support, EHOA concedes that the right to lateral support caused by the disturbance is an integral part of our law. It is an integral part of Ms Postma's entitlement to the use and enjoyment of her property. EHOA takes no issue with the cause of action.

[40] The Court accepts that compensation for reasonable cost of repairing the damage caused by withdrawal of lateral support is competent in our law, and to this extent Ms Postma is entitled to bring an action to be recompensed on this score (the extent proved).[13]

[41] The point of departure with the pleading as it stands is the principle set out in *Gijzen v Verrinder*[14] *(Gijzen)* where the Court held that "in subsidence cases there is usually no unlawful act, and the cause of action is damage and damage only…. prospective damages are not recoverable, and each successive subsidence, although proceeding from the original act or omission, gives rise to a fresh cause of action, the cause of action not being the act which caused the loss..."

[42] The principle regarding prospective damages in *Gijzen* draws from an earlier judgment in *John Newmark & Co (Pty) Ltd v Durban City Council*[15] (*Newmark).* The Authors in *Silberberg and Schoeman's* confirm the position

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[12] 2011 (6) BCLR 577 (CC). Although there are separate judgments, all the Justices agree on this point.

[13] *Gordon v Durban City Council* 1955 (1) SA 634 (N) 639 A

[14] [1965]1 ALL SA 476 (D)

[15] 1959 (1) SA 169 (N)

which has been accepted in our law.[16] Although the authors alluding to *Gijzen* contend that unlawfulness should apply in cases of a withdrawal of support, they agree that negligence is not required, and liability is strict.

[43] Ms Potsma's case is not founded on a withdrawal of support. As I read the pleadings, there are allegations of negligence. In the same vein, an unlawful act (whether committed or apprehended) predicates an interdict. Yet, in respect of the common law duty to provide lateral support, the cause of action is based on damage only. The inherent conflict in the various causes of action is evident.

[44] In any event, the point of objection based on the principle in *Gijzen* is simply that while an interdict restraining EHOA from depriving Ms Postma lateral support is a possible remedy, a mandatory preventative interdict cannot be granted on the ground that future loss is probable. For these reasons, the pleading is bad in law and is excipiable.

[45] The exception is mounted on both the grounds envisaged in Rue 23(1) of the Uniform Rules of Court. The defects can be cured.

In the result, I make the following order:

a. The exception is upheld

b. Leave is granted to the plaintiff to amend its particulars within 10 days of the order, should she so choose, failing which Claim 1 and 2, as well as Claim 3 and 4 only insofar as a mandatory interdict is sought, shall be deemed to have been struck out.

c. The plaintiff is ordered to pay the costs of the exception.

[16] Silberberg and Schoeman's: The Law of Property Sixth Edition; see also *Foentjies v Beukes* 1977 (4) SA 964 (E)

SIWENDU J
JUDGE OF THE HIGH COURT

GAUTENG DIVISION,

JOHANESBURG

This judgment is handed down electronically by circulation to the Applicants and the Respondents' Legal Representatives by e-mail, publication on Case Lines and release to SAFLII. The date of the handing down is deemed to be 12 April 2024.

Date of appearance: 13 March 2024

Date Judgment delivered: 12 April 2024

Appearances:

For the Excipient/ First Defendant: Advocate H P West

Instructed by: Michael Krawitz and Co

For the Plaintiff: Advocate C J Mouton

Instructed by: Kruger and Okes Attorneys

c/o J Swanepoel Attorneys