THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 639/07

THE BODY CORPORATE OF THE SECTIONAL TITLE SCHEME SEASCAPES	Appellant
and	
CYNTHIA ANNE FORD	First Respondent
THE BODY CORPORATE OF THE SECTIONAL TITLE SCHEME OCEAN VIEW HEIGHTS	Second Respondent
CONRAD PETER ERLAND HANSEN	Third Respondent
RUPERT TAILLEFER DU TOIT	Fourth Respondent
THE BODY CORPORATE OF THE SECTIONAL TITLE SCHEME OLIVER COURT	Fifth Respondent
THE BODY CORPORATE OF THE SECTIONAL TITLE SCHEME BEN ROMA	Sixth Respondent
THE REGISTRAR OF DEEDS	Seventh Respondent

Neutral citation:	*Seascapes v Ford* (639/07) [2008] ZASCA 109 (23 September 2008)
Coram:	STREICHER, MTHIYANE, MLAMBO, MAYA and COMBRINCK JJA
Heard:	4 SEPTEMBER 2008
Delivered:	23 SEPTEMBER 2008
Summary:	Sectional Titles Act 95 of 1986 – special resolution – agreement in writing by non-member, if not revoked upon becoming a member, becomes agreement in writing by member – resolution interpreted so as to give effect to intention of signatories.

ORDER

On appeal from: High Court, Cape Town (Uijs AJ sitting as court of first instance)

The appeal is dismissed with costs.

JUDGMENT

STREICHER JA (MTHIYANE, MLAMBO, MAYA & COMBRINCK JJA concurring)

[1] In terms of a notarial agreement concluded on 5 June 2003 and registered on 4 July 2003 the appellant, being the body corporate in respect of the Sectional Title Scheme Seascapes on Erf 1745 Sea Point East in Cape Town, granted to the first to sixth respondents as owners of neighbouring properties, the right to use parking bays in the sectional title scheme. The appellant, contending that the notarial agreement was entered into without its authority, applied to the Cape High Court ('the court a quo') for the agreement to be declared invalid and for its registration to be set aside. The application was dismissed but the court a quo granted leave to the appellant to appeal to this court.

[2] As the proceedings were on notice of motion the court a quo correctly held that the matter had to be decided on the basis of the facts averred in the appellant's affidavits and admitted by the respondents together with the facts alleged by the respondents.

[3] The construction of the Seascapes Sectional Title Scheme as it now stands required departures from the provisions of the applicable town planning scheme. Neighbouring property owners objected to these departures but eventually agreed to withdraw their objections in return for an undertaking by the developer, Faircape Property Developers CC ('the developer'), to register servitudes over six parking bays in the development in favour of neighbouring properties. As a result consent to the required departures was obtained and the project was completed.

[4] In terms of s 11(1) of the Sectional Titles Act 95 of 1986 a developer may, after approval of a draft sectional plan by the Surveyor–General, apply to the registrar in charge of the deeds registry in which the land comprised in the scheme is registered, for the opening of a sectional title register in respect of the land and building in question, and for the registration of the sectional plan. When making such an application a developer may impose registrable conditions (s 11(2)). According to Mr Vietri, a member of the developer, he was advised that the developer could implement the agreement with the objectors by imposing registrable conditions in terms of s 11(2) but that it would involve a further delay, since documentation incorporating such conditions had to be amended and resubmitted to the appropriate authorities. For this reason the developer decided that it would be better to proceed with the registration of the sectional plan and the opening of a sectional title register and to procure the body corporate of the sectional title scheme, once established, to attend to the registration of the servitudes.

[5] Upon registration of a sectional plan the building or buildings and the land shown thereon are deemed to be divided into sections and common property as shown on the sectional plan (s 13(1)). Separate ownership may be acquired in such sections (s 2(b)). The common property is owned by

the owners of sections jointly in undivided shares proportionate to the quotas of their respective sections as specified on the sectional plan (s 16(1)). A section together with its undivided share in the common property is defined as a unit (s 1). With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme there is deemed to be established for that scheme a body corporate of which the developer and such person are members, and every person who thereafter becomes an owner of a unit in that scheme becomes a member of that body corporate (s 36(1)).

[6] Section 29 makes provision for the burdening of the land shown on a sectional plan with a servitude by the body corporate if directed to do so by special resolution adopted by the owners. The section reads as follows:

‘29

(1) The owners may by special resolution direct the body corporate-

(a) to execute on their behalf a servitude or restrictive agreement burdening the land shown on the relevant sectional plan;

(b) to accept on their behalf a servitude or restrictive agreement benefiting the said land.

(2) Every such servitude or agreement shall be embodied in a notarial deed and shall be registered by the registrar by noting such deed on the schedule of servitudes and conditions referred to in section 11(3)(b) and on the title deeds of any party to such servitude or restrictive agreement whose title deeds are registered in the land register.

(3) . . .’

[7] A special resolution is defined as follows (s 1):

‘“special resolution” means, subject to subsection (2), a resolution passed by a majority of not less than three-fourths of the votes (reckoned in value) and not less than three fourths of the votes (reckoned in number) of members of a body corporate who are present or represented by proxy or by a representative recognized by law at a general meeting of which at least 30 days’ written notice, specifying the proposed resolution, has been given, or a resolution agreed to in writing by at least 75% of all the members of a body corporate (reckoned in number) and at least 75% of all such members

(reckoned in value) personally or by proxy or by a representative of any such member recognized by law: Provided . . .'

Only the alternative meaning of special resolution is of relevance in this matter.

[8] The Seascapes sectional title register was opened on 24 December 2002. On the same day 18 of the 21 units in the scheme were transferred to their respective purchasers. The other three remained the property of the developer until they were subsequently transferred.

[9] Before the opening of the register and the transfer of the units to the purchasers and in order to procure the registration of the servitudes agreed to with the objectors, the developer had obtained, with the exception of one, the signatures of the purchasers of the 18 units which were transferred on 24 December 2002, to a document which purports to be the minutes of a meeting. The document reads as follows:

'Minutes of a meeting of the members of the Body Corporate of the Sectional Title Scheme Seascapes (still to be established) at which meeting the following special resolution had been passed in terms of section 29 read together with the definition of special resolution in section 1 of the Sectional Titles Act 95 of 1986.

Resolved that:

1. The Body Corporate enter into a Notarial Agreement together with Cynthia Ann Ford, Ocean View Heights Body Corporate SS32/1989, Conrad Peter Eland Hansen and Rupert Taillefer du Toit, Oliver Court Body Corporate SS62/1987 and Ben Roma Body Corporate SS206/1989 as per the draft agreement annexed hereto marked "A" and initialled for purposes of identification.

2. Michael Joseph Vietri, be and he is hereby duly authorised to sign all documents and do all things necessary to give effect to the resolution in 1 above.'

(I shall refer to the document as 'the minutes' and to the content thereof as 'the resolution'.)

After the opening of the sectional title register and the transfer of the 18 units on the same day, the owners who had signed the minutes constituted more than 75% of all the members of the appellant (reckoned in number) and more than 75% of all such members (reckoned in value).

[10] The purchasers who signed the minutes had been kept informed of the nature of the construction delays caused by the objections and the negotiations taking place and were aware that the developer was obliged to grant servitude rights to six parking bays as a quid pro quo for obtaining the necessary consents from the objectors.

[11] Subsequent to the opening of the sectional title register Vietri, who had been authorised to give effect to the resolution, procured the registration of a notarial agreement in terms of which the appellant -

(i) granted to the first respondent, the second respondent, the third and fourth respondents jointly and the fifth respondent the right to use parking bays 4, 2, 1 and 3 respectively;

(ii) granted to the sixth respondent the right to use parking bays 5 and 6; and

(iii) granted rights of way to provide access to the parking bays.

[12] The appellant contends that the notarial agreement is invalid because a special resolution directing it to execute the agreement as is required by s 29 had not been adopted by the members of the appellant and because even if the ‘minutes’ constituted a special resolution by the members of the appellant, a different agreement to the one authorised had been entered into.

[13] The respondents submitted that the resolution qualified as a special resolution as defined in the alternative definition of special resolution ie

that part of the definition which requires the resolution to have been agreed to in writing by at least 75% of the members reckoned in number and value. The appellant on the other hand submitted that no resolution by members could have been adopted as the minutes were signed at a time when the signatories were not members of the appellant and could not have been members of the appellant as the appellant was not in existence yet.

[14] It is true that the resolution was adopted by non-members but the signatories, by signing the resolution, indicated that they agreed that the appellant (which according to the resolution still had to be established) should once it had been established enter into the draft agreement annexed to the resolution. When the appellant was established and their units were transferred to them, the signatories became members of the appellant. None of them revoked his or her agreement (consent) in writing, it remained his or her agreement in writing and having become a member it then constituted an agreement in writing by a member. Consequently, after transfer of their units to the purchasers, the resolution constituted a resolution agreed to in writing by the requisite majority of members that the appellant should enter into a notarial agreement as per the draft agreement annexed to the minutes and that Vietri should give effect to the agreement. That was still the position when the notarial agreement was concluded on 5 June 2003.

[15] The appellant submitted that a special resolution as defined had nevertheless not been adopted as there is no evidence that every member had been given an opportunity to consider the resolution. He could however not point to any indication in the Act that that was required for a special resolution according to the alternative meaning of special resolution. In the result I am satisfied that a special resolution as defined had been adopted.

[16] There are differences between the draft agreement and the registered notarial agreement. The appellant relies on the differences summarised as follows in one of the affidavits filed by it:

'(a) The first respondent was given a servitude right to one parking bay. The third and fourth respondents were jointly given a servitude right to one parking bay. The sixth respondent was given a servitude right to two parking bays. In respect of each such parking bay, the square metreage differs between the draft agreement and the notarial agreement.

(b) The notarial agreement records a servitude right of way both in favour of the third and fourth respondents and in favour of the fifth respondent. Neither servitude is contained in the draft agreement.

(c) The notarial agreement makes provision for the second respondent to grant reasonable access over its servitude parking bay to the owner of a certain exclusive use store. That provision is not to be found in the draft agreement.'

The appellant submitted that assuming that Vietri was authorised to conclude the draft agreement on behalf of the appellant he had no authority to conclude an agreement which differed in these respects.

[17] The draft agreement in so far as it relates to the right to use a parking bay to be given to the first respondent reads as follows:

'Seascapes as owner of Erf 1745 hereby grants to Ford as owner of Erf 291 a servitude parking bay 13 (Thirteen) square metres in extent, which servitude is depicted by the figure abjk on Diagram No. /2002 attached hereto.'

The corresponding provison in the notarial agreement reads as follows:

'Seascapes hereby grants to Ford as owner of Erf 291 a servitude parking bay SB4 12 (Twelve) square metres in extent, which servitude is depicted by the figure R16, R19, R20, R21, R22, R17 on Sheet 3 of Sectional Plan SG No. D.209/2003 which servitude extends to a height of 61,35 metres above mean sea level.'

The wording in respect of the other parking bays is similar except

(i) that the areas of the parking bays differ;

(ii) that no mention is made in the notarial agreement of the extension above sea level in respect of the parking bays granted to the second respondent and the sixth respondent; and

(iii) that the right of the second respondent is qualified in the notarial agreement but not in the draft agreement. The qualification reads as follows:

'Ocean View Heights will grant reasonable access over servitude parking bay SB2 to the owner of exclusive use area Store S3 depicted on Sheet 5 of Sectional Plan SG No. D.209/2003.'

[18] According to the draft agreement one of the parking bays is 12 m² in extent and all the others 13 m² whereas in terms of the notarial agreement one of the parking bays is 15 m², another is 13 m² and the other four are 12 m² in extent. In the result the total area of the parking bays according to the draft agreement is 77 m² and according to the notarial agreement 76 m². The appellant did not place any reliance on the fact that the extension above sea level is mentioned in respect of some of the parking bays in the notarial agreement but not in respect of any of the parking bays in the draft agreement.

[19] The respondents submitted that on a proper construction of the resolution Vietri was authorised to enter into the notarial agreement on behalf of the appellant. According to the draft agreement the servitudes are depicted on a diagram annexed to the agreement. According to this diagram all the parking bays are 5m long and 2.5m wide ie 12,5 m² in extent and according to a note on the diagram parking bay 2 is approximately 12 m² in extent and all the others are approximately 13 m² in extent. The question thus arises whether on a proper interpretation of the resolution the purchasers agreed that the area of the parking bays had to be exactly what they are stated to be in the draft agreement or whether that area was only

intended to be an approximate area. The appellant submitted that the former was the case and that the diagram could not be used to interpret the draft agreement.

[20] What has to be determined is the ambit of the resolution ie what did the signatories intend to agree to. Although the resolution was that the appellant should enter into a notarial agreement as per the draft agreement it is apparent from a reading of the draft agreement that the intention was not that the notarial agreement was required to be in the exact same terms as the draft agreement. According to the draft agreement the parking bays are depicted by figures on 'Diagram No. /2002 attached hereto.' The diagram attached is not a final diagram. It is specifically stated that all data on the diagram is approximate. It is therefore clear that the signatories must have had in mind that a final diagram would be prepared in which the data ie the location and area could differ from those indicated on the diagram annexed. But could they have intended that the area according to the final diagram should be exactly the area stated in the draft agreement? In my view that could not have been the intention. It is quite clear from the provisional diagram that the exact areas still had to be determined. It follows that properly construed the areas stated in the draft agreement were intended to be approximate and not exact.

[21] The provisional diagram also depicted a right of way in favour of parking bays 1 to 4 and a right of way in favour of parking bays 5 and 6 (as numbered on the provisional diagram). Those rights of way are incorporated in the notarial agreement but in the draft agreement only the rights of way in favour of parking bays 1 and 2 and parking bays 5 and 6 are mentioned. The omission from the draft agreement of the right of way in favour of parking bays 3 and 4, which is exactly the same as the right of way granted in respect of parking bays 1 and 2 and which is required in

order to gain access to the parking bays, is a patent error. The signatories could not have intended to grant a right to use the parking bays without at the same time granting a right of way to access these parking bays. Read with the provisional diagram which is an annexure to the draft agreement I am satisfied that the signatories intended to authorise the registration of the right of way not only in respect of parking bays 1 and 2 but also in respect of parking bays 3 and 4.

[22] Storeroom S3 is delineated on the sectional plan as an exclusive use area. In order to make use of the storeroom access over parking bay 2 is required. No express provision for such access is made in the draft agreement but there can be no doubt that had the signatories been asked the question they would have answered but naturally the servitude right to parking bay 2 should be made subject to such access being granted to whoever is entitled to the use of that exclusive use area. The signatories therefore by implication directed the appellant to impose the qualification to the servitude granted in respect of parking bay 2.

[23] It follows that the court a quo correctly dismissed the application and that the appeal should be dismissed with costs.

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P E STREICHER
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	E Fagan
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