

**IN THE MAGISTRATES COURT FOR THE DISTRICT OF KUILSRIVER
HELD AT KUILSRIVER**

CASE NO: 597/2023

In the matter between:

RUBEN THEODOR FITCHAT Plaintiff

and

KLEINBRON ESTATE HOME OWNERS ASSOCIATION Defendant

ALEX VAN NIEKERK Third Party

**PLAINTIFF'S REPLY TO NOTICE OF INTENTION TO EXCEPT IN TERMS OF
RULE 19(1)(a)&(b)**

PLEASE TAKE NOTE THAT the Plaintiff replies as follows:

RE PARAGRAPH 1 (RE Rule 6(6))

1. The contract upon which the Plaintiff relies in his claim was in writing, and was signed by the Plaintiff and his wife at the MHI Attorneys' offices, 295 Durban Road, Bellville, on Monday, 20 May 2019 at 14:00 in the presence of MHI Attorneys' attorney, Ms Riëtte Smuts.
2. Please see the following supporting documents:
 - 2.1. **E1 - 2019.05.13 Email Fitchat & MHI - Sign docs**
 - 2.2. **E2 - 2019.05.18 Email Fitchat & MHI - Appt**
 - 2.3. **E3 - 2019.06.14 Email Fitchat & MHI - Progress Report**
 - 2.4. **E4 - 2019.06.14 Progress Report**
 - 2.5. **E5 - 2019.07.08 Email Fitchat & MHI - Request signed docs**
 - 2.6. **E6 - 2019.07.08 Kleinbron Estate Constitution & HOA Rules**

3. The contract, which is the Kleinbron Estate Constitution, was annexed to the summons, and was served on the Defendant and Third Party on 30 January 2023 by the sheriff.
4. The Kleinbron Estate Constitution refers to the Kleinbron Estate HOA Rules, which was not included in the summons, but upon which the Plaintiff also relies in his claim.
5. There are two Kleinbron Estate HOA Rules, one dated 7 September 2015, which the Plaintiff had signed on 20 May 2019, and another one dated 11 April 2022, which was emailed to the Plaintiff by the Defendant on 20 May 2022.
6. The Defendant and Third Party were already in possession of the Kleinbron Estate Constitution and both sets of HOA Rules.
7. The Plaintiff sent both sets of HOA Rules to the Defendant and Third Party's attorney in a DropBox folder on 17 February 2023.
8. The Plaintiff again includes both sets of HOA Rules in this reply.
9. Since the Defendant changed the Kleinbron Estate HOA Rules in order to illegally prejudice the Plaintiff, by, among other things, attempting to pressure the Plaintiff to remove his CCTV cameras from his property, as is argued in the Plaintiff's Particulars of Claim, the Plaintiff only acknowledges the new Kleinbron Estate HOA Rules, dated 11 April 2022, as far as it corresponds with the old Kleinbron Estate HOA Rules, 7 September 2015, the latter which the Plaintiff had signed.
10. Most of the rules on which the Plaintiff relies for his Particulars of Claim are exactly the same in the old and new Kleinbron Estate HOA Rules, except for the numbering of some of the rules, so in that respect, it is irrelevant whether the Plaintiff relies on the old or the new rules in his Particulars of Claim.
11. Some of the HOA Rules that have changed in the 11 April 2022 version, are rules which the Plaintiff contends were changed by the Defendant and/or Third Party as a result of the Defendant and Third Party's Abuse of Process, and which is outlined in the Plaintiff's Particulars of Claim.

SIGNATURE

12. The Plaintiff is only in possession of a copy of the Kleinbron Constitution and Kleinbron HOA Rules of 7 September 2016 which was signed by himself.

13. The Plaintiff is not in possession of a copy of the Kleinbron Constitution and Kleinbron HOA Rules which was also signed by the Defendant, despite the Plaintiff requesting one.

14. Please see:

14.1. **E5 - 2019.07.08 Email Fitchat & MHI - Request signed docs**

15. Regardless of this fact, according to the Kleinbron Estate Constitution,

15.1.

2.1 Membership of the ASSOCIATION is compulsory and automatic for all registered Owner/s, commencing upon registration of an Erf in his, her or its name, and such Owner cannot resign as a Member of the ASSOCIATION.

Kleinbron Estate Home Owners Association Rules (7 September 2015)

15.2.

1.1 These Rules have been formulated and imposed by the Trustees in terms of Clause 40 of the Constitution, therein referred to 'regulations and by-laws' and are, together with the provisions of the Constitution and the Architectural Manual, binding upon all the Owners and occupiers of Erven and their successors in title.

Kleinbron Estate Home Owners Association Rules (7 September 2015)

15.3.

3.4 The Constitution of the Association makes provision that no Member shall be entitled to any of the privileges of membership unless and until they have paid all levies and any other sum (if any) which is due and payable to the Association (Clause 18 of the Constitution).

Kleinbron Estate Home Owners Association Rules (7 September 2015)

15.4.

6. MEMBERSHIP

6.1 Membership of the Association shall be compulsory for every registered owner of Unit Erven, which membership shall commence simultaneously and automatically with the transfer of any Unit Erf into the name of the registered owner.

Kleinbron Estate Constitution

15.5.

6.2 Membership of the Association shall be limited to the registered owners of the Unit Erven provided that:

6.2.1 a person who is entitled to obtain a certificate of registered title to any such Unit Erf shall be deemed to be the registered owner thereof

Kleinbron Estate Constitution

15.6.

8. A Member shall not be entitled to sell or transfer a Unit Erf unless it is a condition of the sale and transfer that:

8.1 the transferee becomes a Member of the Association;

8.3 he first obtains the written consent of the Home Owners Association, which consent shall be given provided the purchaser of such Unit Erf agrees in writing to abide by the rules of the Constitution of the Association;

8.4 the registration of transfer of that Unit Erf into the name of that Transferee shall *ipso facto* constitute the transferee as a Member of the Association.

Kleinbron Estate Constitution

16. The Plaintiff signed all relevant transfer documents, which included the Kleinbron Estate Constitution and Kleinbron Estate HOA Rules (7 September 2015).

17. Please see **E4 - 2019.06.14 Progress Report:**

20/05/2019 Paid municipal figures. Purchasers attended our office to sign the transfer documents.

18. Transfer of the house to the Plaintiff's name was approved.

19. Please see **E4 - 2019.06.14 Progress Report:**

31/05/2019 Received Consent to Transfer by Home Owners Association

20. This indicates that consent had been obtained by the previous owners of the house to sell the house to the Plaintiff, indicating that the Defendant had accepted the Plaintiff's signing of the contract.

21. On 5 July 2019 the Plaintiff's wife requested a copy of the signed contract from MHI.

22. On 8 July 2019 MHI forwarded the contract which contained the Plaintiff's and his wife's signatures and which they indicated Osro Investments, the Defendant's levy collection agency, had forwarded to them.

23. The contract did not contain the signature of the Defendant.

24. However, it is clear that the Defendant and the Third Party considered the Kleinbron Estate Constitution and Kleinbron Estate HOA Rules to be binding contracts between the Plaintiff and the Defendant.

25. The Defendant itself relied on the contractual obligations of the Kleinbron Estate Constitution and new HOA Rules when it initiated legal action against the Plaintiff at CSOS.

26. Please see:

26.1. **E8 - 2022.08.24 Kleinbron CSOS - Application 1**

26.2. **E9 - 2022.08.24 Kleinbron CSOS - Attachment 2**

26.3. **E10 - 2022.08.24 Kleinbron CSOS - Attachment 5**

27. Since the Defendant relied on the exact same Kleinbron Estate Constitution and the Kleinbron Estate HOA Rules in legal proceedings against the Plaintiff, as the Plaintiff is now relying on for this lawsuit, it is clear that the Defendant considers both documents to be binding on them, and that they are in possession of all of them.

28. The Plaintiff used the Constitution, and both the old and new HOA Rules in his CSOS reply.
29. Please see:
 - 29.1. **E11 - 2022.09.09 Kleinbron CSOS Fitchat Reply - Addendum 01**
 - 29.2. **E12 - 2022.09.09 Kleinbron CSOS Fitchat Reply - Addendum 05**
 - 29.3. **E13 - 2022.09.09 Kleinbron CSOS Fitchat Reply - Addendum 06**
30. The Defendant did not indicate that he had never been bound by the old HOA rules, and that the Plaintiff was not allowed to rely on them in his reply.
31. Therefore the Plaintiff not being in possession of a copy of the contract that was also signed by the Defendant is irrelevant.
32. Furthermore, the Third Party also indicated that the Plaintiff was bound by the Kleinbron Estate Constitution and the old HOA Rules in an email to the Plaintiff in which Mr van Niekerk indicated, "6. If you don't understand the rules and constitution, I would gladly explain it to you".
33. Please see:
 - 33.1. **E7 - 2019.11.11 Re Sunday work**
34. Osro Investments has also indicated that the Defendant will take legal action against residents who fail to pay their levies, further indicating the Defendant's reliance on the contract.

RE PARAGRAPH 1.3

35. The content of this paragraph is denied.
36. The remedy that the Plaintiff seeks is specific performance and damages.

RE PARAGRAPH 1.7

37. The Plaintiff contends that the relevant paragraph is clearly understood to also refer to misrepresentation, breach of contract and not acting in good faith.
38. In order to clarify the alleged unlinked and/or unidentified basis of the claim, the Plaintiff offers the following clarification of the relevant paragraph:

39. The Defendant and Third Party, due to their misrepresentation of Kleinbron Estate as being a "luxury security estate", but then by breaching the contract and not acting in good faith by not providing gardening services and security services, and since the Plaintiff pays a levy in exchange for such services from the Defendant, which the Defendant does not provide, the Plaintiff seeks to be reimbursed for half the levy amount from when garden services stopped cutting the grass in his backyard until approximately the trial date for this lawsuit. The refund the Plaintiff seeks includes an approximate amount for the poor service that the Plaintiff has received from the Defendant, which is not in line with the Defendant's promised "luxury" lifestyle.
40. The Plaintiff also provides the relevant sections of the contract on which he relies for this claim below.

RE: GARDENS

41. The Plaintiff relies on the following sections of the contract regarding the provision of garden services:

41.1.

"Gardening firm" The person or firm approved and specified by the Trustee Committee, who shall render gardening services to all its Members and/or the Association, the latter with regard to the Mutual Areas.

Kleinbron Estate Constitution

41.2.

4. GARDENS

4.1 A garden service provider being the Gardening Firm referred to in Clause 13.2 of the Constitution, has been appointed to mow the lawns of the homeowners every 14 days and to attend to the upkeep of the communal areas.

Kleinbron Estate Home Owners Association Rules (7 September 2015)

RE: SECURITY

42. The Plaintiff relies on the following sections of the contract regarding the provision of security:

42.1.

3. PURPOSE DESCRIBING THE MAIN BUSINESS

The main business of the Association is to carry on the promotion, advancement and protection of Members of the Association as owners of Unit Erven.

Kleinbron Estate Constitution

42.2.

4. MAIN OBJECT

The main object of the Association is:

4.1 the care, maintenance, upkeep and control of the Mutual Area and, without limiting same, the provision of security services;

4.3 the promotion, advancement and protection of the communal and group interests of the Members generally

Kleinbron Estate Constitution

42.3.

7. SECURITY AND ACCESS CONTROL

7.1 The Access Control procedures is a subset of these Rules but documented separately. All Residents must ensure that they familiarize themselves and comply with the Access Control procedures. Any deviation or non-compliance with the Access Control procedures by any members, or their visitors, will be seen as and treated as a breach. Any such deviations from the Access Control procedures will accordingly be deemed to be grounds for imposing penalties in terms of the provisions in Clause 12 hereof.

Kleinbron Estate Home Owners Association Rules (7 September 2015)

RE: LEVIES

43. The Plaintiff relies on the following sections of the contract regarding the provision of garden services, the provision of security, and the payment of levies:

43.1.

12. The Trustee Committee shall from time to time make levies upon the Members for the purpose of meeting all the expenses which the Association has incurred, or to which the Trustee Committee reasonably anticipates the Association will be put by way of maintenance, repair, improvement and keeping in order and condition of the Mutual Area, and/or for payment of all rates and other charges payable by the Association in respect of the Mutual Area, and/or for the services rendered to it, and/or for payment of all expenses necessary or reasonably incurred in connection with the management of the Association, the Mutual Area and the Association's affairs.

Kleinbron Estate Constitution

43.2.

13. In calculating levies, the Trustee Committee shall take into account income, if any, earned by the Association and shall specifically further take into account expenses incurred with regard to the employment of security firms or security personnel.

Kleinbron Estate Constitution

43.3.

19. The Association shall at all times be sufficiently funded by Members in order for it to fulfill its objects in respect of expenditure for:

19.3 all other necessary and reasonable expenditures incurred/to be incurred in good faith

Kleinbron Estate Constitution

44. The Plaintiff reserves his right to also rely on other sections of the contract as may become necessary.

RE PARAGRAPH 1.8

- 45. Please see relevant sections in this document for a more detailed response.
- 46. The Plaintiff reserves his right to also rely on other sections of the contract as may become necessary, including, but not limited to section 39 of the Kleinbron Estate Constitution and sections 10, 11 and 12 of the Kleinbron Estate HOA Rules (7 September 2015).

RE PARAGRAPH 1.9.1 & 1.9.2

- 47. The Plaintiff addresses his justification of the addition of the Third Party and his claim for damages from the Third Party under the heading "**RE PARAGRAPH 2 (INCLUDING SUB-PARAGRAPHS)**" below.

RE PARAGRAPH 1.10

- 48. The Plaintiff denies the content of this paragraph, and the Defendant and/or Third Party is put to the proof thereof.

RE PARAGRAPH 1.12

- 49. The Plaintiff will prove his claim.

RE PARAGRAPH 1.13

- 50. The Plaintiff denies the content of this paragraph, and the Plaintiff will prove his claim.

RE PARAGRAPH 1.14

- 51. The Plaintiff denies the content of this paragraph.
- 52. The Defendant and/or Third Party bear the onus of proving the allegations in this application for an exception, which they have failed to do.

53. The Plaintiff further queries, if the Defendant and/or Third Party's allegation is correct, why the Defendant and/or Third Party did not apply for a strike out of the Plaintiff's Particulars of Claim.

RE PARAGRAPH 1.15

54. The Plaintiff denies the content of this paragraph.

55. The Plaintiff again queries, if the Defendant and/or Third Party's allegation is correct, why the Defendant and/or Third Party did not apply for a strike out of the Plaintiff's Particulars of Claim.

RE PARAGRAPH 1.16

56. The Plaintiff denies the content of this paragraph, and the Plaintiff will prove his claim.

RE PARAGRAPH 1.17

57. The Plaintiff denies the content of this paragraph, and the Plaintiff will prove his claim.

RE PARAGRAPH 1.18 (INCL SUB-PARAGRAPHS)

58. The Plaintiff denies the content of this paragraph.

RE PARAGRAPH 2 (INCLUDING SUB-PARAGRAPHS)

59. The Plaintiff included in his Particulars of Claim the case law and arguments on which he relies for the inclusion of the Third Party, and the basis on which he seeks relief from the Third Party.

60. The Plaintiff further relies on the following section of the contract:

60.1.

79.2 Every Trustee Member, every servant, agent and employee of the Association, and the Auditors shall be indemnified by the Association against (and it shall be the duty of the Trustee Committee out of the funds of the Association to pay) all costs, losses and expenses (including travelling expenses) which such person or persons may incur or become liable for by reason of any contract entered into, or any act or deed done, by such person or persons in the discharge of any of his/their respective duties, including in the case of Trustee Member, his duties as Chairman or Vice-Chairman.

Without prejudice to the generality of the above, the Association shall specifically indemnify every such person against all losses of whatsoever nature incurred arising out of any bona fide act, deed or letter done or written by him jointly or severally in connection with the discharge of his duties, provided that any such act, deed or letter has been done or written in good faith.

Kleinbron Estate Constitution

DATED AT BRACKENFELL ON THIS 6th DAY OF MARCH 2023.



RUBEN THEODOR FITCHAT

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