IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1)	Reportable: No
(2)	Of interest to other judges: No
(3)	Revised: Yes

SIGNATURE: .....

CASE NO: 4755/2022

In the matter between:

HENDRIK PETRUS CELLIERS	**1ST APPLICANT**
PAUL ERNEST MCMENAMIN	**2ND APPLICANT**
IZAK JACOBUS BOOYSEN	**3RD APPLICANT**
JOHANNES VENTER	**4TH APPLICANT**

and

KLEINFONTEIN AANDELEBLOK (EDMS) BPK	**1ST RESPONDENT**
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**2ND RESPONDENT**

CASE NO: 6713/2022

In the matter between:

KLEINFONTEIN AANDELEBLOK (EDMS) BPK	**APPLICANT**

and

KLEINFONTEIN INWONERSVERENIGING	**1ST RESPONDENT**
JOHANNES VENTER	**2ND RESPONDENT**
HENDRIK PETRUS CELLIERS	**3RD RESPONDENT**
ANNA DORATHEA CELLIERS	**4TH RESPONDENT**
PAUL ERNEST MCMENAMIN	**5TH RESPONDENT**
IZAK JACOBUS BOOYSEN	**6TH RESPONDENT**
ANDRIES ADRIAAN SMIT	**7TH RESPONDENT**
JOHAN DEETLIF KUNNEKE	**8TH RESPONDENT**
CHRISTIAAN HERONIMUS BORNMAN	**9TH RESPONDENT**
JOHANNES STEFANUS STOFFBERG	**10TH RESPONDENT**
CATHERINE PATRICIA PRINS	**11TH RESPONDENT**
EUGENE MEYER	**12TH RESPONDENT**

Coram: A Vorster AJ

Heard: 21 April 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by uploading the judgment onto https://sajustice.caselines.com, and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 2 August 2024.

ORDER

In the application under case number 4755/2022:

1. The second respondent (the City of Tshwane Metropolitan Municipality) is ordered to immediately take appropriate steps to enforce all relevant laws relating to planning and building regulation in as far as it relates to the farms comprising the Kleinfontein settlement.

2. Each party is ordered to pay its own costs.

In the application under case number 6713/2022:

1. The respondents are interdicted and restrained from inducing the shareholders of the applicant to withhold levies raised in terms of the applicant's memorandum of incorporation.

2. The counterapplication is dismissed.

3. Each party is ordered to pay its own costs.

JUDGMENT

A Vorster AJ

INTRODUCTION

1. Article 27 of the **International Covenant on Civil and Political Rights**, which South Africa ratified on 10 December 1998, provides as follows:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."

2. Article 2.1 of the **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**, which was adopted by the General Assembly of the United Nations on 18 December 1992, recognizes that persons belonging to national or ethnic, religious and linguistic minorities have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination. Article 4.2 of the declaration further provides that:

"States shall take measures to create favorable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards."

3. South Africa incorporated these rights into the **Constitution**[i]. Section 31 provides that persons belonging to a cultural, religious, or linguistic community may not be denied the right, with other members of that community (i) to enjoy their culture, practice their religion and use their language; and (ii) to

form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

4. Section 235 of the **Constitution** recognizes the notion of the right of self-determination of persons belonging to a cultural or linguistic community. The section provides as follows:

"The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation."

5. Section 235 was included in the **Constitution** because of **Constitutional Principle** XXXIV;[ii] subsequent discussions between delegations of the African National Congress, the Afrikaner Volksfront, the National Party Government, and eventually the Freedom Front; and an accord on Afrikaner self-determination between the Freedom Front, the African National Congress, and the National Party Government, on 23 April 1994.

6. The **International Covenant on Civil and Political Rights**, read with sections 31 & 235 of the **Constitution** places a duty on the State to enact national legislation to give effect to the right of self-determination, either through specific legislation which establishes and defines the executive authority, structures, administration, and geographic area of a community sharing a common cultural and language heritage, or through framework legislation, which allows other tiers of government, such as municipalities, to enact such legislation.

7. To date parliament is yet to enact national legislation to give effect to the right of self-determination for any cultural or linguistic community, or in general, to give effect to section 235. The perceived lacuna allowed the Kleinfontein Aandeleblok (Edms) Bpk (the KAEB) and its predecessors to unlawfully usurp functions assigned to local government, with issues such as planning, building regulation, and provision of services, being regulated by internal agreement through various private legal instruments, without statutory or regulatory imprimatur.

OVERVIEW

8. On 2 February 1990 FW de Klerk marked the opening of Parliament in Cape Town by proclaiming radical reforms that were intended to lead South Africa to democracy. In May 1990 the Groote Schuur Minute was held where political parties agreed on conditions to be met for ending political conflict in South Africa. On 6 August 1990 the Pretoria Minute was agreed upon by the National Party Government and the ANC, concerning the release of political prisoners, return of exiles, obstacles in the **Internal Security Amendment Act**[iii] and suspension of violence by the ANC. In terms of the DF Malan Accord, which was signed at a high-level meeting between the ANC and the National Party Government on 12 February 1991, the ANC agreed to cease all armed action and related activities. A National Peace Accord was signed on 14 September 1991 by representatives of twenty-seven political parties, interest groups and the national and homeland governments. These events culminated in a referendum where 70% of white people voted in favor of the process of reforms which started in 1990 and heralded the end of Apartheid.

9. The realization dawned on right-wing groups that the winds of change that were blowing through the country made the end of white rule a fait accompli, and the ideal of claiming the whole of South Africa as the exclusive preserve of white people, was no longer attainable. As a result, the notion of a Volkstaat, an all-Afrikaner homeland within the borders of South Africa, started gaining traction. The idea was that a Volkstaat should be created in the old Boer Republics of the Zuid Afrikaansche Republiek and the Oranje-Vrystaat, with its residents being the Afrikanervolk, the Boerevolk, or the Boere-Afrikanervolk. Political leaders involved in the negotiations during the transition era to democratic rule could not agree on the borders of a Volkstaat and the issue was relegated a constitutional principle,[iv] and later to a constitutional obligation.[v]

10. In the absence of a clear constitutional dispensation which provided for a Volkstaat, proponents of Afrikaner self-determination had to find alternative ways of realizing their ideal of an Afrikaner enclave. Territorial ambitions were abandoned and collective ownership of segregated sovereign enclaves, within existing legislation, was an option. The idea was developed that a Volkstaat could be built incrementally through private means, by acquiring and establishing settlements on private property, and incrementally expanding the settlements by purchasing additional property through private treaty.

11. It was this idea that moved the Boere-Vryhyeidsbeweging (the BVB), a Boer liberation political movement that advocated for an independent homeland for Boer / Afrikaners based on the old Transvaal and Orange Free State Republics, to establish the Kleinfontein settlement. The settlement was named after one of the farms on which the settlement was to be established, shortly after the referendum in 1992. Kleinfontein was mooted as a 'growth point for Afrikaner

self-determination', and was established on the following farms, located roughly halfway between Pretoria and Bronkhorstspruit:

11.1. remainder of the farm Kleinfontein 368, registration division JR, held under title deed T38786/1990 (386.4704 hectares in extent);

11.2. remainder of portion 14 of the Farm Donkerhoek 365, registration division JR, held under title deed T57746/1992 (17.1308 hectares in extent);

11.3. portion 67 of the Farm Donkerhoek 365, registration division JR, held under title deed T57746/1992 (8.5653 hectares in extent);

11.4. portion 68 of the Farm Donkerhoek 365, registration division JR, held under title deed T57746/1992 (8.5653 hectares in extent).

12. The site was of symbolic and historical significance to the founders of Kleinfontein because it was the site where, on 11 & 12 June 1900, the Battle of Diamond Hill took place during the Second Anglo Boer War. During the battle the Boers slowed down the progress of advancing British forces to allow President Paul Kruger to escape to Lourenço Marques (present day Maputo), from where he left on a Dutch warship to self-imposed exile in Switzerland. The site was also where the Maritz rebellion, an armed insurrection in South Africa in 1914 at the start of World War I, led by Boers who supported the re-establishment of the South African Republic in the Transvaal, was planned in 1914. The founders of Kleinfontein symbolically identified with the Boer protagonists involved in these events. They believed they were also facing

insurmountable forces (black majority rule), much the same as their forebears faced the British Empire and the Union Government.

13. At the time of its acquisition, the farms were held in a close corporation called Kleinfontein Boerderybelange BK. In 1992 three members of the BVB, Jan Groenewald, Niël de Beer, and Hennie van der Walt, purchased the membership interest in the close corporation. The transaction was funded through a loan with Volkskas, later to become part of the Amalgamated Banks of South Africa (ABSA). Shortly after the founders purchased the membership interest, they converted the close corporation to a private company called Kleinfontein Boerderybelange (Edms) Bpk, and in 1996 to a trading cooperative called Kleinfontein Boerebelange Köoperatief Beperk (the KBKB). The successive conversions were likely because of restrictions placed on the number of members of a close corporation and shareholders of a private company by the **Close Corporations Act**[vi] and the old **Companies Act**[vii] respectively. When Kleinfontein was founded, it was anticipated that the settlement would eventually accommodate around 6'000 people.

14. Not only did the old **Cooperatives Act**[viii] provide a solution to the numerical restrictions imposed by the **Close Corporations** and old **Companies Acts**, but it also allowed a corporate structure which could be aligned with the ideological substratum of Kleinfontein's existence, namely that the settlement was to be the precursor of a Volkstaat. The Act (i) imposed no limitations on the purposes for which the KBKB could be used, since a trading cooperative could be formed to carry out any object and the vehicle could therefore be used to achieve Kleinfontein's development objectives; (ii) allowed arbitrary exclusion of persons since section 59 of the Act specified who could become members, but contained no limitation on who could be excluded, which meant that non-Afrikaners could be excluded without any ostensible statutory

impediment; (iii) provided for a founding document which vested the directors with an unbridled discretion to refuse any person membership, which meant that non-Afrikaners did not have a legitimate expectation or claim of becoming members; (iv) embedded a 'one shareholder, one vote' principle embedded which allowed for equal representation in voting when residents elected a political unit that would ultimately claim authority over them, which presupposes an elected political unit with sovereignty over the settlement; (v) lacked limitations on the purposes for which a trading cooperative could be used which allowed the KBKB, through its constitution, to which members were contractually bound, to usurp functions normally assigned to a municipality, such as control and regulation of the use of land, buildings and improvements on land, and provision of services, for which the KBKB could charge fees and other levies and duties.

17. After converting into a cooperative, the KBKB sub-divided the farms internally into erven and assigned shares to each erf. The shares were sold to individuals who aligned themselves with the Kleinfontein ideology and were willing to assimilate themselves with the ideology of a community sharing a common cultural and language heritage. The sub-divisions were not registered with the Surveyor-General, and 'ownership' of the erven was not registered in the Deeds Office. No-one could obtain a private title deed and people who bought erven in Kleinfontein bought shares in the cooperative, which were then assigned to an erf. Ownership of the shares entitled the buyer to the exclusive use of the surface area of the erf. Because the subdivisions were done internally, and transfer of 'ownership' of erven was not registered in the Deeds Office, the directors used the constitution of the KBKB to regulate the registration, management, and maintenance of erven. Control and regulation of the use of erven, and control and regulation of buildings and improvements were founded on the principle of reciprocity, and enforcement

was by mutual agreement between the members through adherence to the KBKB's constitution. The constitution of the KBKB provided the administrative framework within which it continued to expand and develop Kleinfontein.

18. Institutions were created, within the framework of the old **Cooperatives Act** and the KBKB's constitution, to restrict access to Kleinfontein to white Afrikaners, either transiently, through adherence to the foundational principle of 'volkseie arbeid', or permanently, by precluding people from other races from acquiring shares in the KBKB. Although the KBKB was acting outside the scope of the law, by 2000 it achieved the objective of its founding fathers in that it created an exclusive Afrikaner enclave, insulated from unwanted State interference, in a country which it deemed hostile to its main constituents.

19. In 2001 the KBKB acquired portion 38 of the farm Donkerhoek 365, registration division JR, held under title deed T3296/2001 (215.3170 hectares in extent). The farm was adjacent to the existing settlement and its acquisition allowed the KBKB to expand the settlement by offering plots that were larger than the erven in the existing settlement. The introduction of these plots caused a significant influx of new residents, and it would seem as if this influx precipitated the broedertwis (fraternal friction), that would ultimately culminate in the litigation that ensued between different factions in the community.

20. The new residents' interests were different from the founding fathers and those residents who established the settlement. The new residents wanted security of tenure, better municipal services, and more financial security. To the new residents the ideological basis for the establishment of Kleinfontein, although important, was a secondary concern. Self-determination and

secession became subservient to the socio-economic conditions within the settlement that affected their own wellbeing and development.

21. The primary concern for the residents who first established and populated the settlement remained the formal recognition by the State of Kleinfontein as a 'growth point for Afrikaner self-determination'. They were opposed to the aspirational vicissitudes of the new residents because they equated these aspirations to greater involvement by the State.

22. In 2005 the KBKB acquired portion 63 of the farm Donkerhoek 365, registration division JR, held under title deed T69905/2005 (8.5653 hectares in extent) and further expanded the settlement. The expansion put additional pressure on already strained 'municipal' services and fostered greater discontent. The KBKB could not keep up with the rate of expansion of the settlement which outstripped the rate at which services and infrastructure could be extended. Residents started experiencing service delivery problems such as degradation of dirt roads and intermittent interruptions in the reticulation of electricity. The residents also experienced problems with the decentralized sewerage system because the use of septic tanks posed a risk to the quality of potable water drawn from the natural fountain and boreholes located on one or more of the farms.

23. Electricity for the main settlement was bought in bulk form Eskom, the South African electricity public utility, and reticulated internally by the KBKB. A charge more than the base tariff charged by Eskom was added to the fees payable by residents for individual consumption. This meant that residents in the main settlement paid more for electricity than residents in the new settlements who were supplied by Eskom directly.

24. Residents in the main settlement were supplied with potable water from a natural fountain located in the main settlement, whereas residents of the new settlement were supplied with potable water from various boreholes. The water quality in the new settlement was markedly better than the water quality in the main settlement.

25. The conflict that started brewing with the acquisition of portion 38 came to a head when the old **Cooperatives Act**, which was used by the KBKB as an instrument to legitimize the settlement, was substituted by the new **Cooperatives Act,**[ix] which came into effect in 2007. The new Act had important ramifications for Kleinfontein. The provisions in the old Act regarding membership were changed with section 3(1)(a) of the new Act providing that 'membership of that cooperative is open to persons who can use the services of that cooperative and who are able to accept the responsibilities of membership'. In terms of section 3(2)(b) of the Act membership may only be restricted in instances where 'it does not constitute unfair discrimination'. This provision meant that the KBKB would in future not be able to exclude people on the bases of cultural, ethnic, religious, or linguistic affiliation. This was inimical to the ideological basis upon which Kleinfontein was founded.

26. The Act also contained strictures on the purposes for which a cooperative could be used, which did not align with the notion of an intentional community and collective ownership of land. This left the KBKB with no choice but to reconstitute itself, by either adopting a constitution that aligned itself with the non-discriminatory ethos of the new **Cooperatives Act**, or by finding an alternative corporate structure that could facilitate what national legislation, promulgated in terms of section 235 of the **Constitution**, was meant to

achieve, namely, self-determination of the Kleinfontein community, which encompassed racial, ethnic, and cultural exclusivity.

27. Existing cooperatives were given two years by the Registrar of Cooperatives to draw up new constitutions which were in line with the new **Cooperatives Act**. This period was extended from time to time by the Registrar.

28. The directors of the KBKB attempted to amend the constitution in a way that would align with the Act but still advance the ideological basis for Kleinfontein's establishment. In formulating a new constitution section 235 of the **Constitution** was invoked. The directors argued that the members of the KBKB shared a common heritage, culture, language, belief etc., and a shared vision of a separate future which is part of their cultural obligation (kulltuuropdrag). Kleinfontein was still seen by the directors of the KBKB as a future Volkstaat. The drafters also drew on the protection afforded by section 31 of the **Constitution**.

29. There were various iterations of the proposed constitution but eventually the directors had to accept that the Act no longer provided refuge and solace for the ideological aspirations of the Kleinfontein community. Any constitution that embedded the exclusionary nature of the aspirations of the Kleinfontein community would have conflicted with various laws and the effect of section 235 of the **Constitution** was offset by the absence of national legislation aimed at giving effect to the rights enshrined in the section. It became apparent that it was time for the KBKB to consider an alternative corporate structure.

30. The residents could not agree on how the KBKB's corporate structure was to be reconstituted. Several residents, who would later be labeled by the directors of the KBKB as 'moeilikheidmakers' (troublemakers), insisted that the settlement be aligned with then current planning laws by transforming the settlement from collectively owned property to a recognized land development area with multiple ownership of erven, land or units, and multiple land uses, as contemplated in the **Development Facilitation Act** (the **DFA**)[x]. These residents wanted the settlement to have a similar character to other private security estates which were mushrooming to the east of Pretoria. The idea was mooted that the KBKB should be replaced by a homeowners' association (a section 21 company). It was anticipated that once the settlement was approved as a recognized land development area, the homeowners' association will take responsibility for public amenities, and the memorandum of incorporation will be used to exercise a modicum of control over who gained access to Kleinfontein.

31. The coming into operation of the new **Cooperatives Act** coincided with the acquisition by the KBKB of portions 90 & 96 of the farm Kleinfontein 368, registration division JR (held under title deeds T6652/2008 & T96645/2008) in 2008. The two farms were 17.8866 & 59.0226 hectares in extent respectively. These properties were used to further expand the settlement. As with the acquisition of portion 63 in 2005 the expansion of the settlement onto these properties piled even more pressure on the strained 'municipal' services provided by the KBKB. The rate at which the settlement expanded outstripped the rate at which the KBKB could expand basic services and infrastructure, leading to inadequate water supply, degradation of road infrastructure, and inadequate sewerage systems. To address the infrastructure problems the directors of the KBKB increased levies, which led to ever growing discontent amongst residents.

32. On 20 May 2010 nine 'moeilikheidmakers', who were shareholders and residents of Kleinfontein, approached the High Court for a structural interdict. The respondents in that application were amongst others the KBKB, various Organs of State responsible for, or involved in, municipal planning and building regulation, as well as private entities involved in the construction, marketing, and sale of residential units within the settlement. The applicants claimed the following relief (paraphrased since the papers were in Afrikaans):

32.1. an order, compelling the KBKB to take steps to procure the registration of Kleinfontein settlement as a formal township in accordance with the provisions of the **Town Planning & Townships Ordinance**,[xi] or any other applicable planning laws;

32.2. an order, compelling the KBKB to take steps to comply with all obligations or requirements of any statutory body applicable to the construction of buildings and the installation and maintenance of engineering works;

32.3. an order, interdicting and restraining the KBKB, and the private entities involved in constructing, marketing, and selling residential units within the settlement, from:

32.3.1. conducting any property development, or marketing of properties;

32.3.2. constructing buildings or installing infrastructure;

32.3.3. marketing or transferring any rights in respect of any property, or part thereof, except in respect of rights of existing members of the KBKB;

pending finalization of the township establishment process.

33. Properly construed the applicants wanted to compel the KBKB to take steps to establish a lawful township, and prevent the settlement from expanding, until a formal township was established. The application was premised on the notion that the properties that constituted the settlement were arranged in such a manner as to have the character of what constituted a township without the necessary development approvals having been obtained. According to the applicants the settlement was an illegal township because the properties comprising the settlement was land held under farm title but used for purposes contemplated in the definition of a township where such use was not being exercised because of the establishment of a township in terms of the relevant laws. The applicants also alleged that in administering the settlement, the KBKB acted in contravention of various other laws relating to environmental approvals, building regulation, and the reticulation of electricity.

34. The application was opposed by the KBKB. The KBKB conceded that township establishment had not taken place but resisted the application on the basis that various steps had been taken by the KBKB to facilitate township establishment. The deponent to the KBKB's answering affidavit was at pains to explain that for several years the KBKB had been in the process of applying for township establishment. However, the KBKB's members only adopted a

resolution on 26 March 2011 to apply for township establishment, and it was only on 9 May 2012 that a land development application for township establishment was submitted to the Development Tribunal, established in terms of the **DFA**.

35. The concession that township establishment had not taken place was a tacit, if not express, admission that the relevant planning and building regulation laws, prevalent at the time, had not been complied with, and that the use of the properties comprising the settlement was unlawful, if not illegal.

36. The KBKB asserted that although the Kungwini Local Municipality, the local authority within whose area of jurisdiction the settlement was situated, was prepared to fast track its application for township establishment, the finalization of the process was hamstrung by the declaration of constitutional invalidity of two chapters of the **DFA**.[xii] The KBKB also contended that orders in the terms prayed for by the applicants would have caused unnecessary hardship to the residents of Kleinfontein since it would have disrupted service delivery. The court was implored to consider that the establishment and proliferation of the settlement occurred after the Eastern Gauteng Services Council gave oral confirmation in 1998 to the directors of the KBKB that Kleinfontein's development was reconcilable with the Guide Plan for the Greater Pretoria, and the development of the settlement took place with full knowledge of all relevant State actors.

37. In November 2013, whilst the application in the High Court was pending, the Gauteng legislature recognized Kleinfontein as a cultural community. What this recognition entails is not clear from the papers.

38. The matter came before Fourie J who handed down judgment on 16 April 2016. He dismissed the application on the basis that the applicants failed to establish a clear right. Fourie J argued that because the KBKB had already undertaken a process to apply for township establishment, the applicants were not entitled to the prerogative writs that would have compelled the directors to do so. In as far as the prohibitory interdict was concerned, Fourie J found that, based on various undertakings given by the KBKB to regulatory authorities to cease and desist with the expansion of the settlement, doubt existed whether the applicants succeeded in demonstrating that they had a right worthy of protection.

39. None of the defenses raised by the KBKB were legally relevant. The facts raised by the KBKB did not locate the KBKB's defenses within one or more recognized legal construct. The fact that the KBKB applied for a township to be established, provided undertakings to the regulatory authorities to cease and desist from expanding the settlement did not legitimize the use of the properties. The allegation that the Eastern Gauteng Services Council gave written confirmation that the development was reconcilable with the then current local government integrated development plans was legally irrelevant.

40. Before the KBKB commenced with the use of the properties in a manner as to have the character of what constituted a township it should have made sure that it was permissible in terms of the prevailing laws.[xiii] As I will indicate in due course, the KBKB's use of its properties had been in contravention of prevailing laws since its inception. While the KBKB was in contravention of various planning laws it acted unlawfully and committed a crime. The court was duty-bound to prevent it from so acting by granting an effective remedy.

41. Even if grounds existed which militated against the granting of an interdict in the terms prayed for by the applicants in that matter, the court could, and in my view should have granted an order, with such conditions qualifying or limiting its scope, to ensure the illegality did not continue unabated.[xiv] The lenient approach adopted by the court became an open invitation to the KBKB to continue to use its properties illegally with a hope that the use will be legitimized in due course and that pending finalization the illegal use will be protected indirectly by the refusal of the court to grant an order.[xv]

42. Be that as it may, what is significant from the judgment of Fourie J is that the KBKB (i) gave an undertaking not to proceed with expansion of the settlement; and (ii) gave the assurance that it informed its members that there will be a complete cessation of building activities, until all planning approvals had been obtained.

43. On 13 October 2010, whilst the application in the High Court was pending, the KBKB submitted an application to the Gauteng Department of Agriculture & Rural Development for environmental authorization in terms of section 24G of the **National Environmental Management Act** (the **NEMA**),[xvi] and the sub-regulations of Schedule 1 of Government Notice R1182 of 5 September 1997, promulgated in terms of section 21, 26 & 28 of the **Environment Conservation Act** (the **ECA**),[xvii] for rectification of the unlawful residential township which at the time consisted of single dwellings, medium density town houses, accommodation for the handicapped, retired persons, community facilities, retail, commercial, education, sport facilities, open spaces, and internal roads.

44. The KBKB obtained a record of decision from the Department on 10 October 2017 in terms of section 24G(2)(b) of the **NEMA**, authorizing it to continue

with the unlawful activities, subject to certain conditions. The authorization was limited to existing activities listed in the approval and expressly excluded any proposed activities, processes and infrastructure that required additional authorization from the Department and did not exempt the KBKB from complying with any other statutory requirements applicable to any of the listed activities.

45. On 11 November 2017 at an extraordinary general meeting of the members of the KBKB a special resolution was adopted to convert the KBKB from a cooperative to a private company as provided for in section 62(1) of the new **Cooperatives Act**. On 2 March 2018 the Registrar of Companies approved the conversion as provided for in sections 62 & 64 of the Act and registration of the KBKB as a cooperative was cancelled with effect from 16 March 2018. On this date the KAEB came into existence. In terms of section 62(7) of the Act, from the date of cancellation of the registration of the KBKB, it ceased to exist and all assets, rights, liabilities and obligations of the cooperative vested in the KAEB, with all members of the now defunct KBKB becoming shareholders of the KAEB.

46. On 5 February 2021 the 'moeilikheidmakers', who were all shareholders of the KAEB, or residents of Kleinfontein, adopted a constitution to form a voluntary association (universitas), called the Kleinfontein Inwonersvereniging (the KIV). According to its constitution, the objects of the KIV are to protect and advance the individual and common interests of its members, and membership is restricted to shareholders in the KAEB, and those persons who are ordinarily resident in Kleinfontein.

47. After its formation the members of the KIV, who describe themselves as 'shareholder activists', embarked on a campaign to speak out against what

they considered the illegal use of the farms comprising the Kleinfontein settlement, the failure by the directors of the KAEB to rectify the breaches, and the unabated expansion of the settlement to the detriment of existing residents and shareholders. The members also spoke out about alleged mismanagement by the directors of the affairs of the KAEB. On 7 November 2021 the KIV circulated a general communiqué to all Kleinfontein residents in which the following allegations were made, and aspersions were cast:

47.1. Various directors of the KAEB had a direct personal financial interest in the way in which the KAEB and the Kleinfontein settlement were being managed. This interest manifested in the sale of erven, the development of erven with own funds, the building contractor who built houses, the resale of erven (shares) by the only estate agent, without the properties having been offered to all shareholders of the KAEB. The system is propped up by a social structure where people pay exorbitant rent to live in the developer's properties.

47.2. The directors of the KAEB intimidated members of the KIV and their sympathizers. Members of the KIV were classified as persona non grata and terrorists. Wives of the management of the KIV were physically intimidated. Workers were dismissed because they supported the KIV. Tenants were not approved because they wanted to rent properties from members of the KIV. Rental agreements were drawn up in such a way to bar prospective tenants from joining the ranks of the KIV. Members of the KIV were removed from all internal communication mediums of the KAEB. The KIV and its members received threatening lawyers' letters. Tenants who were part of the management of the KIV were evicted.

47.3. Insider trading of shares in the KAEB took place which according to the communiqué constituted fraud.

47.4. Although the KAEB was duly registered with the Registrar of Companies, and its existence therefore lawful, the Kleinfontein settlement was an illegal settlement, and no future expansion of the settlement was to take place.

47.5. Although the directors of the KAEB were the elected representatives of the company, their election was beset by irregularities, especially through the manipulation of proxies.

48. The communiqué specifically dealt with the withholding of levies by shareholders, payable in terms of the company's memorandum of incorporation. The author was at pains to draw a distinction between the withholding of levies and non-payment of levies. What the KIV agitated for was not non-payment of levies, but that shareholders withhold their levies as a form of public protest, or civil disobedience, until the directors of the KAEB addressed the concerns of the KIV. The communiqué proposed that levies be paid into an alternative facility which was to be managed by the KIV for the benefit of its members. The withholding of levies was justified with reference to the following allegations:

48.1. Significant funds of shareholders were being spent on funding the business interests of certain individuals. These expenses were expressed in the KAEB's financial statements as shareholders' expenses. The full extent of the benefit derived from these

expenses were not disclosed to shareholders in the financial statements of the KAEB.

48.2. The directors of the KAEB did not differentiate between shareholders' capital and levy contributions, resulting in shareholders' capital contributions being expropriated and viewed by the directors as working capital of the KAEB. The directors were misrepresenting to shareholders of the KAEB that the expropriation of capital contributions was generally accepted accounting practice, notwithstanding the fact that the erstwhile auditor of the KAEB was found guilty because of this malpractice.

48.3. By abusing the proxy system of voting at directors' meetings the directors of the KAEB ensured that the unlawful policy of capital expropriation was approved in the financial statements of the KAEB.

48.4. The initial start-up capital derived from the sale of erven (shares) was not held in trust by the KAEB or its predecessors and as a result was not available for outstanding capital liabilities. The use of these funds could not properly be accounted for.

48.5. The directors of the KAEB denied the full extent of the capital liability of the KAEB to comply with legislation and the trading of shares in the KAEB took place without the directors disclosing the full extent of the KAEB's capital liabilities to prospective buyers.

48.6. The directors of the KAEB resorted to malicious prosecution of shareholders to coerce them to pay their levies so that they could continue to fund their unlawful activities. The malicious prosecution of shareholders led to wasteful and fruitless expenditure with the result that conflicts of interests were being sustained.

48.7. The deliberate failure to ensure that the interests of shareholders align with existing legislation facilitated an environment where insider trading of shares flourished when shares in deceased estates were being traded.

48.8. A certain interest group of directors of the KAEB manipulated the proxy system of voting for directors to ensure they remained in power. This interest group was unwilling or unable to protect the interests of shareholders.

49. The communiqué concluded that before resorting to a public campaign, the KIV first attempted to exhaust internal communication channels with the KAEB, but to no avail.

50. The directors of the KAEB labelled the allegations levelled against them as slanderous, implying that the allegations were false.

51. In addition to the circulation of the general communiqué, the KIV's campaign included the following:

51.1. Information sessions were held to inform shareholders and residents of the KIV's concerns.

51.2. A complaint was laid against the directors with the Community Schemes Ombud Service, a service established in terms of the **Community Schemes Ombud Service Act,**[xviii] to regulate the conduct of parties within community schemes relating to non-disclosure of company records.

51.3. A complaint was laid with the Estate Agents Affairs Board against the only estate agent allowed to operate in Kleinfontein.

51.4. A director who allegedly committed perjury was reported to the relevant authorities.

51.5. Some sort of dispute was declared.

51.6. Voluntary withholding of levies was initiated.

51.7. Legal proceedings against the KAEB were instituted.

51.8. Residents were being supported by the KIV in legal disputes with the KAEB.

51.9. The KIV appointed its own environmental consultant.

51.10. The KAEB's auditor was reported to the relevant authorities.

52. Members of the KIV also embarked on a WhatsApp campaign. In WhatsApp's dispatched to shareholders and residents, the KIV and its members invited shareholders and residents to join their ranks and encouraged shareholders to withhold levies.

53. On 23 November 2021 the chairman of the KIV addressed an e-mail to many shareholders and residents. The e-mail encouraged shareholders and residents to attend an annual general meeting of the KAEB. In the e-mail aspersions were cast on the way the directors of the KAEB were likely to deal with contentious issues raised by shareholders and residents.

54. The chairman of the KIV also addressed a letter to the chairman of the board of directors of the KAEB in which he alleged that the KAEB was wasting money procured through the collection of levies.

55. The campaign by the KIV was ostensibly successful in that a significant number of shareholders of the KAEB began to withhold levies. The defaulters were paying their levies into a trust fund under the control of the KIV. The KAEB had to resort to litigation to force defaulting shareholders to pay their levies. The KAEB complains that the litigation is time consuming and costly and hampers it in the administration of the KAEB and the Kleinfontein settlement.

56. In 2022 Kleinfontein accommodated an existing residential development and supporting uses. The development consists of approximately 650 houses situated in six different neighborhoods. The existing settlement comprises of

the following land uses: (i) approximately 650 dwelling units (which include a retirement village / care Centre); (ii) a business Centre (including banks, offices and shops); (iii) a school (which is not operational); (iv) a community hall; (v) a light industrial area (including warehouses and storage units); (vi) paved and gravel roads; and (vii) related infrastructure. The total size of the settlement is approximately 793.51 hectares in extent.

57. Compared to the extent of the settlement in 2010, the extent of the settlement in 2022 is a clear indication that notwithstanding (i) intra-curial assurances and undertakings given by the KBKB in 2010; (ii) knowledge of the unlawful and illegal use of its properties; (ii) and the restrictions imposed by the Gauteng Department of Agriculture & Rural Development, the KBKB and its successor, the KAEB, continued unabated with the expansion of the settlement.

THE CURRENT LITIGATION

58. On 27 January 2022 four shareholders of the KAEB, Hendrik Petrus Celliers, Paul Ernest McMenamin, Izak Jacobus Booysen, and Johannes Venter, issued out an application under case number: 4755/2022. The applicants are all members of the KIV. The respondents in the application are the KAEB and the City of Tshwane Metropolitan Municipality (the COT). The application is opposed by the KAEB but not by the COT.

59. On 4 February 2022 the KAEB issued out an application under case number: 6713/2022 against the KIV, the applicants under case number: 4755/2022, and other members of the KIV. The application is opposed, and the respondents issued out a counterapplication which is opposed by the KAEB.

60. The matters came before me on 21 April 2023. Since the issues to be decided in the two applications overlap, the parties agreed that the matters should be heard simultaneously, and that one judgment should be handed down in respect of both applications.

THE APPLICATION UNDER CASE NUMBER: 4755/2022

The relief sought

61. The principal relief is aimed at interdicting and restraining the KAEB from commencing or continuing with:

61.1. the construction and development of any new buildings or dwellings;

61.2. setting out additional erven with the aim of expanding the settlement; and

61.3. providing services (water, electricity, sewerage, storm water and sanitation) to any new erven or stands.

62. The relief is sought pending compliance with the provisions of (a) the **National Building Regulations and Building Standards Act** (the **NBRBSA**);[xix] (b) the **Spatial Planning and Land Use Management Act** (the **SPLUMA**);[xx] (c) the **City of Tshwane Spatial Planning and Land Use**

Management Bylaws (the **SPLUMB**); and (d) the **City of Tshwane Town Planning Scheme** (the **CTTPS**).

63. An interdict is also sought against the City of Tshwane, directing it to enforce compliance with the laws listed in the preceding paragraph against the KAEB, and to take all necessary steps to commence with the prosecution of the KAEB, as represented by its directors.

Applicants' case

64. The applicants' case is that the Kleinfontein settlement is an illegal township, and its continued expansion contravenes various laws relating to municipal planning and building regulation. The contravention of the laws has a detrimental impact on the applicants, and they are entitled to enforce the laws. The continued expansion of the settlement negatively impacts on the rights of the applicants as consumers to adequate 'municipal' services.

Respondent's case

65. As was the case in 2010, the KAEB concedes that township establishment had not taken place, and as was the case then, the concession that township establishment had not taken place is a tacit, if not express, admission that the relevant planning and building regulation laws had not been complied with, and that the use of the properties comprising the settlement is wrongful, if not illegal.

66. The relief is opposed on the following bases:

66.1. non-joinder of the shareholders of the KAEB;

66.2. the applicants approach the court with unclean hands;

66.3. the applicants do not satisfy the requirements for a final interdict.

Discussion

67. Before the advent of the final **Constitution** and preceding the transition to a democratic local government planning laws were mainly restricted to urban and peri-urban areas. Agricultural land was subject to very little restrictions on land use, such as zoning ordinances or environmental regulation. When Kleinfontein was founded, the settlement was situated outside any municipal boundaries.

68. When the Kleinfontein settlement was established, it was situated outside the boundaries of any approved township and outside of what is colloquially known as the urban edge.[1] The settlement was not even situated within a peri-urban

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[1] The urban edge is a virtual development boundary which serves to control urban sprawl by mandating that the area inside the boundary be utilized for higher density urban development, and the area outside for lower density, green open spaces, and / or future development. Outside the urban edge development was only permitted within exiting small towns and rural nodes, taking into consideration that the natural environment and agriculture should not be compromised. The urban

area as defined in the **Peri Urban Areas Town Planning Scheme,** 1975 (the **PUTPS**). The settlement was therefore subject to very little planning laws. However, since its inception, township establishment was subject to the provisions of the **Town Planning & Township Ordinance** (the **TPTO**).

69. In terms of ordinance 65 the following provisions apply to every township established by an owner of land:

(1) *Subject to the provisions of subsections (2), (3) and (4), no person shall establish a township otherwise than in accordance with the provisions of this Ordinance.*

(2) ...

(a) ...;

(b) ...

(3) *The Administrator may, on such terms and conditions as he may determine, exempt:*

(a) ...;

(b) ...;

(c) ...;

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edge forms the boundary between urban development and the natural and agricultural hinterland and is aimed at containing lateral growth of urban areas.

(d) *a cooperative as defined in section 1 (1) of the Cooperatives Act, 1981 (Act 91 of 1981);*

(e) *...;*

(f) *..;*

(g) *....*

(4) *...*

70. Ordinance 67 prohibits the conclusion of certain contracts and options, pending establishment of a township:

(1) *After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70*

(a) *enter into any contract for the sale, exchange or alienation or disposal in any other manner of an erf in the township;*

(b) *grant an option to purchase or otherwise acquire an erf in the township,*

until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing

land on which he wishes to establish a township subject to a condition that upon the declaration of the township as an approved township, one or more of the erven therein will be transferred to the seller.

(2) *Any contract entered into in conflict with the provisions of subsection (1) shall be of no force and effect.*

(3) *Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.*

(4) *For the purposes of subsection (1):*

(a) *"steps" includes steps preceding an application in terms of section 69 (1) or 96 (1);*

(b) *"any contract" includes a contract which is subject to any condition, including a suspensive condition.*

71. Ordinance 69 provides for the procedure to establish a township. I will quote only relevant parts of the ordinance:

(1) *An owner of land who wishes to establish a township on his land may, in such form as the Director may determine, apply in writing:*

(a) *to the local authority within whose area of jurisdiction the land is situated;*

(b) *where the land is not situated within the area of jurisdiction of a local authority and the Director is satisfied that steps have been taken to incorporate the land in the area of jurisdiction of a local authority, to the latter local authority, and if he so applies:*

(i) *he shall comply with such requirements and pay to the local authority such fees as may be prescribed;*

(ii) *he shall submit a copy of the application to the Director and pay to the Director such fees as may be prescribed.*

(2) *An application contemplated in subsection (1) shall be accompanied by such plans, diagrams or other documents as may be prescribed and the applicant shall furnish such further information as the local authority may require.*

72. Ordinance 88 deals with the extension of boundaries of an approved township which was a prerequisite for the approval of the establishment of a township on property that fell outside existing municipal boundaries. I will quote only the relevant provisions:

(1) *An owner of land contemplated in section 49 of the Deeds Registries Act, 1937, who wishes to have the boundaries of an approved township*

extended to include his land as contemplated in that section may, in such form as the Director may determine, apply in writing through the local authority within whose area of jurisdiction the township is situated, to the Administrator for his approval, and the applicant shall:

(a) *comply with such requirements as may be prescribed;*

(b) *submit a copy of the application to the Director;*

(c) *pay to the Director and the local authority such fees as may be prescribed.*

(2) *The provisions of section 69, excluding subsection (1), and section 71 (1) shall apply mutatis mutandis to an application contemplated in subsection (1), and for the purposes of:*

(a) *section 69 (4) and (5) and section 71 (1) (a) a reference to a consent to the establishment of a township shall be construed as a reference to a consent to extend the boundaries of a township contemplated in subsection (1);*

(b) *section 69(4) and (5) a reference to the land on which an applicant wishes to establish a township shall be construed as a reference to the land contemplated in subsection (1).*

73. Ordinance 134 deals with contraventions of the provisions of the Ordinance:

Any person convicted of an offence in terms of this Ordinance for which no penalty is expressly provided, shall be liable to a fine not exceeding R5'000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

74. Neither did the KBKB's directors and their predecessors at any given time apply for the Kleinfontein settlement to be established as a township in terms of the Ordinance, nor did they apply for the boundaries of an approved township to be extended to include the settlement. It is highly doubtful whether they would have been successful with such endeavors. The establishment of a township in the absence of approval in terms of the Ordinance constituted a criminal offence.

75. The sale of erven within the settlement is expressly prohibited by the Ordinance and the conclusion of contracts in contravention of the express provisions of the Ordinance are illegal and unenforceable (ex turpi causa non oritur actio).[xxi] The rule is absolute and has no exceptions, even where there has been part performance.[xxii] In terms of Proclamation No. R. 161 of 31 October 1994 the administration of the Ordinance had been assigned to the Province of Transvaal. Both the 1993 **Constitution** (section 229) and the 1996 **Constitution** (schedule 6, section 2) provides for laws in force immediately before the commencement of the respective constitutions, to remain in force, subject to repeal or amendment by a competent authority. The Ordinance is therefore a law as contemplated in section 104 of the final **Constitution**. The law had not been repealed and to this day the prohibition still applies.

76. The **NEMA**, which commenced on 29 January 1999, is the statutory framework to enforce section 24 of the **Constitution**. In terms of section 31A

of the **NEMA** offences listed under section 49A of the Act and the Specific Environmental Management Acts are considered as Schedule 1 offences under the **Criminal Procedure Act**, No. 51 of 1997, which may result in the imposition of a fine or jail sentence on conviction for an offence. In terms of the **NEMA**, directors may be held liable for environmental offences. Section 49B provides that persons convicted of offences in terms of section 49A may be liable to a fine and / or imprisonment. Schedule 3 of the **NEMA** contains a list of offences, which can be committed in terms of the Act or any of the Environmental Management Acts.

77. As is apparent from the application for rectification of the unlawful residential township, submitted by the KBKB to the Gauteng Department of Agriculture & Rural Development on 13 October 2010, the KBKB commenced and continued with listed activities as defined in the **ECA and** the **NEMA**. The listed activities related to engineering works carried out in the settlement, the change of land use from agriculture to residential, disposal and storage of general waste, etc. These activities are offences and should have resulted in the imposition of a fine or jail sentence.

78. The record of decision from the Department on 10 October 2017 in terms of section 24G(2)(b) of the **NEMA**, authorizing the KBKB to continue with the unlawful activities, was limited to existing activities listed in the approval and expressly excluded any proposed activities, processes and infrastructure that required additional authorization from the Department. Notwithstanding the restrictions imposed by Department, the KBKB and its successor the KAEB, continues unabated with the expansion of the settlement. The conduct of the directors of the KAEB and their predecessors constitutes a criminal offence.

79. In terms of section 151(1) of the **Constitution**, municipalities had to be established for the whole territory of the Republic. To comply with the constitutional requirement, national government enacted the **Local Government: Municipal Structures Act,**[xxiii] which, together with the **Local Government: Municipal Demarcation Act,**[xxiv] paved the way for wall-to-wall municipalities, resulting in every part of the country being situated within municipal boundaries.

80. The Kungwini Local Municipality, a local municipality in the Metsweding District, with the town of Bronkhorstspruit as its seat, was established with effect from 5 December 2000, and included the town of Bronkhorstspruit, peri-urban, and agricultural areas. From that date Kleinfontein became situated within the municipal boundaries of Kungwini.

81. At the time the **Bronkhorstspruit Town-Planning Scheme, 1980** applied to the town of Bronkhorstspruit. Kungwini had to adopt a town planning scheme for those areas within its municipal boundaries which were historically excluded from the operation of the town planning scheme. Kungwini adopted the **PUTPS** in terms of the provisions of ordinances 29 - 40 of the **TPTO**, to apply to those areas not covered by the **Bronkhorstspruit Town-Planning Scheme**. The result was that the Kleinfontein settlement became subject to the **PUTPS**. In terms of the Scheme all the farms comprising the Kleinfontein settlement were zoned 'undetermined'. The Scheme restricted permitted land uses on properties zoned 'undetermined' to the following:

Agriculture *- means land and buildings used for any bona fide farm activities, which may include market gardens, game farming, cattle, goats and sheep farming, beef farming, bird breeding, plant nursery, plantations, aquaculture, mushroom*

production, forestry and orchards and activities normally regarded as incidental thereto, but excludes abattoirs, cattle feeding rods, poultry farming, pig farming and animal boarding place.

Farm Stall *- means a building on the property that is zoned "Agricultural", "Municipal" and "Undetermined", used for the sale of agricultural produce.*

Dwelling House *- means a single dwelling unit on a property that is zoned "Residential 1", "Agricultural" and "Undetermined".*

Dwelling Unit *- means a self-contained suite of rooms internally and mutually connected and consisting of a habitable room(s), bathroom(s), toilet(s) and not more than one kitchen without the permission of the municipality for the purpose of residence by a single family or a single person or two unmarried persons and may include outbuildings which are ancillary and subservient to the dwelling unit and may include a home enterprise.*

82. The use of the properties comprising the Kleinfontein settlement constituted a contravention of the Scheme. In terms of ordinance 40(2) or 58(2) of the **TPTO** the use of the properties in contravention of the Scheme constituted a criminal offence.

83. Kungwini, along with the Metsweding District, was disestablished and absorbed into the COT on 18 May 2011, the date of the 2011 municipal elections, and from that date Kleinfontein became situated within the municipal boundaries of the COT, and the COT obtained exclusive municipal, executive, and legislative competence over the area where Kleinfontein is situated.

84. On 17 September 2014 the COT revised the **CTTPS** in terms of ordinance 57(1)(a) of the **TPTO**, to incorporate the area of Kungwini into the Scheme. The result was that the zoning of properties which were incorporated into the municipality remained as they were under the applicable Schemes applied by Kungwini, and the permitted uses similarly remained the same. Consequently, under the **CTTPS** the properties comprising the Kleinfontein settlement are still zoned undetermined with permitted uses as per the **PUTPS**.

85. The **SPLUMA** came into effect on 1 July 2015. The Act confirms municipalities as the appropriate authority to take decisions on matters concerning land use planning and land use management. It does so by giving effect and meaning to the functional area of 'municipal planning', a function which the **Constitution** allocates to local government in Part B of Schedule 4. The Act establishes a wall-to-wall system of land use management, which corresponds with wall-to-wall municipal boundaries.

86. In terms of section 26 of the Act an adopted and approved land use scheme, has the force of law, and all landowners and users of land, including a municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of such a land use scheme.[2]

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2 Bylaw 45 the **City of Tshwane Land Use Management Bylaws**, 2016 also provides for an adopted Land Use Scheme to have the force of law which binds all persons, and particularly owners and users of land, including the Municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of such a Land Use Scheme.

87. Section 32 of the Act deals with the enforcement of an approved land use scheme and allows for a municipality to pass Bylaws aimed at enforcing its land use scheme.

88. Section 58 of the Act deals with offences and penalties and provides as follows:

(1) *A person is guilty of an offence if that person—*

(a) *...;*

(b) *uses land contrary to a permitted land use as contemplated in section 26(2);*

(c) *alters the form and function of land without prior approval in terms of this Act for such alteration;*

(d) *...;*

(e) *...*

(2) *A person convicted of an offence in terms of subsection (1) may be sentenced to a term of imprisonment for a period not exceeding 20 years or to a fine calculated according to the ratio determined for such imprisonment in terms of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), or to both a fine and such imprisonment.*

(3) *...*

89. The land comprising the Kleinfontein settlement is used for purposes that are not permitted by the **CTTPS**. The use of the land in contravention of the Scheme constitutes a criminal offence in terms of the Act. The same applies to the continued expansion of the settlement. The continued expansion of the settlement alters the form and function of the properties comprising the Kleinfontein settlement in that it changes the function of the land from agriculture to mixed uses. This is taking place without prior approval in terms of the Act. The expansion of the settlement similarly constitutes a criminal offence in terms of the Act.

90. On 2 March 2016 the Municipal Manager of the COT published, in terms of section 13(a) of the **Municipal Systems Act**, the **SPLUMB**, as approved by its Council, to give effect to municipal planning as contemplated in the **Constitution** and the **SPLUMA**.

91. Bylaw 16 deals with the process to be followed when an owner of land wants to establish a township.

92. Bylaw 31, which deals with contracts and options, is similar to ordinance 67 of the **TPTO**. The bylaw provides as follows:

(a) *After an owner of land has applied in terms of the provisions of this By-law or any other relevant law for the approval of a land development application, but prior to the rights coming into operation in terms of this By-law, he/she may apply to the Municipality for consent to enter into any contract or to grant any option, and the Municipality may consent to the entering into of such contract or the granting of such option subject to any*

condition it may deem expedient, and thereupon it shall deliver a notice thereof to the owner in writing and of any condition imposed.

(b) *On receipt of a notice contemplated in subsection (a) the applicant shall, before entering into a contract or granting the option, but within a period of 6 months from the date of the consent, furnish the Municipality with a guarantee of such type and for such amount as the Municipality may determine and which is otherwise to its satisfaction to the extent that he/she will fulfill his/her duties in respect of the engineering services contemplated in Chapter 7 of this By-law, and, if he/she fails to do so, the consent shall lapse.*

(c) *The owner of land shall not enter into any contracts and/or options contemplated in subsection (a) until and unless he/she has provided the guarantees as contemplated in subsection (b).*

(d) ...

(e) *Where the Municipality has, in terms of subsection (b) consented to the entering into of a contract or the granting of an option, the contract or option shall contain a clause stating that the rights have not yet come into operation.*

(f) *Where a contract or option contemplated in subsection (e) does not contain the clause contemplated in that subsection, the contract or option shall, at any time before the land use rights comes into operation, be voidable at the instance of any party to the contract or option, other than the person who alienates or disposes of the property(ies) erf or who grants the option.*

(g) *Any person who alienates or disposes of a property and who enters into a contract contemplated in subsection (e) or grants an option contemplated in that subsection which does not contain the clause contemplated therein, shall be guilty of an offence.*

93. The conclusion of all contracts for the sale of erven by the directors of the KAEB and its shareholders in contravention of the bylaw is a criminal offence. Bylaw 36 deals with offences and penalties and provides as follows:

(1) *An owner and/or other person are guilty of an offence if such owner or person:*

(a) *contravenes or fails to comply with a:*

(i) *decision taken or a condition imposed or deemed to have been taken or imposed by the Municipality in terms of this By-law or any other law relating to land development;*

(ii) *provision of the Land Use Scheme or amendment scheme;*

(iii) *uses land or permits land to be used in a manner other than permitted by the Land Use Scheme or amendment scheme;*

(iv) *...;*

(v) *uses land or permits land to be used in a manner that constitutes an illegal township as defined in terms of the provisions of this By-law;*

(b) *alters or destroys land or buildings to the extent that the property cannot be used for the purpose set out in the Land Use Scheme or zoning scheme;*

(2) *An owner who permits land to be used in a manner contemplated in subsection (1) and who does not cease such use or who permits a person to breach the provision of subsection (1) is guilty of an offence and upon conviction is liable to the penalties contemplated in subsections (3) and (4).*

(3) *Any person convicted of an offence in terms of this By-law, shall be liable to a fine not exceeding R5 000 or as may be determined by a Court of Law or to imprisonment for a period not exceeding 12 months or both such fine and such imprisonment.*

94. Bylaw 37 provides for the prosecution of a corporate body which in the current instance would include the directors of the KAEB. The bylaw is quoted below:

A partner in a partnership, a member of the board, executive committee or other managing body or a corporate body is personally guilty of an offence contemplated in terms of this By-law if such offence was committed by:

(1) a corporate body established in terms of any law; or

(2) a partnership; and

(3) such person failed to take reasonable steps to prevent the offence.

95. Bylaw 45(2) prescribes that land may be used only for the purposes permitted by the adopted Land Use Scheme. The land comprising the Kleinfontein settlement is used for purposes that are not permitted by the **CTTPS**. This constitutes a contravention of clause 14(3) of the Scheme which limits the permitted land uses for properties that are zoned 'undetermined'.[3]

96. Clause 14(4) of the Scheme prohibits a person to use or cause or allow to be used, any land or building or part thereof for a purpose other than that for which it was approved or has the rights in terms of clause 14, unless such building has been altered for any new use and any necessary consent or permission of the municipality therefore has been obtained. In terms of clause 14(5) the expression "the erection and use" of a building for a particular use includes the conversion of the building for that use, whether involving the structural alteration thereof.

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3 These uses accord with the permitted uses under the **PUTPS** enumerated earlier.

97. The use of the properties comprising the Kleinfontein settlement in contravention of the Scheme, not only by the KAEB, but also by its shareholders, constitutes a criminal offence.

98. Section 4 of the **NBRBSA** makes provision for approval by local authorities of applications in respect of the construction of buildings. Section 4(1) of the Act prohibits any person from erecting any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act, without the prior approval in writing of the local authority in question. In terms of section 4(4)b any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building. Section 7 prescribes the process to be followed to obtain approval in respect of the construction of buildings.

99. In terms of section 14(4) of the Act the owner of any building or, any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building:

(i) *unless a certificate of occupancy has been issued in terms of subsection (1) (a) in respect of such building;*

(ii) *except in so far as it is essential for the erection of such building;*

(iii) *during any period not being the period in respect of which such local authority has granted permission in writing for the occupation or use of*

such building or in contravention of any condition on which such permission has been granted; or,

(iv) *otherwise than in such circumstances and on such conditions as may be prescribed by national building regulation,*

(v) *shall be guilty of an offence."*

100. The occupation of buildings situated within the Kleinfontein settlement contravenes section 14(4) of the Act because the buildings are being occupied without certificates of occupancy having been issued in terms of section 4(1) of the Act and its Regulations. The occupation of these buildings constitutes a criminal offence.

101. The applicants clearly established that the conduct of the KAEB, its directors, and its shareholders, which invariably includes the applicants, is not only unlawful, but illegal. The only question that remains is whether the applicants are entitled to the prohibitory relief sought against the KAEB and the mandatory relief sought against the COT. I will first deal with the applicants' entitlement to the interdicts before I deal with the issue of non-joiner. The reason for doing so will become apparent in due course.

Relief against the KAEB

102. The applicants apply for an interdict against the KAEB to cease and desist from expanding the Kleinfontein settlement until all laws relating to municipal planning and building regulation had been complied with. If one considers not

merely the form of the order, but also predominantly its effect, the interdict sought is not interlocutory in nature.[xxv] Until the final determination of applications for planning and building approvals, the court order will prevent the KAEB from realizing its developmental objectives. Whether the KAEB should be prevented from doing so is not an issue which would be decided by the official or tribunal considering the applications for planning and building approvals. The interdict, once granted, will consequently be final in effect, even if only for a limited period.[xxvi] In consideration of the aforesaid the applicants must satisfy the requirements for a final interdict, namely a clear right, an injury committed or reasonably apprehended, and the absence of any other satisfactory remedy.[xxvii]

103. In as far as a clear right is concerned the applicants rely on the following:

103.1. the applicants are shareholders of the KAEB;

103.2. the applicants reside in the illegal township;

103.3. the applicants have a right to enforce the provisions of the **CTTPS**, the **SPLUMB**, and the **SPLUMA** on the basis that these legal instruments operate in the applicants' favour since they reside within its area of operation;

103.4. the applicants are affected by the lack of municipal services which is a consequence of the expansion of the settlement.

To succeed in obtaining the remedy of an interdict against the KAEB, the applicants must show that any of the aforesaid individually, or all the aforesaid cumulatively, constitute a right worthy of protection.

104. The new **Companies Act** is the principal source of shareholder rights in a company. The memorandum of incorporation may also bestow rights on a shareholder. In terms of section 161 of the Act a shareholder may apply to court for an order necessary to protect any right or rectify any harm done to the securities holder by the company (because of an act or omission that contravened the Act or the constitutive documents of the company) or the directors of the company (to the extent that they are liable for a breach of their fiduciary duties). Similarly, pursuant to section 163 of the Act, a shareholder may apply to court for relief from oppressive and unfairly prejudicial conduct of the company or a related person. The court has a wide range of remedies including restraining the conduct, declaring a person delinquent or under probation or setting aside transactions. In accordance with the provisions of section 165 of the Act, a shareholder may bring proceedings in the name of and on behalf of a company to protect the legal interests of the company. Nowhere in the Act or the memorandum of incorporation of the KAEB do I find a provision which grants a shareholder the right to insist that the company use its property for a lawful purpose in accordance with laws that regulate municipal planning or building regulation.

105. It is common cause that the applicants reside in an illegal township. It is also common cause that the applicants' own use of the property is unlawful and illegal. It is farcical to suggest that the applicants' unlawful and illegal use of the KAEB's property somehow bestow on them the right to insist that the KAEB should not use its property for the very same purpose.

106. Municipal planning and building regulation are functions assigned to municipalities in terms of section 156 of the **Constitution**, read with Part B of Schedule 4 and in terms of which municipalities have both executive authority and a right to administer to the extent set out in section 155. Municipal planning relates to the control and regulation of the use of land, and building regulation relates to the control and regulation of buildings and improvements on land. All the laws relied upon by the applicants in support of their contention that the Kleinfontein settlement is an illegal township have their own enforcement measures. The COT is the responsible authority who should enforce these laws.[xxviii] The COT has the right to enforce the laws, not the applicants.

107. In **Joseph and Others v City of Johannesburg and Others**[xxix] the Constitutional Court held that 'the provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government' and 'the obligations borne by local government to provide basic municipal services are sourced in both the Constitution and legislation'. In **Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others**[xxx] Yacoob J held that 'municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty'. The applicants have a right to receive municipal services from the COT. The relationship between the applicants and the KAEB is governed by the company's memorandum of incorporation. If the applicants have a right to insist that they be provided with municipal services by the KAEB, such right should be grounded in the

memorandum of incorporation. I could not locate such a right in the memorandum of incorporation.

108. I therefore find that the applicants failed to show a clear right, worthy of protection, which will be infringed if the interdict against the KAEB is not granted.

109. Even if I am wrong as far as the first requirement for an interdict is concerned and the applicants have a clear right to the relief sought, an aspect which militates against the granting of the interdict is the availability of an adequate alternative remedy. An order against the COT compelling it to pursue the remedies available to it to enforce compliance with the relevant laws renders an interdict unnecessary.

Relief against the COT

110. In **City of Tshwane Metropolitan Municipality v Grobler**[xxxi] it was held that it is the duty of the relevant local authority to enforce the provisions of its town-planning scheme and that a local authority is duty-bound to do so.

111. In the matter of **United Technical Equipment Co (Pty) Ltd v Johannesburg City Council**[xxxii] a full court of this Division held as follows:

"The Respondent has not only a statutory duty, but also a moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the Respondent as a public authority to uphold the law, a lenient approach could be an open invitation to members of the

public to follow the course adopted by the Appellant, namely to use the land illegally with a hope that the use will be legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict."

112. In **District Six Committee and Others v Minister of Rural Development & Land Reform and Others**[xxxiii] Kollapen J expressed himself as follows on Government's duty to fulfil constitutional duties:

"Section 237 of the ***Constitution*** *provides that all constitutional obligations must be performed diligently and without delay. That this should be so is self-evident. Compliance with the supreme law affirms and validates the law while dilatory conduct not only undermines that law but also deprives the bearers of constitutional rights of timeous performance of the obligations owed to them. It must follow that a relatively young and fragile democracy such as ours must ensure that the letter and spirit of the Constitution is internalized into the DNA of the State and the rest of society. A strong commitment to performing constitutional obligations without delay, diligently and conscientiously contributes not only to the consolidation of democracy and greater respect for the Constitution but also engenders confidence amongst all that the law can and does indeed work and that the imperatives contained in the Constitution are much more than paper promises but promises of substance that can be enforced."*

113. In **Lester v Ndlambe Municipality**[xxxiv] the SCA expressed itself as follows:

[23] *The answer is simple that the law cannot and does not countenance an ongoing illegality which is also a criminal offence. To do so would be to subvert the doctrine of legality and to undermine the rule of law.*

[24] *Courts have a duty to ensure that the doctrine of legality is upheld and to grant recourse at the instance of public bodies charged with the duty of upholding the law.*

[27] *The Court a quo, in turn, had a concomitant duty to uphold the doctrine of legality, by refusing the countenance of an ongoing statutory contravention and criminal offence.*

[28] *I have already found that the Court below erred in finding that it had a discretion whether or not to issue a demolition order. Absent such discretion, the Court below simply had to uphold the rule of law, refuse to countenance an ongoing statutory contravention and enforce the provisions of the Act."*

114. In **Pick 'n Pay Stores Limited v Teazers Comedy and Revue CC**[xxxv] it was held:

"*The applicants rely on the applicable town planning scheme for the area in question and state that they are members of a class of persons in whose interest the town planning scheme was enacted. This, submit the applicants, establishes their locus standi. I am in agreement with this submission. At the very least the applicants established in their founding papers that they lawfully occupy and conduct business within the area in question.*

The nature and purpose of the relevant town planning scheme is dealt with in more detail elsewhere in this judgment, it is enough that I find that the applicants are indeed members of a class of persons in whose interests the town planning scheme was enacted.

115. The court referred to **BEF (Pty) Ltd v Cape Town Municipality and Others**[xxxvi] where the following was stated:

'The purposes to be pursued in the preparation of a scheme suggest to me that scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by this scheme or at any rate those inhabitants who would be affected by a particular provision...

116. In **Administrator, Transvaal and The Firs Investments (Pty) Ltd v Johannesburg City Council**[xxxvii] Ogilvie-Thompson JA said that it was:

'of the essence of a town planning scheme that it is conceived in the general interests of the community to which it applies.

The appellants' interest as persons in whose favour the Howick Scheme operates is a sufficient interest for purposes of S 38(a) of the Constitution to enable them to apply to Court to vindicate their fundamental right to just administrative action entrenched in S33(1) of the Constitution and given effect to by the PAJA. The challenge to their standing consequently has, in my view, no merit and must fail.'"

117. Based on the authorities quoted I am satisfied that the COT has a duty to enforce the relevant laws relating to land use planning and building regulation, that the applicants have the requisite locus standi to apply for an order compelling the municipality to do so, and that the court is duty bound to grant such an order.

118. I am not inclined to grant an order compelling the COT to commence with the prosecution of the KAEB. The COT has various remedies at its disposal in the event of a contravention of the laws relating to municipal planning and building regulation. One of these remedies is a criminal prosecution. It is not open to the court to prescribe to the COT which remedies it should pursue. It is settled law that the court must be sensitive and accord other branches of Government due respect and should exercise self-restraint in exercising judicial power.[xxxviii]

119. In deciding on an appropriate enforcement mechanism, the COT is implored to consider the extent of the breaches that have occurred over the past 30 years. The shareholders and directors of the KAEB are clearly a group of individuals with an identified hierarchy engaged in significant criminal activity. The directors and their predecessors have shown themselves capable of egregious and criminal behavior, insidiously evading laws relating to municipal planning and building regulation, and the KAEB is eligible to be labelled a criminal enterprise.

Non-joinder

120. Since I am only prepared to grant the relief sought against the COT, and not against the KAEB, I will consider the non-joinder point raised only in relation to the relief sought against the COT.

121. In **Amalgamated Engineering Union v Minister of Labour**[xxxix] the court held that:

'It is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in litigation with which it

is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion from litigation. Clearly the ratio in Amalgamated Engineering Union is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the Court, has a direct and substantial interest in the matter and should be joined as a party'.

122. The test applied to determine whether a party has a direct and substantial interest to be joined was set out by 'Herbstein and Van Winsen p 170-173' as follows:

'Would the third party have locus standi to claim relief concerning the same subject matter; and could a situation arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance'.

123. The KAEB contends that there are shareholders who bought shares in the KAEB which entitle them to construct dwellings on erven assigned to them. The substantial test is whether these shareholders are necessary parties for purposes of joinder, with a legal interest in the order granted against the COT, which may be affected prejudicially by the order so granted.[xl]

124. A decision by the COT to enforce the relevant laws, and any steps taken in pursuance of such a decision, will most likely have a direct and substantial effect on the interests of the shareholders, not an order compelling the COT to enforce the law.

The 'unclean' hands defence

125. The KAEB contends that the applicants should be non-suited based on the 'clean hands' doctrine. The KAEB contends that the applicants approached the court with unclean hands based on the following facts:

125.1. The second and fourth applicants were directors of the KAEB between from 24 August to 23 November 2020.

125.2. During their tenure they attended directors' meetings and participated in discussions and the approval of a resolution that the KAEB purchase additional land for future development.

125.3. The first applicant was a member of a committee tasked with formalising the township.

125.4. During their tenure as directors, they failed to pursue the formalisation of the township with the necessary dedication.

125.5. The first, second and fourth applicants seek relief seek relief in respect of decisions and actions that flowed from their own involvement in the management of the KAEB.

126. Without reference to the grounds advanced by the KAEB as to why it contends the applicants approach the court with unclean hands, I am of the view that

the applicants' hands are not merely 'unclean' but dripping with moral turpitude. What is in no way innocuous is that the applicants are also guilty of contravening the very same laws which render the existence of the Kleinfontein settlement illegal. The applicants' occupation of the KAEB's property is illegal and constitutes a criminal offence. The applicants are part of the criminal enterprise which is the Kleinfontein settlement. It is not suggested that the applicants became involved with Kleinfontein unwittingly and without knowledge of its status.

127. The applicants request the court to sanction the illegal activities of the KAEB but is completely silent when it comes to their own illegal conduct. The hypocrisy is staggering. I am satisfied that the applicants approached the court with unclean hands. However, the court's duty to uphold the rule of law compels me to relax the application of the doctrine.[xli]

THE APPLICATION UNDER CASE NUMBER: 4755/2022

The relief sought

128. The following relief is claimed (paraphrased):

128.1. an order interdicting and restraining the KIV and its members from influencing, persuading, convincing or encouraging shareholders of the KAEB to withhold levies, or not to pay any financial obligation towards the KAEB;

128.2. an order declaring that shareholders of the KAEB are obliged to pay levies to the KAEB as provided for in the KAEB's memorandum of incorporation.

129. In their counterapplication the respondents claim for an order that the KAEB be compelled to disclose and make available to the KIV and its members documents and information listed in an order dated 28 March 2022 by an adjudicator in terms of the **Community Schemes Ombud Services Act**. The respondents also apply for orders in the following terms:

129.1. that it be declared that it is an express, implied, or tacit term of the KAEB's memorandum of incorporation that the development of the KAEB's properties presupposes the development of a lawful township which could lawfully be occupied by its shareholders;

129.2. that it be declared that the KIV's members are excused from the obligation imposed on them by the KAEB's memorandum of incorporation to pay levies until the KAEB fulfils its obligation to establish a lawful township.

Applicant's case

130. Based on the provisions of the **Share Block Control Act**,[xlii] the KAEB's memorandum of incorporation and its rules, the KAEB has a clear right to claim and receive levies for the services it provides.The KIV and its members are interfering with the KAEB's entitlement by inciting and provoking the KAEB's

shareholders to withhold levies and not to comply with other financial obligations they may have towards the KAEB.

131. The KAEB is entitled to enforce the provisions of the memorandum of incorporation against the KIV and its members and a prohibitory interdict is the only satisfactory way to achieve this purpose.

132. The KAEB is also entitled to a declaratory order that its shareholders are obliged to pay levies.

133. The counterapplication stands to be dismissed because the KAEB furnished the documents sought. The respondents failed to satisfy the requirements for a final interdict and do not make out a case for the declaratory orders they seek. The effect of the declaratory relief, once granted, would be that the court made a contract for the parties, which is not legally sustainable. The payment of levies and the establishment of a lawful township are not reciprocal obligations.

134. The respondents fail to disclose a defence to the relief sought by the KAEB.

The respondents' case

135. The KAEB is not entitled to any relief because it did not satisfy the requirements for a final interdict. The application is a knee-jerk reaction to the application under case number 4755/2022.

136. The true purpose of the application is to prevent the KIV and its members from bringing to the unlawful conduct of the KAEB's board of directors to the attention of its shareholders.

137. The KAEB's memorandum of incorporation prescribes reciprocal obligations which have not been fulfilled by the KAEB's board of directors. An interpretive exercise of the memorandum of incorporation should lead to a finding that the KAEB has a reciprocal obligation to establish a lawful residential township. Insofar as the KAEB fails to comply with the obligation, the KIV and its members are excused from paying levies which is an obligation imposed on them by the memorandum of incorporation.

138. The KIV and its members have the right to bring to the attention of shareholders relevant facts such as the directors' unlawful conduct and the rights accorded to them by the KAEB's memorandum of incorporation.

The interdict sought by the KAEB

139. In appropriate cases a claim for an interdict lies against a third party who intentionally and without justification induces or procures another to breach a contract.[xliii]

140. The KAEB adopted a memorandum of incorporation in accordance with section 13(1) of the new **Companies Act**[xliv] so that the standard form memorandum of incorporation for a private limited company referred to in regulation 15(1)(a) does not apply to the KAEB. In terms of section 15(6) of the Act the KAEB's memorandum of incorporation, and any rules of the KAEB, became binding (a) between the KAEB and each shareholder; (b) between or among the

shareholders of the KAEB; and (c) between the KAEB and (i) each director or prescribed officer of the KAEB; or (ii) any other person serving the KAEB as a member of a committee of the board, in the exercise of their respective functions within the KAEB.

141. The memorandum of incorporation has contractual force between the KAEB and its shareholders, including those who became shareholders when the KAEB came into existence and those who became shareholders after that, but only in their capacity as shareholders.[xlv] It follows that the obligations imposed on shareholders of the KAEB is binding since the relationship between shareholders and the KAEB is a contractual relationship. The provisions of the memorandum form the basis of the contract.[xlvi]

142. Clause 32 of the KAEB's memorandum of incorporation imposes certain financial obligations on the shareholders. One of these obligations is the payment of levies or contributions to the KAEB. According to the clause the levies are essential for the efficient operation and maintenance of the Kleinfontein settlement. The levies must be used for repair, upkeep, control, management, and administration of the KAEB and the farms comprising the Kleinfontein settlement. The levies must also be used to provide certain 'municipal' services.

143. It is common cause on the papers that the KIV and its members are inducing the KAEB's shareholders to breach the memorandum of incorporation by withholding levies. Our law clearly recognizes a party's right to be protected from unlawful interference with its contractual rights. The KIV and its members are clearly interfering with the contractual relationship between the KAEB and its shareholders, and in the process deprive the KAEB of its contractual rights under its memorandum of incorporation. If the interference

is not justified in law the KAEB will be entitled to a prohibitory interdict which is designed to put a stop to the interference, because nobody is entitled to violate another person's right unless the law authorizes such a breach. The KAEB will be entitled to an interdict unless the KIV and its members can show that the law authorizes or excuses their conduct. That is of course if the KAEB also have a reasonable apprehension of harm and lack an adequate alternative remedy.

144. The KIV and its members rely on section 16 of the **Constitution** as the basis upon which they should escape liability for what seems to be unlawful interference with the KAEB's contractual rights. Section 16(1) provides as follows:

Everyone has the right to freedom of expression, which includes—

(a) *...;*

(b) *freedom to receive or impart information or ideas;*

(c) *...; and*

(d) *...*

145. The full respect for the right of all individuals to receive and impart information, ideas and opinions, without interference constitutes one of the fundamental principles upon which a democratic society is based. This means that it is not only statements of fact about events that happened, or that are empirically true, and which can be supported by evidence, that are protected. Opinions or beliefs, which are normally subjective and can vary based on a person's perspective, emotions, or individual understanding of something, are also

protected. This is especially so when the expression of opinions or beliefs can be corrected and / or countered. In this context, freedom of expression is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.

146. The KAEB does not seem to suggest that the KIV and its members do not have the right to freedom of expression. A necessary corollary of the right in the context of this case would be that the KIV and its members cannot be prevented from embarking on a campaign to impart information or ideas about the illegal use of the farms comprising the Kleinfontein settlement, the failure by the directors of the KAEB to rectify the breaches, the unabated expansion of the settlement to the perceived detriment of existing residents and shareholders, or about the alleged mismanagement by the directors of the affairs of the KAEB. It will be difficult to conclude that a campaign in the field of public opinion aimed at advancing the interests of the KIV and its members could be actionable. As was stated by Tipp AJ in **Petro Props (Pty) Ltd v Barlow and another**[xlvii]**:**

'In this context, it should be borne in mind that the Constitution does not only afford a shield to be resorted to passively and defensively. It also provides a sword, which groups like the Association can and should draw to empower their initiatives and interests.'

147. The nub of the KAEB's complaint is that the KIV and its members are inducing its shareholders to breach the memorandum of incorporation by withholding levies. The question to me seems to be whether such conduct falls within the ambit of the right to free speech, and if so, whether the right outweighs the right of the KAEB to be protected from interference with its contractual rights.

148. To me the act of inducing shareholders to breach the memorandum of incorporation of the KAEB is not an incidence of free speech. It cannot be argued with any measure of conviction that imparting information or ideas include the commission of an act which is prohibited by law, whether it be an Act of Parliament or the common law. I am therefore constrained to conclude that the KIV and its members are not protected by the right to freedom of expression because their conduct is not an incidence of freedom of expression.

149. Although the KIV and its members are free to pursue their campaign, the inducement of shareholders to breach the terms of the memorandum of incorporation should not form part of the campaign. In consideration of the aforesaid I am satisfied that the KAEB satisfied the first requirement for a final interdict, namely a clear right worthy of protection, and that the respondents' reliance of the right to freedom of expression cannot vitiate this right.

150. I am further satisfied that the KAEB has a reasonable apprehension of harm and that although it may have alternative remedies at its disposal to deal with the consequences of the breach of its rights, an interdict is the most appropriate remedy. I must emphasize that the scope of the interdict is limited to the inducement of shareholders to withhold levies and not the campaign to impart information or ideas about the illegal use, the failure by the directors to rectify the breaches, the unabated expansion of the settlement, or the alleged mismanagement by the directors.

151. The interdict should also not be understood to operate against individual shareholders and should any shareholder decide of his or her own volition to withhold levies this interdict will not operate against such shareholder. The scope of the interdict is limited to the KIV and its members being interdicted from inducing shareholders to withhold levies, and not the actual withholding of levies.

The declaratory orders

152. I will deal with the declaratory orders sought by both the applicant and the respondents. Whether the parties are entitled to declaratory relief should be assessed with reference to both the common law and section 21(1)(c) of the **Superior Courts Act**[xlviii] which authorize the High Court to grant declaratory orders. In terms of section 21(1)(c) of the Act, the High Court:

"in its discretion, and at the instance of any interested person, to inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

153. In **Langa v Hlophe**[xlix] the correct approach to section 21(1)(c) was described as follows:

"The jurisdiction of a high court to grant a declaration of rights is derived from s 19(1)(a)(ii) of the Supreme Court Act. The court may, at the instance of any interested person, enquire into and declare any existing, future or contingent right or obligation, notwithstanding that the applicant cannot claim any relief consequential upon such determination. This involves a two-stage enquiry: First, the court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied, it must decide whether the case is a proper one for the exercise of its discretion (Durban City Council v Association of Building Societies 1942 AD 27 at 32)."

154. Corbett CJ in **Shoba v OC, Temporary Police Camp, Wagendrift Dam**[l] dealt with the approach to be followed when dealing with section 19(1)(a)(iii) of the now repealed **Supreme Court Act**[li], that had similar wording to section 21(1)(c), as follows:

An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction in a particular case (see Ex Parle Ne// 1963 (1) SA 754 (A) at 759H - 7608). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (Nell's case, at 760B - C). In Nell's case, supra at 759A - B, Steyn CJ referred with approval to the following statement by Watermeyer JA in Durban City Council v Association of Building Societies 1942 AD 27, at 32, with reference to the identically worded s 102 of the General Law Amendment Act 46 of 1935:

> *'The question whether or not an order should be made under this section has to be examined in two stages. First, the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'*

155. The Supreme Court of Appeal in **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd**[lii] held that the two-stage approach under the subsection consists of the following:

"During the first leg of the enquiry, the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage, the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exists. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

156. I am satisfied that both the applicant and the respondents fulfil the first leg of the enquiry in that the parties all have an interest in existing, future, or contingent rights or obligations. I am not satisfied that the parties meet the second leg of the enquiry. I do not believe that this is a proper case where the court should exercise its discretion in favor of determining the rights and obligations of the parties in terms of the memorandum of incorporation. There are several interested parties on whom the declaratory order would be binding who are not before court. These parties are all those shareholders who are not participating in these proceedings.

157. Whether the shareholders of the KAEB are obliged to pay levies will not necessarily only be dependent on the terms of the memorandum of incorporation, but individual shareholders may be excused from performance for other lawful reasons. Whether a shareholder is obliged to pay levies should be assessed with reference to the facts applicable to that specific shareholder.

158. The question whether the terms contended for by the respondents in the counterapplication should be included in the memorandum of incorporation is in my view an issue on which the court is required to act as an adviser. Whether shareholders should be excused from paying levies on the bases contended for by the respondents is a question that should be decided when a shareholder is confronted with a claim for payment.

The respondents' claim for delivery of documents and information

159. In the counterapplication the respondents claim delivery of documents and information which the Community Schemes Ombud directed the KAEB to make available to the KIV.

160. In reply the KAEB alleged that the KIV was furnished with the documents and information.

161. In the counterapplication the **Plascon Evans** test operate against the respondents who are the applicants in the counterapplication. The KAEB's version should be accepted unless the version is palpably implausible or patently false. I cannot make such a finding, and I must therefore accept that the respondents had been provided with the requisite documents and information and that the relief sought is incompetent.

COSTS

162. All parties who participated in the two applications before court approached the court with unclean hands. As a result, none of the parties should be rewarded with a cost order in either of the applications, notwithstanding the fact that in both applications the respective applicants were substantially successful.

CONCLUSION

163. On a conspectus of all the issues raised I propose to make the following order in the application under case number 4755/2022:

163.1. That the second respondent (the City of Tshwane Metropolitan Municipality) be ordered to immediately take appropriate steps to enforce all relevant laws relating to planning and building regulation in as far as it relates to the farms comprising the Kleinfontein settlement.

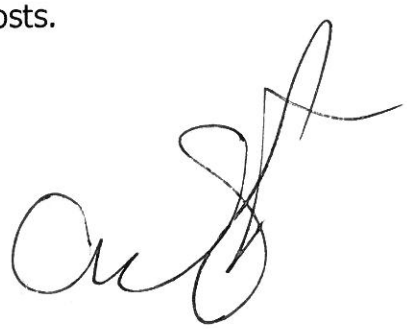
163.2. That each party pay their own costs.

164. On a conspectus of all the issues raised I propose to make the following order in the application under case number 6713/2022:

164.1. That the respondents be interdicted and restrained from inducing the shareholders of the applicant to withhold levies raised in terms of the applicant's memorandum of incorporation.

164.2. That the counterapplication be dismissed.

164.3. That each party pay their own costs.



A. VORSTER AJ
Acting Judge of the High Court

Date of hearing: **21 April 2023**

Date of judgment: **2 August 2024**

Counsel for applicant: **Adv. J.A. Venter**
(Case number 4755/2022)
Counsel for respondents:
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Instructed by: **TC Botha Incorporated**

Counsel for first respondent: Adv. D.B. du Preez SC

(Case number 4755/2022)

Counsel for applicant

(Case number 6713/2022)

Instructed by: **MJ Lombard Incorporated**

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i No. 108 of 1996.

ii **Interim Constitution**, No. 200 of 1993.

iii No. 79 of 1976.

iv **Constitutional Principle** XXXIV of the **Interim Constitution**, 1993.

v Section 235 of the **Final Constitution**, 1996.

vi No. 69 of 1984.

vii No. 61 of 1973 ('the old **Companies Act'**).

viii No. 91 of 1981.

ix No. 14 of 2005.

x No. 67 of 1995.

xi No. 15 of 1986.

xii **City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal** 860 2010 (9) BCLR 859 (CC).

xiii **City of Tshwane Metropolitan Municipality v Grobler & Others** [2005] JOL 14349 (T).

xiv **CD of Birnam (Suburban) (Pty) Ltd and Others v Falcon Investments Ltd** 1973 (3) SA 838 (W) at 854.

xv **United Technical Equipment Co (Pty) Ltd v Johannesburg City Council** [1987] 4 ALL SA 409 (T).

xvi No. 107 of 1998.

xvii No. 73 of 1998.

xviii No 9 of 2011.

xix No. 103 of 1977.

xx No. 16 of 2013.

xxi **Cool Ideas 1186 CC v Hubbard and another** [2014] ZACC 16, 2014 (4) SA 474 (CC) & **Wierda Road West Properties (Pty) Ltd v SizweNtsalubaGobodo Inc** 2018 (3) SA 95 (SCA).

xxii **Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport and others** 2015 (10) BCLR 1158 (CC) paras 25–27 & **Panamo Properties (Pty) Ltd and another v Nel NO and others** 2015 (5) SA 63 (SCA), [2015] 3 All SA 274 (SCA).

xxiii No. 117 of 1993.

xxiv No. 27 of 1998.

xxv **JR 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd** 2009 (4) SA 302 (SCA) at paragraph [25] at 312B.

xxvi **Maccsand CC v Macassar Land Claims Committee and Others** [2005] 2 All SA 469 (SCA).

xxvii **Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited** (CCT242/15) [2016] ZACC 42; 2017 (1) SA 613 (CC); 2017 (2) BCLR 152 (CC); [2017] 1 CPLR 1 (CC) (25 November 2016) at par 8.

xxviii **United Technical Equipment Co (Pty) Ltd v Johannesburg City Council,** 1987 (4) SA 343 (T) at 348 I-J.

xxix 2010 (4) SA 55 (CC) at par 34.

xxx [2004] ZACC 9 (SCA); 2005 (1) SA 530 (CC).

xxxi 2005 (6) SA 61 T at pars 6 & 9 (page 65D-J).

xxxii 1987 (4) SA 343 (T) at 348 I-J.

xxxiii (LCC54/2018) [2019] ZALCC 15; 2019 (5) SA 164 (LCC) (20 March 2019) para 28.

xxxiv 2015 (6) SA 283 (SCA).

xxxv 2000 (3) SA 645 (W) at 653 C-F, 653 H-I and 654 D-F.

xxxvi 1983 (2) SA 387 (C) at 401 B-F.

xxxvii 1971 (1) SA 56 (A) at 70 D.

xxxviii **National Treasury v Opposition to Urban Tolling Alliance** 2012 (6) SA 223 (CC).

xxxix 1949 (3) SA 637(A).

xl **Transvaal Agricultural Union vs Minister of Agriculture and Land Affairs** 2005 (4) SA 212 (SCA) para 64-66.

xli **Afrisure CC and Another v Watson NO and Another** (522/2007) [2008] ZASCA 89; [2009] 1 All SA 1 (SCA); 2009 (2) SA 127 (SCA) (11 September 2008) at par 39.

xlii No. 59 of 1980.

xliii **Masstores** supra & **Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng** 2014 (12) BCLR 1397 (CC), 2015 (1) SA 1 (CC).

xliv No. 71 of 2008.

xlv **De Lange v Methodist Church and Another** 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) & **Itzikowitz v ABSA Bank** Ltd [2016] JOL 35608 (SCA); 2016 (4) SA 432 (SCA) para 9.

xlvi **Trinity Asset Management (Pty) Ltd v Investec Bank Ltd** 2009 (4) SA 89 (SCA) at para 22.

xlvii 2006 (5) SA 160 (W) at par 55.

xlviii No. 10 of 2013.

xlix 2009 (4) SA 382 (SCA) at para 28.

l 1995 (4) SA 1 (A) at paras 14F-I.

li No. 59 of 1959.

lii (2006] 1 All SA 103 (SCA) (30 May 2005).