



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 84/09

SP & C CATERING INVESTMENTS (PTY) LIMITED

Appellant

and

THE BODY CORPORATE OF WATERFRONT MEWS
THE REGISTRAR OF DEEDS, JOHANNESBURG,
GAUTENG

First Respondent

N A POP & M M SAMODIEN

Second Respondent

G T J MOORE

Third Respondent

U B JANUARY, R JONES &

Fourth Respondent

D J VAN DER WESTHUIZEN

Fifth Respondent

J M RANGWAGA

Sixth Respondent

N BAPOO

Seventh Respondent

G M LEHAPA & I M LEHAPA

Eighth Respondent

I PATEL & S BHOOLA

Ninth Respondent

A AKHTAR & N AKHTAR

Tenth Respondent

M RANKOE

Eleventh Respondent

D V SHEZI

Twelfth Respondent

P NAICKER

Thirteenth Respondent

S P MBELE

Fourteenth Respondent

B T TEKLETSION & L A TEKLETSION

Fifteenth Respondent

R G DON

Sixteenth Respondent

A GOWRIAH & E GOWRIAH

Seventeenth Respondent

P GOVAN

Eighteenth Respondent

Neutral citation: *SP & C Catering Investments (Pty) Ltd v The Body Corporate of Waterfront Mews* (84/09) [2009] ZASC 162 (30 November 2009).

Coram: HARMS DP, NAVSA, MTHIYANE, PONNAN JJA *et* HURT AJA

Heard: 24 NOVEMBER 2009

Delivered: 30 NOVEMBER 2009

Summary: Sectional title scheme — reserved right to extend scheme — right lapsing after period for which it is reserved — court has no 'inherent' or statutory power to extend the period.

ORDER

On appeal from: North Gauteng High Court, (Botha J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

HURT AJA (HARMS DP, NAVSA, MTHIYANE *et* PONNAN JJA concurring):

[1] The appellant applied to the North Gauteng High Court for an order extending the time within which the appellant was entitled to complete extensions to the Waterfront Mews sectional title scheme, of which the appellant was the ‘developer’ as defined in s 1 of the Sectional Titles Act 95 of 1986 (‘the Act’). The application was opposed by 16 of the unit holders in the scheme. Botha J dismissed the application on the ground that the high court did not have jurisdiction to grant such an extension. He refused leave to appeal but a petition to this court for leave was successful.

[2] The appellant’s title to extend the scheme was derived from s 25(1) of the Act.¹ As stated in the subsection, this right must be reserved at the time when application is made for the registration of the initial sectional plan and the developer is required to stipulate the period for which he requires the right to complete the extensions. There are no limits set in relation to this period and the developer is at liberty to fix the period to meet his own requirements and future plans. Section 25(2) stipulates that when a right is reserved in

¹ ‘25(1) A developer may . . . in his application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11(2), the right to erect and complete, from time to time, but within a period stipulated in such condition, for his personal account [the extensions] on a specified part of the common property, and to divide such building or buildings into a section or sections and common property and to confer the right of exclusive use over parts of such common property upon the owner or owners of one or more sections.’

terms of subsec (1), the application must include detailed documentary information which, inter alia, specifies precisely the layout of the new units in the extended portion, the nature and extent of the construction work involved and requires the developer to furnish estimates of the anticipated participation quotas of all the sections in the scheme after its extension. In addition, the developer is required to include in the documents a copy of the certificate of real right. The appellant, on its own election, stipulated a period of ten years in this regard. The right was registered on 31 August 1998. The relevant portion of the certificate reads:

'In pursuance of the provisions of the said Act, I, the Registrar of Deeds at JOHANNESBURG do hereby certify that the Developer or his successor in title is the registered holder of the right to erect and complete from time to time within a period of 10 (TEN) years for his personal account a further building or buildings on the specified portion of the common property as indicated on the plan referred to in Section 25(2)(a) of the Act filed at this office . . .'

Subsections 25(14) and (15) make it mandatory for the developer to disclose the existence of the reserved right to purchasers of units in the scheme on pain of rendering the purchase voidable at the instance of the purchaser.

[3] Section 25(6) provides that if no right is reserved in terms of subsec (1) at inception of the scheme or if a right has been reserved but has lapsed, the right to extend the scheme will vest in the body corporate.²

[4] The application was based, in the first instance, upon the contention that the court had 'inherent jurisdiction' to grant an order in relation to the reserved right particularly because the right was one to 'immovable property' and the court had inherent power to regulate all matters pertaining to such property. Botha J rejected the contention. He held, following the decision of

² '25(6) If no reservation was made by the developer in terms of subsection (1), or if such a reservation was made and for any reason has lapsed, the right to extend a scheme . . . shall vest in the body corporate which shall be entitled, subject to this section and after compliance, with the necessary changes, with the requirements of paragraphs (a), (b), (c), (d) and (g) of subsection (2), to obtain a certificate of real right in the prescribed form in respect thereof: Provided that the body corporate shall only exercise or alienate or transfer such right with the written consent of all the members of the body corporate as well as with the written consent of the mortgagee of each unit in the scheme: Provided further that a member or mortgagee shall not withhold such approval without good cause in law.'

this court in *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A) at p 886-887, that the right of extension is a personal servitude which, in this instance, was subject to the time limit stipulated by the developer in reserving it and causing it to be registered.

[5] After pointing out that there is no provision empowering a court (or indeed, any other administrative body) either in the Act itself or in the Deeds Registries Act, 47 of 1937, to extend the period for which a registered praedial servitude is to operate, Botha J summed up his inability (as a high court judge) to grant an extension of the period during which the reserved right could be enforced, in these simple but effective words:

'I simply cannot see how a court can, without express statutory authorisation, make an order that will have the effect of adding to someone's real right and at the same time subtracting from someone else's real right.'

[6] On appeal before us, counsel for the appellant presented an argument which they had not raised in the lower court. It is based on a contention that the reserved right has not lapsed through effluxion of time (notwithstanding the passage of ten years since the date of its registration) and that, consequently, the application for its extension had been unnecessary. On this basis counsel submitted that the appellant should be granted a declaratory order to the effect that

'On a proper interpretation of s 25(13) of [the Act] the appellant's real right of extension in terms of s 25 of the Act has not lapsed.'

The appellant's contentions are founded upon a novel approach to the interpretation of subsecs 25(6) and 25(13). Section 25(13) reads:

'25(13) A developer or his successor in title who exercises a reserved right referred to in subsection (1), or a body corporate exercising the right referred to in subsection (6), shall be obliged to erect and divide the building or buildings into sections strictly in accordance with the documents referred to in subsection (2), due regard being had to changed circumstances which would make strict compliance impracticable, and an owner of a unit in the scheme who is prejudiced by his failure to comply in this manner, may apply to the Court, whereupon the Court may order proper compliance with the terms of the reservation, or grant such other relief, including damages, as the Court may deem fit.'

[7] As I understand it, the argument is that s 25(6) should not be treated as a 'guillotine' which terminated the reserved right *automatically* on the expiry of the 10 year period referred to in the certificate. The termination of the reserved right, so the argument runs, constitutes a 'deprivation of property' in violation of s 25 of the Constitution. Therefore it is incumbent to approach the construction of s 25 of the Act with an eye to the prescripts of s 39(2) of the Constitution, ie to see whether its provisions are 'reasonably capable' of being given a meaning which would not result in the 'deprivation' of the developer's 'property'. The answer, the appellant contends, lies in the true meaning of s 25(13).

[8] Counsel submitted that s 25(13) was enacted as much for the developer as for the unit owner. This view was expressed in *Knoetze v Saddlewood CC* [2001] 1 All SA 42 (SE) at 47. The subsection requires the developer to carry out the extended phases of the scheme 'strictly in accordance with the documents referred to in subsec (2)'. One of those documents is the certificate of real right. Bearing this in mind, so the submission ran, the qualifying words 'regard being had to changed circumstances' take on a more extensive meaning than might at first appear from their limited context in the subsection. Where the circumstances have been such that the developer has been delayed, through no fault of his own, in the execution of the work, that constitutes a 'changed circumstance' on the ground of which he is entitled to ask the court for relief in the form of an extension of the period of the reserved right. On the basis of this interpretation counsel contended that where the completion of the scheme extension is delayed by circumstances beyond the developer's control, the reserved right does not lapse at the end of the stipulated period, but may be discretionally extended by the court if application is made to it by an aggrieved unit holder in terms of the subsection. If the court is not satisfied that the delay is due to 'changed circumstances' it may declare that the developer is not entitled to an extension and, in that event, the reserved right will terminate. The contention is tantamount to a submission that the right was one in perpetuity subject to the exercise by the court of a discretion to declare it terminated.

[9] This argument is riddled with flaws. I do not intend to identify them all. It will suffice to refer to two, either of which is fatal to the contention. The first is that the expiry of the right by effluxion of time amounts to a deprivation of property. The very fact that the developer himself states the period for which his right is to exist negates any possibility of a suggestion that he is 'deprived' of it at the end of the period. The second is that the contention confuses the developer's obligations to effect the scheme extension with his registered entitlement to do so. The subsection deals, at its commencement, with a 'developer . . . who exercises a reserved right referred to in subsection (1)'. The right is one which the developer has reserved for the period expressly stipulated in his application. It is a right to construct the additional buildings, or extend the existing ones, on the common property, to divide them into sections and to confer rights of exclusive use in respect of them. That is the content of the right. It is to be distinguished from the obligation to perform the work which is defined in s 25(13). The appellant's submission is that because the certificate reflecting the content of the registered reserved right must be one of the documents listed in s 25(2), the time period stated in the certificate is imported, as an obligation, into s 25(13). The submission is unfounded. It seeks to invert the effect of the subsection in favour of the developer. The section is plainly designed to enable unit owners to enforce compliance by the developer with the specifications. It gives the developer an opportunity to justify non-compliance with his original specifications on the ground of 'changed circumstances' and no more. The concept that the legislator intended to give him an opportunity, in the face of a complaint by an aggrieved unit owner, effectively to obtain a variation of his registered real right to the detriment of the rights of other registered owners is ludicrous. If the legislator had intended to make such far-reaching relief available to an embarrassed developer, it would surely have spelt out its intention explicitly and not hidden it subtly in the wording of a section which, in its literal terms, confers rights on unit owners. This argument must fail.

[10] As to the claim for the extension of the reserved period, now relegated to alternative relief in the event of the declarator not being granted, the

appellant persists in the contention that Botha J was wrong in holding that he had no power to grant such an order. I am not persuaded that there is any substance in this contention. The case of *Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) which was the foundation for the appellant's submission is totally unrelated to the circumstances of this case. Vieyra J was dealing with the court's power to make orders to which there was no objection by affected parties. The situation differs *toto caelo* from that which applies here, where the affected parties have expressly objected to an order which would reduce their rights in the property which they own.

[11] The appeal is dismissed with costs.

N V HURT
ACTING JUDGE OF APPEAL

Appearances:

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