

# Kingsmead Office Park Owners Association v Shasri Investments CC

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**Case number:** 15277/07  
**Judgment:** 27 September 2012  
K Pillay J



### SUMMARY

Contract - Office park - Levies - Action for unpaid levies  
- Defendant declining to pay levies because not having received benefits from association due to lack of fencing and lack of access to the main feature of the office park - Alleged that office park turning out differently from the brochures used to promote the park - However, owner contractually bound to pay levies.

### JUDGEMENT

**[1]** The Plaintiff is a company registered in terms of Section 21 of the Companies Act 1973.

**[2]** The Defendant is a close corporation incorporated and registered in accordance with the laws of South Africa. At all times the Defendant was represented by Mr Maniklall who has a fifty percent member's interest in the Defendant.

**[3]** The Plaintiff instituted action against the Defendant for payment of unpaid levies in the amount of R199 219.80, together with interest at the rate of 12% per annum calculated monthly in advance from 2nd April 2011 to date of final payment, and costs of suit on the scale as between attorney and own client.

**[4]** It is necessary to set out the background that gave rise to this action. For this I will draw extensively from the Plaintiff's Heads of Argument, as these aspects do not appear to be in dispute. The members of the Plaintiff are owners of properties situate within Kingsmead Office Park. In terms of its Articles of Association the Plaintiff is obliged to impose and collect levies from its members in order to manage the park.

**[5]** The Kingsmead Office Park exists upon land originally owned by the city of Durban which was then the north central and south central local councils and which is now the eThekweni Municipality. All of the sites owned by the members of the Plaintiff were originally owned by the local authority and the sale of the sites was conducted by way of a tender procedure, tender No. DRE 164F. The tender document is Exhibit "B".

**[6]** Anyone interested in purchasing a site purchased a tender "package" for the sale of the land in the Kingsmead Office Park. Each tender "package" consisted of, *inter alia*:-

- a) Procedural guidelines and conditions of tender imposed by the local authority for the sites;
- b) A pro forma offer to purchase;
- c) Conditions of sale to which was annexed inter alia annexure "A" which was the site planning requirements and development controls and a design code document called annexure "B";
- d) The memorandum and articles of association of the Plaintiff.

**[7]** In terms of clause 1.2 of the Procedural Guidelines and Conditions of Tender, tenderers were requested to read the tender documentation which is Exhibit "B" carefully prior to submitting the tender form. Furthermore, in terms of clause 6 of the Procedural Guidelines and Conditions of Tender, a tenderer was deemed to have acquainted himself with the following documentation which was annexed to the tender form and conditions of sale and which formed "an integral part of the sale agreement":-

- a) The precinct development framework plan and design report; and
- b) The Kingsmead Office Park Owners Association documents.

**[8]** The Kingsmead Office Park Owners' Association documents consisted of:-

- a) Guidelines;
- b) The Memorandum of Association;
- c) The Articles of Association;

**[9]** The main object of the Plaintiff as summarised in its memorandum of association is to manage the Kingsmead Office Park and to enhance and protect the interests of the members of the Plaintiff. In addition to protecting the rights and interests of the owners of lots within the office park, the Plaintiff is to ensure acceptable aesthetic landscaping and architectural standards:-

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- a) For the construction of office buildings in the park;
- b) For the ongoing maintenance of the park.

**[10]** In a document entitled "Guidelines for Future Members" of the Plaintiff included in the tender document, would be purchasers of lots within the park are advised that:-

- a) It should be clearly appreciated by each purchaser of land within the park that the entire precinct is privately owned and as such managed by the Plaintiff.
- b) Each owner of property within the park is obliged to become a member of the Plaintiff which is to manage the estate in the best interests of all owners of their joint expense;
- c) The principal areas of responsibility of the Plaintiff include:-
  - i. the management and maintenance of the security system which monitors the perimeter fencing and general policing in the park;
  - ii. the management and maintenance of all planting and street furniture within the park;
  - iii. the monitoring and collection of the water consumption and electrical consumption costs from sites;
  - iv. the maintenance of the internal road system.

**[11]** No person may become an owner of an erf within the park without first being accepted as a member of the association, and the rights and obligations of membership commence on the day upon which a person becomes an owner and cease on the day when he ceases to be an owner.

**[12]** The Defendant made an offer to purchase site 12 in the office park on 10th August 2001. On 24th October 2001, the eThekweni Municipality accepted the offer. Thus a contract was concluded between the eThekweni Municipality and the Defendant.

**[13]** In terms of the contract:

- a) the Defendant purchased site 12 ("the property") for R281 358.00 plus VAT;

b) the Defendant by Mr Maniklal's signature, acknowledged that it had acquainted itself with:-

- i. the conditions of sale.
- ii. the Precinct Development Framework Plan and Design Report.
- iii. the Kingsmead Office Park Owners Association documents (that is the memorandum of association and the articles of association and guidelines for future members).

**[14]** The conditions of sale which were incorporated as terms of the contract were:

- a) the property was sold subject to the terms and conditions set out in those conditions of sale.
- b) occupation of the property would be given to the defendant on the date of registration of transfer from which date the defendant would acquire the risk and profit in and would be liable to the Plaintiff for all levies and amounts payable by it in terms of the Plaintiff's articles of association.
- c) the defendant undertook to become a member of the plaintiff immediately upon transfer and would be subject to the articles of association and rules of the association as amended from time to time with which the defendant acknowledged that it was "fully conversant" and by which the defendant undertook to abide.
- d) the conditions of sale constituted the whole and only agreement between the parties and no representations, express or implied and which were not recorded in the document would be binding and no variation of these conditions would be of any force or effect unless reduced to writing and signed by the parties.

**[15]** An *inspection-in-loco* was held prior to the commencement of the trial. Present at this inspection were Advocate Thatcher, Advocate Choudree, Advocate Sewpaul, Mr Maniklal, Mr Chellen and Mr Schenk. The site in question is on the corner of Somtseu Road and a Lane called Lords Terrace. The site lies in front of a temple and a temple hall.

**[16]** The boundary line of the site extends from the beginning of the wall of the temple hall up to Somtseu

Road. The area in front of the temple is fenced. Access to the temple is through Somtseu Road, The property in question is fenced along Lords Terrace at present. No access is available to the property through Lords Terrace but through Somtseu Road. Parallel to the property is a building used by McCarthy Toyota. Lords Terrace is divided into two lanes with an Island in the centre that is in line with the property in question.

**[17]** Standard Bank, whose access is controlled by a boom lies further into Lords Terrace and completely blocks access to the park except through the underground parking and through its boom. Next to the temple is a four storey office building that is under construction. The property is fenced. Opposite that property is an open space which is also fenced. An inspection revealed the following; access to the oval from the site in question at present is only through Kensington Gardens which is also controlled by a boom.

**[18]** The narrow path leading from Lords Terrace, between the back of the temple property and the Standard Bank property, does not allow access directly to the oval because of a steep ditch. It is also fenced and uneven and would as it stands not allow safe access to the oval. It was pointed out that the defendant's power would be supplied by a power station that is closer to the Standard Bank boom gate on Lords Terrace and this would be at a more preferential rate. It was also pointed out that a wall at the back of the temple property which impedes any access from the front of the property is a recent construction.

**[19]** Access to the oval as I have pointed out was also through Kingsmead Way at present. The Defendant's site is used as a car park for the temple property and it was indicated that should the site be eventually developed, there would be very little access or parking for persons who intend to use the temple hall. The area around the temple and the building that is in construction is presently fenced.

**[20]** Both parties adduced the evidence of one witness each.

**[21]** Mr Colin Bernard Schenk who testified for the Plaintiff stated that he is employed by Spire Property Management who are the administrators of the property in the Kingsmead Office Park Owners Association. As their property manager, he personally attends to the administration of the properties at the Kingsmead Office Block. He attends to the

arranging of meetings and the attendance of persons at those meetings.

**[22]** The estimated levy budget for the 12 months from July 2006 to June 2007 was prepared by him in preparation for the meeting of creditors to be held on the 14 of September 2006. The levies proposed for the Defendant's property for the year 1 July 06 to 30 June 07 was R1 745. per month.

**[23]** He attended the meeting of 14 September 2006 and confirmed the minutes as it appears on the record as being accurate. The proposed levy was approved at the Directors meeting on the 30 November 2006. At the AGM, Mr Maniklall appeared for the Defendant. A recommendation by the Directors that the levies be increased was rejected and the levy was left at R1 745 backdated to July 2006.

**[24]** He stated that Mr Maniklall had requested that his Lot be excised from the park as he had not had a perimeter fence and did not enjoy the benefits from the park which in fact excluded him. At that meeting Mr Maniklall was informed that until such time as a development proposal was received a fence could not be erected and benefit from the park will only be enjoyed once the Plaintiff developed the property.

**[25]** The witness stated that as at the date of his testimony no plans were submitted for the development of the Defendant's property. On 4 March 2010 another meeting of Directors was held where a levy increase of just less than 10% was approved. It was also considered that a special once off levy of R3.01 per square metre should be raised. According to the witness the association paid for the installation of the boom in Kensington Boulevard and the maintenance of it as well as for the security staff that manned the boom.

**[26]** He stated that the association would if necessary purchase a fence for the Defendant's property. The perimeter of the entire office block was guarded by permanent security guards during the day and three permanent security guards at night. Those guards patrol throughout the park and also the perimeter. He said there was no point in fencing a property if he did not know how the property was going to be developed and it would be unnecessary to fence off a property where there was nothing of value in it.

**[27]** He said being a member of the lot owners association gave the lot owner the advantage of having to provide only three parking bays per 100 square metres instead of 5. At no stage did the Defendant make a formal motivation to be excluded or excised from the park. This motivation would normally be set down for a special general meeting or an annual general meeting where he would make the motivation and the other lot owners would then have to decide whether it was a good idea or not.

**[28]** At the first annual general meeting in which the witness was involved and at which Mr Maniklall was present the feeling at that meeting was strong that the Defendant should not be excised from the park. He stated that no levies at all have been paid from July 06 to date. He confirmed the accuracy of annexure D to the pleadings.

**[29]** Cross examined by Mr Choudree he stated that as at September 2005 the firm known as Glen Larken Investments CC were the managing agents of the Kingsmead Office Park. His company took over the management of the park in 2006 and the park came into existence approximately 11 years at the time he testified. With regard to his own background he says that he has been managing a number of office parks and has been in the property industry for approximately 25 years both in KwaZulu-Natal, Cape Town and Gauteng.

**[30]** Although he does not have a formal degree he has insight into the Companies Act. He is aware that when meetings are convened of directors of a company that there has to be compliance with the Companies Act and with the Memorandum of Articles of Association.

**[31]** He stated that in his opinion the Companies Act and the Articles of Association of the Kingsmead Park have been complied with. According to him the previous managers had mismanaged the park by not holding AGM's. He conceded that for some years it was not possible to hold AGM's during the period when his company was managing the park because of a dispute they had with the municipality with regard to the quantum of a loan account between the Lot Owners Association and the municipality. He stated that to have an AGM and produce financial statements that were largely incorrect would not have been proper.

**[32]** He said 20 members comprised the Lot Owners Association and of those 20 members, about eight or nine developed their sites and he said some of those lot owners' properties were also unfenced. None of those undeveloped sites without fencing front on any of the major road. One of those sites is the SABC site and is on the corner of Eden Gardens and Kingsmead Way.

**[33]** He stated that although there was fencing available it was not used on the Defendant's site because it would be a waste to erect fencing in an incorrect position and without the lot owner indicating the position for it to be put up where he has not developed the property. He was referred to Exhibits D1 and D2 which are two brochures. He stated that Exhibits D1 and D2 which were provided to the Defendant when he responded to the initial advertisement represents what the Defendant's representative thought he was going to get at the time. Exhibit D2 shows, at the heart of the development, a cricket oval and the various points of access to and from the oval.

**[34]** At the inspection it was put to him that the observation was made that there were a number of entry points to the Kensington Oval. However, the points of entry have now been curtailed because of the Standard Bank development which blocks off access to one of the roads that would have given entry to the oval. The witness conceded that observation. It was put to him that the diagrammatic representation as it appears on Exhibit D2 does not hold anymore in terms of for example, the access to the oval.

**[35]** The witness replied that the diagram was obviously a computer generated document to envisage what the park may look like at some stage. He was then referred to another diagram which is a general plan from the surveyor general which appears on page 27 of Exhibit B. The plan has a stamp from the surveyor general's office with the number SG 1393/2000 showing that it was approved on the 3 October 2000.

**[36]** According to him the Standard Bank would have started their development around 2002 and 2003. He was not sure if the general plan had been amended to reflect the



acquisition of the points by Standard Bank which cuts off access to the oval. He also did not know whether the issue was raised at a meeting of the directors and shareholders.

**[37]** In response to whether there was any compelling reason why the Defendant's site had to be part of the park he stated that there were distinct guide lines set down for the office park in terms of architecture and the nature in which the developments were to be carried out, that one needed to carry that theme throughout the park and that is strictly monitored by the design review committee in terms of the design code of the buildings which have to adhere to the proposed design code or the applicable design code in the tender document. He stated that what needs to be considered as well is that the land benefits by being part of an upmarket office park with national tenants, for instance, the Standard Bank, Grinrod and others.

**[38]** Re-examined he said that the Defendant has not written any letters since 2006 complaining about the lack of access to the oval. Mr Choudree requested the courts leave to ask a further question. He then referred Mr Schenk to a statement of account or a tax invoice addressed to Mr Maniklal dated 21 May 2008 which shows the writing off of two levy amounts. Mr Schenk confirmed that that document had come from his company in May 2008 and reflected the writing off of bad debts to Mr Maniklal's property. Unfortunately the witness was not able to comment on the document in question as he had not had sight thereof.

**[39]** That concluded the evidence for the Plaintiff.

**[40]** Mr Ravindra Maniklal testified on behalf of the Defendant. He stated that he was a director of the defendant and duly authorised to represent it in these proceedings. He also engaged in all transactions concerning the Kingsmead Office Park Lot Owners Association. He said initially he identified the property through an advertisement in the local newspapers calling for tenders. It was marketed by Marriott Property Services who were the estate agents and also part of the developers.

**[41]** After having noticed the advertisement he made contact with Marriott Property and was called into a meeting with an agent. At that meeting he was given Exhibits D1 and D2.

He thereafter went with one of the agents to the site and was shown the perimeters of the site. This was done before he purchased the property.

**[42]** Having perused Exhibits D1 and D2 he realised that this was a unique opportunity for acquiring property in a unique outstanding development or one of its kind development in the decentralised area of Durban and that if one looked at the diagram on page 2 it depicts the entire park as being completely fenced off. At that time there were only two real developments in the park. However he said the entire property was fenced.

**[43]** He said over the years the entire façade has changed. He said Exhibit D1 and D2 were not mere proposals but represent a sense of what the park would be on completion. He accepted or understood that nothing could be cast in stone but he expected the development to be at least similar to what was depicted in Exhibit D1 and D2. According to him the oval was the heart of the development and an important feature.

**[44]** He accepted that his lot would not have had direct access to the oval. He stated however, that he could have had direct access to the oval through the temple plot. He states that the wall built at the back of the temple cuts off access to the oval from that end. The only other way to get through to the oval is through Kensington Boulevard through the boom gates. He conceded that a bridge could be built from the pathway near the Standard Bank.

**[45]** Cross examined Mr Maniklal confirmed that he is a practising attorney. When questioned about his knowledge of the Law of Contract he stated that he was familiar with the Law of Contract. He has a 50% member's interest in the Defendant. He was referred to Clause 24 of the Conditions of Sale as it appears on page 24 of Exhibit B. He said he was familiar with that clause which is a non variation clause.

**[46]** He stated that D1 and D2 were entirely relevant to his rights and obligations in terms of the contract. His tender was accepted by the municipality in October 2001 and on the 19th of November 2001 he wrote to Marriott for confirmation of the time frame within which the perimeter fence would be erected. At that time all the properties

had perimeter fences excluding number 12. He wanted assurance before he took transfer and wrote to them again on the 19th of June.

**[47]** He said the reference to him commencing the development no later than June 2003 in the municipality's letter was correct at that stage but due to financial constraints he was unable to. He was asked whether he regarded the Defendant as not being in law the member of the park because it in fact de facto wasn't part of the park. His reply was that the Defendant would not be a member of the park because they were not accepted as a member of the park.

**[48]** According to him this aspect was not raised at the meeting as the issue was not debated and the minutes do not correctly reflect what was debated at the meeting. When asked if he received a copy of this minutes he said he was not sure. A copy would have been posted to him. He conceded that the minutes were an accurate summary of what was discussed to a certain extent. He said he accepted that on a de iure basis the Defendant could be regarded as a member of the association.

**[49]** That concluded the evidence for the Defendant.

**[50]** During his testimony, the Mr Maniklall seemed to dispute that the Defendant is a member of the Plaintiff. However this is contrary to his plea where he does not dispute that the Defendant is a member of the Plaintiff. This argument has not been developed further in Defendant's Heads of Argument. Although some issue was made about whether levies were properly raised, this aspect too was not elaborated on in the aforesaid Heads of Argument. This Court will accept therefore that the levies were lawfully raised.

**[51]** The quantum of the claim was disputed on the basis of a letter from the Plaintiff that purportedly wrote-off some of the arrears. The parties were asked to resolve the issue prior to judgment as this issue was not raised in the pleadings. It appears that no such resolution ensued.

**[52]** The Defendant's refusal to pay levies lies in the contentions that:

- i) It has received no benefit from being part of the association;
- ii) The plaintiff has failed to erect a wall around the Defendant's property;
- iii) The Defendant has effectively been excised from the office park;
- iv) The Plaintiff neglects and fails to maintain the Defendant's property.

**[53]** The basis for Plaintiff's refusal to erect fencing is that the property in question is a vacant land constituting mostly gravel and dirt and is primarily used for informal parking by members of the public attending the neighbouring Hindu temple. There is nothing of value on the property. As observed, during the inspection in loco, the property is unfenced and is easily accessed from Somsteu Road.

**[54]** The Plaintiff submits that there is no point in erecting a fence until development plans are submitted and the Defendant's preferred access point is determined, as any fence erected may prove a hindrance in carrying out any proposed development and may have to be removed. In any event guards are provided by the association to undertake perimeter patrols around the park including the Defendant's property.

**[55]** To support his submission that the Defendant has been excised from the park, Mr Maniklall referred to the two brochures, Exhibits "D1" and "D2", which were used to promote the office park to potential purchasers of properties in the park. He emphasised that the set-up of the office park at the time he concluded the contract on behalf of the Defendant, varied materially from what it turned out to be post development. In addition he contended that one could proceed up Lords Terrace (the preferred access route) in a westerly direction to gain entrance to the cricket oval.

**[56]** However the manner in which the Standard bank has developed its property has impacted negatively on its access to the oval. The inspection revealed that access to the oval could still be possible if the Plaintiff built a bridge over a ditch behind the temple. Mr Schenk testified that such access could be provided if requested but that the Defendant has never made such a request. In fact it was

pointed out that since the Defendant became owner it had not raised the issue of access or lack thereof from its property to the cricket oval in any of the correspondences exchanged or at the meeting he attended.

**[57]** However, as correctly submitted on behalf of the Plaintiff, no reliance can be placed on the aforesaid brochures because of Clause 24 of the Conditions of Sale, which provides as follows:

“These conditions of sale constitute the whole and only agreement between the parties and no representation, express or implied, which are not recorded herein, shall be binding...”

**[58]** In terms of Clause 7(1) of the Articles of Association the levy fund was created, inter alia, for the “repair, upkeep, control, management and administration” of the office park. As observed during the inspection in loco and conceded by Counsel for the Plaintiff, the Defendant at present receives no benefit from being part of the park. It would appear that the benefit that owners in general were to receive from

the payment of levies would only accrue once they had developed their properties.

**[59]** Although there appears to be no obligation on the part of an owner to develop their site, an owner was contractually bound to pay levies. Defendant’s counsel effectively argued the Defendant’s position as being that of a person that has been made to pay for a service but who has not been the recipient of such service. Regrettably this analogy is not accurate, in that the underlying contractual relationship between the parties herein is not akin to that in a contract of service.

**[60]** Mr Maniklall, who is an attorney, has unfortunately done very little to protect his interests in relation to the allegation that he has been excised from the park. Rather than seeking relief in some form or another, he has simply refused to pay the levies that he contractually undertook to. As correctly pointed, this is further exacerbated by his own evidence that even if his property was fenced, he would still refuse to pay levies.

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**[61] IN THE CIRCUMSTANCES JUDGEMENT IS GRANTED AGAINST THE DEFENDANT FOR:-**

1. R199 219.80;
2. Interest thereon at the rate of 12% per annum compounded monthly in advance from the 2nd April 2011 to the date of payment.
3. Costs of suit on the scale as between attorney and client.

Date of Judgment	27 September 2012
Plaintiff's Counsel	Advocate G R Thatcher
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