



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 942/2020

In the matter between:

FLOWER FOUNDATION PRETORIA

HOMES FOR THE AGED NPC

APPELLANT

and

REGISTRAR OF DEEDS, PRETORIA

FIRST RESPONDENT

SUSANETTA DANIE SMITH N O

SECOND RESPONDENT

GERTRUIDA MAGDALENA BOTHA N O

THIRD RESPONDENT

JOHANNES PETRUS WILHELM SMITH N O

FOURTH RESPONDENT

SYBRAND ALBERTUS TINTINGER N O

FIFTH RESPONDENT

Neutral citation: *Flower Foundation Pretoria Homes for the Aged NPC v Registrar of Deeds, Pretoria and Others* (942/2020) [2022]
ZASCA 8 (20 January 2022)

Coram: SALDULKER ADP, MOCUMIE, MOLEMELA and MOKGOHLOA
JJA and MEYER AJA

Heard: 24 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 9h45 on 20 January 2022.

Summary: Housing Development Schemes for Retired Persons Act 65 of 1988 – interpretation of s 4B of the Housing Development Schemes Act – whether the holders of rights of occupation in a housing development scheme have to give consent to the alienation of part of the property to the purchaser free of encumbrances in terms of ss 4A, 4B and 4C of the Housing Development Schemes Act – whether the housing development scheme was registered over the entire property – s 4B prohibits alienation of the property without 75% consent of the holders of rights of occupation

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Nonyane AJ sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Mokgohloa JA (Saldulker ADP, Mocumie and Molemela JJA and Meyer AJA concurring)

[1] This is an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the court *a quo*) dismissing the application by the appellant, Flower Foundation Pretoria Homes for the Aged NPC, to declare that the transaction between the appellant and DIY Systems and Projects (Pty) Ltd (DIY Systems) selling part of a property over which a housing development scheme was registered, does not transgress the provisions of s 4B of the Housing Development Schemes for Retired Persons Act 65 of 1988 (the Housing Development Schemes Act).

[2] The facts can be summarised as follows. The appellant is the registered owner of Erf 578, Groenkloof Extension 1, measuring 1.0133 hectares, held under certificate of consolidated title deed T32837/1988 (the property). During 2001, the appellant established a housing development scheme on the property. The title deed was endorsed as such in terms of s 4C(3) of the Housing Development Schemes Act on 5 July 2001. The property consists of 39 rental units or guest rooms, 10 cottages, 29 bachelor flats, 19 'life right' units, and a communal hall. During April 2015, the second to fifth respondents (the respondents) purchased a lifelong right of occupation in respect of unit 41, garage 9 on the property. The sale

agreement was drawn in accordance with the provisions of the Housing Development Schemes Act.

[3] On 22 and 27 February 2018, the appellant had general meetings with the life-right owners. The purpose of the meeting was for the appellant to inform the life-right owners of the intention to sell a portion of the property on which the communal hall is situated. The appellant sought consent of the life-right owners in terms of s 4B of the Housing Development Schemes Act. Only two of the life-right owners gave their consent.

[4] Notwithstanding the fact that the majority of life-right holders withheld their consent, the appellant entered into a deed of sale and option agreement with DIY Systems in around July 2018. In terms of this agreement, the appellant proposed to sell a portion of Erf 578 to DIY Systems for a purchase price of R7.8 million in order for DIY Systems to use it for the development of mixed development, comprising of medical related uses, offices and/or residential units. The agreement was subject to the fulfilment of the following suspensive conditions:

- (i) that approval is granted by the relevant authorities for the subdivision of the land to create the property;
- (ii) that the Local Authority approves the amendment of the town planning scheme to allow the development on the property; and
- (iii) that approval is granted in terms of s 4C of the Housing Development Schemes Act in terms whereof 75% of the holders of the rights of occupation approve the sale of the property and the alienation thereof to the purchaser free of encumbrances in terms of ss 4A, 4B and 4C of the Housing Development Schemes Act.

[5] When the written consent of the life-right owners was not forthcoming, the appellant, through its attorney, wrote a letter to the life-right owners demanding their consent. The letter informed the life-right owners that failure to give their

consent in terms of s 4B would result in the launching of an application to court, and that those who withheld their consent would be liable for the costs of the application. The majority of life-right holders refused to give their consent.

[6] The appellant approached the court *a quo* seeking an order declaring that (i) the transaction between the appellant and DIY Systems does not implicate and does not transgress the provisions of s 4B of the Housing Development Schemes Act; (ii) the consent of the holders of rights of occupation in the scheme is not required for the proposed alienation of the portion of the property; (iii) the subdivision of the property to create portion 1, and the alienation and transfer of portion 1, are not null and void as contemplated by the provisions of s 4B(2) of the Housing Development Schemes Act; and (iv) the registrar of deeds, Pretoria be authorised to transfer portion 1 of the property to DIY Systems. The court *a quo* dismissed the application and held that the consent of the life-right owners was required, because the housing scheme was established on the entire property.

[7] The issue in this appeal is whether the court *a quo* was correct in refusing to grant the declaratory orders sought by the appellant. Central to this is whether s 4B of the Housing Development Schemes Act prohibits the appellant from alienating the proposed portion 1 of the property to DIY Systems without the consent of the life-right holders. This issue involves the interpretation of the Housing Development Schemes Act as enunciated in *Endumeni*¹ as restated in *Commissioner, South African Revenue Service v United Manganese*,² where this Court stated:

'It is unnecessary to rehearse the established approach to the interpretation of statutes set out in *Endumeni* and approved by the Constitutional Court in *Big Five Duty Free*. It is an objective unitary process where consideration must be given to the language used in

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).

² *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) para 8.

the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.’

[8] Wallis JA, who wrote for the court, went on to say:

‘. . . Statutes undoubtedly have a context that may be highly relevant to their interpretation. In the first instance there is the injunction in s 39(2) of the Constitution that statutes should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. Second, there is the context provided by the entire enactment. Third, where legislation flows from a commission of enquiry, or the establishment of a specialised drafting committee, reference to their reports is permissible and may provide helpful context. Fourth, the legislative history may provide useful background in resolving interpretational uncertainty. Finally, the general factual background to the statute, such as the nature of its concerns, the social purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates, provides the context for the legislation.’³

[9] Section 4B of the Housing Development Schemes Act, which is headed ‘Alienation of land subject to right of occupation’, provides:

‘(1) Unless at least 75 percent of the holders of rights of occupation in a housing development scheme consent thereto the land concerned may not be alienated free from such rights: Provided that the holders of the rights of occupation shall in the case of such an alienation have preferent claims in respect of the proceeds of the sale of land, which claims shall, notwithstanding the provisions of any other law –

- (a) rank in priority over the claim of any mortgagee; and
- (b) be equal to the amount paid in terms of paragraph (a) of the definition of right of occupation.

(2) Any alienation taking place without the consent of the holders as contemplated in subsection (1) shall be null and void.’

³ Footnote 2 para 17.

[10] The appellant contended that the establishment of the housing development scheme was only on a portion of Erf 578, which consists of 19 residential units that are occupied by the life-right holders. Therefore, the life-right holders' housing interests in relation to the housing scheme is limited to the occupation of their respective units only. According to the appellant, the life-right holders' rights of occupation are not affected by the contemplated sale of the portion of land which they do not occupy. Consequently, the contention continues, the sale agreement between the appellant and DIY Systems does not implicate and transgress the provisions of s 4B of the Housing Development Schemes Act.

[11] The appellant's contentions are devoid of merit for the following reasons. In the first instance, when the housing development scheme was established on 5 July 2001, the title deed to the property was endorsed as follows:

‘ T32837/1988

Endorsement in terms of section 4C (3) of Act 65 of 1988

The within mentioned property is subject to a housing development scheme as contemplated in section 4C(1)(A) of the above mentioned Act.

Application filed with . . . ’

The number T32837/1988 above refers to the title deed in respect of Erf 578 Groenkloof (the property) measuring 10 133 m². Therefore, the housing development scheme was established on the entire property and not just a portion thereof. There is only one property and one title deed.

[12] Second, clause 1.1.1 of the agreement of sale between the appellant and the respondents records that the appellant has established a housing development scheme for retired persons of the age of 60 years or older over the property described as:

‘Erf 578 GROENKLOOF EXTENSION 1 MEASURING 1,0133 HECTARES HELD UNDER DEED OF TRANSFER NO T32837/1988 ALSO KNOWN AS 64 GEORGE STORRAR DRIVE, GROENKLOOF, PRETORIA
(hereinafter called the PROPERTY).’

[13] Third, clause 6.1 of the sale agreement records that the respondents are to pay a monthly levy to make provision for, inter alia, the following services and charges:

- '(h) Roads and access maintenance;
- (i) Internal street lighting;
- . . .
- (l) Such costs as are incurred in the provision of security services.'

[14] This confirms that the respondents were paying levies in respect of the maintenance of the entire property and not only a portion of the property they occupy, as alleged by the appellant. The appellant's contention that the life-right holders' housing interests in relation to the housing scheme are limited to the occupation of their respective units only, disregards the fact that the life-right holders bought into a scheme as described in the consolidated title deed. There is only one title deed in respect of Erf 578. Every inch of Erf 578 forms part of the scheme. If the scheme was intended to be used for residential purposes on part of the property only, the endorsement against the title deed would have stated that.

[15] The purpose of the Housing Development Schemes Act is to regulate the alienation of certain interests in housing development schemes for retired persons and to provide for matters connected therewith. In *Eden Village (Meadowbrook) (Pty) Ltd v Edwards and Another*,⁴ (*Eden Village*) this Court stated:

'When one has regard to the objects of the Act the reason for such wide authorisation becomes more apparent. The Act falls within the category of what might be termed "social" or "consumer protection" legislation. Its object is to protect elderly or retired persons investing their savings in a housing development scheme from possible exploitation by a developer. As an example of this one may have regard to sections 2-4 of the Act, which provide in considerable detail what a contract for the acquisition of a housing interest by

⁴ *Eden Village (Meadowbrook) (Pty) Ltd v Edwards and Another* 1995 (4) SA 31 (A) at 44A-F.

a retired person should contain: details as to exactly what he is acquiring and what his obligations will be, and also what other facilities or services will be provided. These sections also bind the developer to provide the facilities promised; if the landed property is unencumbered to keep it unencumbered; and to give an estimate, for a period of three years in advance, of what the upkeep of the scheme is likely to cost. So too, sections 4A, 4B and 4C give the holder of a right of occupation very considerable security by requiring the endorsement of that right against the title deed, and according that right priority over any other right, whether or not such other right has been registered or endorsed against the title deed, and irrespective of the time when such other right was registered and endorsed. The whole Act is designed to protect the rights and the interests of the retired persons, and recognises the fact that the residents have a vested interest in the housing development scheme in which they have chosen to stay.'

[16] The respondents averred in their answering affidavit that they bought into the scheme, which presented a rustic, scheme retirement village which offered peace and tranquillity on a large property consisting of open lawns, with a sense of community for the elderly people residing in the flats and cottages. The respondents and other life-right holders invested their hard-earned money into a lifelong right not only in the units they occupy, but also into the lifestyle which the housing scheme offered. They never anticipated that they were to spend a portion of what remained of their lives on the porch of a large commercial building site. In response, the appellant stated that it does not take issue with the respondents' averments, because these will be addressed when the city council approves the subdivision.

[17] The text of s 4B must be interpreted purposively. As stated in *Eden Village*, the Housing Development Schemes Act was intended to provide protection to the life-right owners against possible exploitation by a developer. Section 4B clearly prohibits the appellant from alienating the proposed portion of the property without the 75% consent of the life-right owners.

[18] As regards costs, the appellant argued that the court *a quo* should have denied the respondents their legal costs or at least a major portion thereof. According to the appellant, the respondents in their answering affidavit dealt in great detail with the proposed DIY Systems development as it is projected, and the impact it would have on the life-right holders' daily lives and activities. This, according to the appellant, was irrelevant for the adjudication of the legal point that required determination by the court *a quo*.

[19] In my view, the appellant's contentions in respect of the costs are flawed. This application does not merely involve the question of legal interpretation of the Act. It also involves how the respondents, as elderly people, will have to live the remainder of their days in the housing development in which they have to stay. They invested their hard-earned money into the scheme that represented the retirement village which offered them peace and tranquillity on a large property. Their future would be spent socially interacting with other elderly people in a rustic and serene environment on a large property consisting of open lawns, with a sense of community and not just in a specific unit occupied by them. They never anticipated that they would have to share their peaceful space on the porch of a large commercial building site which would impact their daily lives and activities. Therefore, their extensive dealing with this issue in their answering affidavit was relevant, reasonable and justified. Thus, they are entitled to their costs.

[20] In the result, the appeal is dismissed with costs including the costs of two counsel.

F E MOKGOHLOA
JUDGE OF APPEAL

Appearances

For appellant:	A M Heystek SC
Instructed by:	VDT Incorporated, Pretoria Phatshoane Henney Attorneys, Bloemfontein
For respondent:	D M Leathern SC (with, M Coetzee)
Instructed by:	Tintingers Incorporated, Pretoria Honey Attorneys, Bloemfontein