

**IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF KUILSRIVIER
HELD AT KUILSRIVIER**

Case number: **7536/2023**

In the matter between:

KLEINBRON ESTATE HOMEOWNERS' ASSOCIATION

Plaintiff

and

RUBEN THEODOR FITCHAT

First Defendant

SONET FITCHAT

Second Defendant

DEFENDANTS' REPLY

RE: PARAGRAPH 1

1. The content of this paragraph is noted.

RE: PARAGRAPH 2

2. The content of this paragraph is noted.
3. However, the erf number is 15152, not 1512.

RE: PARAGRAPH 3

4. The Plaintiff did not annex the relevant Title Deed or Power of Attorney on which the Plaintiff relies for its arguments to their summons, so the Defendants are unable to comment on the Title Deed's contents.
5. Despite this, the Defendants deny the content of this paragraph.

CONTRACTUAL AGREEMENTS

6. There are two contractual agreements between the Plaintiff and the Defendants, which are the Kleinbron Estate Constitution and the Kleinbron Estate HOA Rules.
7. The Plaintiff annexed to its summons the Kleinbron Estate Constitution (Annexure A) and the Kleinbron Estate HOA Rules dated 11 April 2022 (Annexure B). There is an error on the first page of the Plaintiff's Annexure B, the date should be 11 April 2022, not 14 November 2022.
8. The Defendants purchased their house in Kleinbron Estate in 2019.
9. At the time the Defendants signed the Kleinbron Estate Constitution and the Kleinbron Estate HOA Rules dated 7 September 2015.
10. The Plaintiff did not provide the Defendants with a copy of the documents that were signed by both parties when the Defendants purchased their house.
11. The Defendants are only in possession of a copy that contains only their own signatures.
12. The Plaintiff also did not annex a copy of either document that was signed by both parties to their summons.
13. To its summons, the Plaintiff annexed an unsigned copy of the Kleinbron Estate Constitution, a copy of which the Defendants signed at the offices of MHi Attorneys in Bellville on 20 May 2019, and a new set of Kleinbron Estate HOA Rules dated 11 April 2022, which the Defendants never signed.
14. The Plaintiff did not annex the Kleinbron Estate HOA Rules dated 7 September 2015, which the Defendants had signed, to their summons.
15. Since the Defendants dispute some of the terms of the new Kleinbron Estate HOA Rules dated 11 April 2022, the Defendants annex the Kleinbron Estate HOA Rules dated 7 September 2015 to their Reply (see **Annexure D01**).
16. Both the old and new versions of the Kleinbron Estate HOA Rules indicate that the Kleinbron Estate HOA is responsible for providing security and gardening services to residents.
17. The Kleinbron Estate Constitution and the Kleinbron Estate HOA Rules are governed by contract law and the Consumer Protection Act.
18. The Title Deed and the Kleinbron Estate Constitution/HOA Rules, each exist and rely on their own merits, separately from each other.

19. The Title Deed is not an agreement between the Plaintiff and the Defendants, and as such does not impose any contractual responsibilities from either the Defendants towards the Plaintiff, nor from the Plaintiff towards the Defendants.
20. Even if the Title Deed was a binding contract between the Plaintiff and the Defendants, any legally enforceable contract requires all parties to the contract to have agreed to it.
21. Neither of the Defendants saw, agreed to or signed the Title Deed when they purchased their property in Kleinbron Estate.
22. Neither of the Defendants saw, agreed to or signed any of the alleged terms that the Plaintiff alleges to be on the Defendants' Title Deed, including the Title Deed allegedly binding the Defendants to another contract, which is allegedly the Kleinbron Estate Constitution, which allegedly cannot be cancelled even if the Kleinbron Estate HOA fails to uphold their side of the contract.

PLAINTIFF'S RESPONSIBILITIES

23. According to the Kleinbron Estate Constitution and HOA Rules, the Plaintiff is responsible for providing security and gardening services to the Defendants.
24. The Plaintiff has not provided security services to the Defendants since at least December 2021 and gardening services since April 2022, which amounted to the Kleinbron Estate HOA's repudiation of the contract.
25. The Defendants paid all their monthly and special levies from August 2019 to March 2023, when the Defendants terminated the contract due to the Plaintiff having failed to provide them with services for over a year (see **Annexure D02**).
26. The Defendants exercised their legal rights, according to the Consumer Protection Act, to cancel the contract, and to stop paying their levies.
27. The Plaintiff cannot legally expect the Defendants to uphold their end of the agreement (to pay levies), while not upholding their end of the agreement (to provide security and gardening services).
28. Since the Defendants cancelled the contract and stopped paying their levies, the Kleinbron Estate HOA has made no attempt to mitigate their loss and to provide security and gardening services to the Defendants.

29. It is unclear why the Kleinbron Estate HOA considers it reasonable for them to continue charging the Defendants a levy when they do not provide the services which would justify the levy.

PLAINTIFF'S FAILURE TO PROVIDE SECURITY SERVICES

30. The Plaintiff's levy is supposed to include the provision of security services to the Defendants.

31. Since about October 2019 the Defendants have experienced countless and continuous security incidents in Kleinbron Estate including stalking, harassing, trespassing, vandalism, intimidation, attempted assault, death threats and house break-ins.

32. When the security incidents started, the Defendants informed the Plaintiff, and asked for assistance, but the Plaintiff refused.

33. The Kleinbron Estate manager has indicated to the Defendants on a number of occasions, including on 1 March 2021, 4 April 2021, 27 October 2021 & 8 December 2022, that residents are responsible for their own security (see **Annexure D03, Annexure D04, Annexure D05 & Annexure D06**).

34. Since every time the Defendants have asked the Plaintiff for assistance with their security, the Plaintiff has refused, the Defendants have stopped asking the Plaintiff for assistance.

PRIVATE SECURITY MEASURES PROHIBITED

35. In December 2021, the Defendants had a security incident at their property, and the First Defendant discharged a warning shot with an airgun.

36. Kleinbron Estate's security provider, SJC Security, arrived, and wrote a report in which they alleged that the Plaintiff is not able to be responsible for his own safety, since they allege he is paranoid and unfit to own a firearm (see **Annexure D07**).

37. This report was used by a neighbour who is harassing the Defendants to obtain a protection order against the First Defendant, and for SAPS to confiscate the First Defendant's airgun and firearm.

38. The First Defendant also obtained a protection order against the neighbour, but the neighbour continues to harass the Defendants.
39. Also due to the security incidents at their property, the Defendants installed CCTV cameras around their property.
40. After the Defendants installed their CCTV cameras, the Plaintiff changed the Kleinbron Estate HOA rules to ban the Defendants' kind of cameras (PTZ cameras, whose angle can be changed from inside the house), and attempted to pressure the Defendants into removing their cameras by encouraging three of the Defendants' neighbours to take legal action against the First Defendant at CSOS.
41. CSOS found in the First Defendant's favour in all three cases.
42. Then the Plaintiff itself also took legal action against First Defendant at CSOS.
43. CSOS again found in the First Defendant's favour.
44. Kleinbron Estate had indicated to the Defendants that residents are responsible for their own security, but if this is so, why then does the Kleinbron Estate HOA involve themselves in residents' security, and demand the Defendants to remove their CCTV cameras?
45. If the Defendants are responsible for their own security, why does Kleinbron Estate charge a non-cancellable levy for security and maintain a monopoly on the estate's security?
46. Is Kleinbron Estate responsible for residents' security or not?
47. Furthermore, according to the Kleinbron Estate HOA Rules, residents are also not allowed to implement other private security measures on their properties, such as building a wall around the front of their property.
48. The reason provided is that no walls in front of properties apparently give the impression of spaciousness, and assumedly also to give the impression that Kleinbron Estate is safe.
49. Who does it benefit that there are no walls in front of the houses in Kleinbron Estate?

50. It appears to be the Kleinbron Estate HOA, who then forces residents to rely on their security provider, for which they have to pay a levy.

51. A spacious and safe impression does not increase the actual safety of the estate. It only results in higher property prices, which could then be used to justify a higher levy.

CHILDREN

52. The Kleinbron Estate HOA has also attempted to construe the Defendants' security concerns as them complaining unreasonably and ridiculously about children playing in the public areas around the Defendants' house, or walking over the lawn in front of their house (see **Annexure D08**).

53. If the area is safe, and the Defendants are only unreasonably complaining about children playing, why then do the Defendants need to pay a levy to the Kleinbron Estate HOA for security services in order to be protected against children?

54. If the area is actually unsafe, why not allow the Defendants to not pay the levy and be responsible for their own safety?

ACCESS CONTROL

55. Residents of Kleinbron Estate are forced to use the access control provided by Kleinbron Estate's security provider, which involves the security provider phoning residents when a contractor or visitor arrives at the estate's gate.

56. Since the Defendants cancelled their contract with the Plaintiff, Kleinbron Estate has no contractual obligation to continue providing access control to the Defendants anymore, but the Plaintiff's security company continues doing so of their own volition.

57. If the Defendants hired a contractor to work at their house, the Plaintiff calling them to tell them their contractor is at the estate's gate does not increase the Defendants' security.

58. Calling the Defendants to confirm whether they agree for the contractors to enter the estate may increase the security of other residents in the estate, but the Defendants are not responsible for the security of the other residents, just as the other residents are not responsible for the Defendants' security.
59. The fact that the Plaintiff continues phoning the Defendants means that the access control is more for the Plaintiff's benefit than for the Defendants'.
60. It does not make sense for the Defendants to pay a levy exclusively for the Plaintiff's (or potentially the other residents in the estate)'s benefit.
61. There have been many incidents where Kleinbron Estate's security provider has allowed people into the estate who indicated they were the Defendants' contractors, without calling the Defendants (see **Annexure D09**).
62. The amount of crime that the Defendants have experienced while living in Kleinbron Estate indicates that the Plaintiff's access control is not increasing the security of the Defendants at all.

GARDENING SERVICES

63. The Plaintiff stopped mowing the lawn in the Defendant's backyard in April 2022.
64. The Plaintiff continues to mow the lawn in the Defendant's front yard of their own volition.
65. The Defendant contends the Plaintiff mowing the Defendants' front yard is more for the Plaintiff's advantage, in order for them to portray Kleinbron Estate as a luxury security estate, which it is not.

PURPOSE OF LEVY

66. According to the Kleinbron Estate HOA Rules of 7 September 2015, "2.3 Every Member shall be jointly liable with all the Members for all expenditure incurred by the ASSOCIATION to third parties."
67. If the Plaintiff is not using the levies for the expenditures stipulated in the contract, then for what is it charging the levy?

68. Does the Kleinbron Estate HOA consider themselves to be the Defendants' landlord, and the Defendants to be their tenants who have to pay rent to them?
69. Does the Plaintiff have a tacit hypothec over the Defendants' property?
70. The fact that the Defendants' property is situated inside Kleinbron Estate, does not bestow any ownership rights over the Defendants' property upon the Kleinbron Estate HOA.
71. If that is what the Kleinbron Estate HOA is trying to do, then they are overstepping the boundary of the contractual agreement between them and the Defendants, and are trying to usurp the Defendants' ownership rights with their monopoly as sole service provider of the Estate.
72. If that is not what they are doing, then what are they doing?
73. The levy should be used for the benefit of the members of the Kleinbron Estate HOA, of which the Defendants are members, so if it is not being used for the benefit of all the HOA members, for whose benefit is it being used?
74. Also, since the levy should be used for the benefit of the Defendants, the Plaintiff is essentially suing the Defendants for apparently not benefitting themselves.

UNJUST ENRICHMENT

75. Since the Plaintiff continues claiming a levy from the Defendants, the Plaintiff may consider themselves to be providing the services which justify a levy.
76. If the Plaintiff was continuing to provide their services to the Defendants, and the Defendants had stopped paying their levy, why does the Plaintiff continue to apparently unjustly enrich the Defendants?
77. Why not just stop unjustly enriching the Defendants, and stop providing the Defendants with the alleged services?
78. If the Plaintiff is not providing their services to the Defendants, why does the Plaintiff insist on keeping the Defendants bound by a contract that does not benefit them?

79. The Plaintiff also has a responsibility to mitigate their losses, and they have the option of adjusting their budget by, for example, hiring less garden attendants.

COMPOUND INTEREST

80. The Plaintiff is also attempting to charge the Defendants compound interest on the alleged outstanding levy and for unjustified legal fees (please see **Annexure D10**).

81. The purpose of the levy is not for the levy to be invested for interest and profit.

82. The purpose of the levy is to pay Kleinbron Estate's service providers, such as the security and gardening service companies.

83. Since the Plaintiff does not provide the Defendants with security or gardening services, the Defendants do not owe the Plaintiff a levy or legal fees, and therefore the Defendants also do not owe the Plaintiff any interest, compound or otherwise, on these alleged outstanding amounts, either.

TERMINATION OF CONTRACT

84. The Plaintiff implies that the only way for the Defendants to terminate their contract with the Plaintiff is for the Defendants to relocate and to sell their property to new homeowners.

85. However, the Defendants are unable to sell their property, since the Defendants are not able to honestly market the property as safe and secure to prospective homebuyers.

86. The Defendants would have to disclose the problems they have with the Kleinbron Estate HOA, and the lack of security and gardening services, to potential new homeowners.

87. If the Defendants are able to find someone who would be willing to buy such a house, they would have to sell it to that person for an amount far below market value for the area.

88. The Plaintiff has caused the Defendants' property to be unsellable, and has caused the Defendants to be unable to relocate, due to them not being able to receive a fair price for the house.

EMAILS AND MINUTES

89. The Defendants also query why the Plaintiff has annexed an overabundance of irrelevant attorney emails and minutes of meetings to their summons, instead of just annexing the Title Deed, on which they apparently rely for their claim, and which is apparently all they have to provide to allegedly prove their claim.

90. It appears as though the Plaintiff is attempting to portray themselves as having exhausted all attempts to resolve the matter out of court, and that the only recourse left to them was to proceed with litigation.

91. Why resort to litigation instead of just providing the Title Deed in the first place, or better yet, just providing the Defendants with security and gardening services, as stipulated in the contract, in order for the Defendants to resume paying their levies?

RE: PARAGRAPH 4.1

92. The content of this paragraph is noted.

RE: PARAGRAPH 4.2

93. The content of this paragraph is denied, and the Plaintiff is put to the proof thereof.

94. The Plaintiff repudiated its contractual duties and responsibilities towards the Defendants.

RE: PARAGRAPH 4.3

95. The content of this paragraph is denied.

96. The Defendants have acted in good faith towards the Plaintiff at all times, while the Plaintiff has not acted in good faith towards the Defendants.

RE: PARAGRAPH 4.4

97. The content of this paragraph is noted.

RE: PARAGRAPH 4.5

98. The content of this paragraph is noted.

99. Levies in return for services rendered is reasonable. However, the Plaintiff has failed to provide the agreed-upon services, and is therefore not entitled to levies.

RE: PARAGRAPH 4.6

100. The content of this paragraph is noted.

101. The Plaintiff often provided ambiguous dates by email for when levies were payable.

102. The Defendants dutifully paid all their levies while the agreement between them was still active.

RE: PARAGRAPH 4.7

103. The content of this paragraph is noted.

104. The Plaintiff has failed to comply with the provisions of the Kleinbron Estate Constitution and HOA Rules, and is therefore not entitled to levies.

RE: PARAGRAPH 4.8

105. The content of this paragraph is noted.

106. The Plaintiff has repudiated its contract with the Defendants by withholding services from them, so the Defendants are within their legal rights to withhold their levies, since levies are paid in exchange for services.

RE: PARAGRAPH 4.9

107. The content of this paragraph is noted.

108. Attorney-client legal fees are not applicable to this lawsuit, since the Defendants did not breach their contract with the Plaintiff.

109. The Plaintiff breached the contract with the Defendants.

RE: PARAGRAPH 5.1

110. The content of this paragraph is denied, and the Plaintiff is put to the proof thereof.

111. Just because the Defendants may be members of the Kleinbron Estate HOA by virtue of them owning a property in Kleinbron Estate, it does not mean that they are compelled to remain in a contract with the Kleinbron Estate HOA and pay levies to them if the Kleinbron Estate HOA does not provide services to them in exchange for the levy.

RE: PARAGRAPH 5.2

112. The content of this paragraph is denied and the Plaintiff is put to the proof thereof.

RE: PARAGRAPH 6

113. The content of this paragraph is denied and the Plaintiff is put to the proof thereof.

114. The interest rate percentage which the Plaintiff charges residents on arrear accounts is irrelevant, since the Defendant does not owe the Plaintiff any money.

115. The Plaintiff does not sufficiently clarify its legal basis for how it has the authority to decide what the interest rate on arrear accounts is.

RE: PARAGRAPH 7

116. The content of this paragraph is denied and the Plaintiff is put to the proof thereof.

117. In January 2023, the First Defendant took legal action against the Plaintiff to recover damages from the Plaintiff due to the Plaintiff's repudiation of the contract.

118. On 17 February 2023 Kleinbron Estate sent an email to the First Defendant that their new levy amount would be R995 per month effective from 1 March 2023 (see Plaintiff's annexure E1).
119. The R995 was an increase of 15.03% over the previous levy amount.
120. In previous years, the Plaintiff charged a levy increase between 4.46% and 5.49% (average 4.97%) commencing on 1 June each year.
121. A levy increase of 5% to 6% is reasonable, since it is in line with inflation.
122. The Plaintiff does not sufficiently clarify its legal basis for how it has the authority to change the rate and date with which the levy increases.
123. The Defendants considered the sudden and premature 15.03% increase to be unreasonable.
124. On 18 February 2023 the First Defendant indicated to the Plaintiff by email that he did not agree with the new and premature levy increase, and that he would pay the existing levy amount until 1 June 2023, as the Plaintiff increased the levy in June in previous years, and a levy increase once a year in line with inflation was reasonable (please see **Annexure D11**).
125. The Plaintiff insisted on the new amount, and indicated that they would take legal action if the Defendants did not pay.
126. Taking into account the Plaintiff's history of unreasonable actions and breach of contract, in addition to the unreasonable and premature levy increase, the Defendant decided to cancel the contract with the Plaintiff.
127. On 20 March 2023, the First Defendant paid their last levy, which was the existing levy amount of R865 per month.
128. On 17 April 2023 the First and Second Defendants sent an email to the Plaintiff in which they indicated they were terminating the contract with the Plaintiff effective 31 March 2023, due to the Plaintiff's unreasonable actions and lack of service.
129. Despite the Plaintiff having breached the contract by not having provided security and gardening services to the Defendants for over a year, the Defendants had continued paying their levy because the Plaintiff had indicated they would take legal action against residents who did not pay their levies, and that they would report them to a credit bureau which they alleged may result in the Plaintiff attaching to the Defendants' house.

130. Since the Plaintiff made it clear that they had no intention to act in a reasonable manner towards the Defendants, or to uphold their side of the contract, the Defendants decided to cancel the contract.

RE: PARAGRAPH 8

131. The content of this paragraph is denied and the Plaintiff is put to the proof thereof.

132. The Plaintiff is to clarify how it could charge residents an increased levy from 1 March 2023, if the alleged meeting to confirm the increase was only held on 18 April 2023.

RE: PARAGRAPH 9

133. The content of this paragraph is noted.

RE: PARAGRAPH 10

134. The content of this paragraph is denied and the Plaintiff is put to the proof thereof.

RE: PARAGRAPH 11

135. The content of this paragraph is denied and the Plaintiff is put to the proof thereof.

Dated at **BRACKENFELL** on this **22nd DAY of AUGUST 2023**.



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