ADJUDICATION ORDER IN TERMS OF SECTION 54

OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011

Ref: CSOS515/WC/20

IN THE MATTER BETWEEN

ALISON PAULA BRYANT	**Applicant**
and	
DEBRA KIRKUT NICHOLSON	**First Respondent**
IMPALA FLATS BODY CORPORATE	**Second Respondent**
TRUSTEES OF THE BODY CORPORATE	**Third Respondent**

ADJUDICATION ORDER

EXECUTIVE SUMMARY

1. The Applicant purchased unit 10 in the sectional title scheme, Impala Flats, from Nedbank Limited ("Nedbank"). She thought that such purchase also included

the registered exclusive use rights to three garages and one storeroom. It turned out that no such rights were registered in the Deeds Registry at Cape Town. What was recorded in the Deeds Registry was Rule 6 which conferred the exclusive use rights to such garages and storeroom upon the owner of unit 10 in terms of section 27A of the Sectional Titles Act, 95 of 1986, ("the STA"). However, the sale agreement with Nedbank reflected that no exclusive use rights were alienated to the Applicant. The Applicant eventually accepted that she may be entitled to such rights in terms of Rule 6 and not any registered exclusive use rights. She also subscribed to the prevailing practice that such rights had automatically transferred to her when unit 10 was registered in her name despite not having purchased such rights.

2. The former chairman of the Third Respondents, who contended that such rights had reverted to the Second Respondents on various grounds, then, in the face of the Applicants insistence that such rights had vested in her, obtained an opinion on behalf of the Second Respondent from specialist sectional title practitioners ("the Practitioners") to resolve the legal issues raised by the parties.

3. The Practitioners advised that the Applicant had lawfully acceded to such rights when she took transfer of unit 10 when the rights had automatically passed to her. They also found that the exclusive use rights created in terms of section 27A had been lawfully created by the Second Respondents when they passed a special resolution to impose Rule 6 in 2011.

4. Despite such opinion the First Respondent, who had leased one of the garages from the former owner of unit 10, refused to vacate such garage, which led to this application to resolve the dispute.

5. The adjudicator found that the Applicant could only obtain occupation of the garage in question if such exclusive use rights had accrued to her by whatsoever means. Accordingly, it was not necessary to determine whether that such rights had been legally created and conferred. Accordingly, the prevailing practice of the deemed vesting of such rights automatically upon transfer of the linked unit concerned was examined and found to be unlawful. Accordingly, the Applicant

was not entitled to the relief she had sought and so the application was dismissed.

INTRODUCTION

1. The Applicant is Alison Paula Bryant. She is the registered owner of unit 10 by virtue of Deed of Transfer ST19387/2019 in the sectional title scheme known as Impala Flats, scheme number SS16/1979. She is therefore a member of the Body Corporate of Impala Flats (also known as Marrakesh) and has standing as a party to this dispute because she has a material interest in this community scheme by virtue of her ownership of section 10 and as the Applicant she is materially affected by this dispute.[1]

2. The First Respondent is Debra Kirkhus Nicholson. She is the registered owner of unit 2 by virtue of Deed of Transfer ST6174/2008 in the sectional title scheme Impala Flats, scheme number SS16/1979. She is therefore a member of the Body Corporate of Impala Flats and has standing as a party to this dispute because she has a material interest in this community scheme by virtue of her ownership of section and as the Third Respondent she is materially affected by this dispute because the relief that may be granted to the Applicant could deprive her of the occupation of one of the garages[2] which constitutes an exclusive use area.[3]

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[1] The Trustees of the Avenues Body Corporate v+ A Shmaryahu 2018 (4) SA 566 (WCC). See par. 19 on p. 10, "Both requirements must be satisfied for standing as an applicant in terms of section 38 of the Community Schemes Ombud Service Act". Although the main ratio of this decision was overturned by Stenersen & Tulleken Administration CC v Linton Park Body Corporate and Another 2020 (1) SA 651 (GJ), this finding was not affected by the latter judgement. Although the Avenues case involved a sectional title property, Binns-Ward J considered the provisions of the CSOS Act, which apply to all community schemes.

[2] The Applicant has failed to identify the exclusive use area occupied by the First Respondent in her Application. She merely refers to the eua occupied by the First Respondent. However, the exclusive use areas are not indistinct spaces on the common property but consist of three garages and a storeroom housed in a building on the common property. Although the rights to use such spaces are disputed in this matter, such spaces can be identified on the ground with reference to this building. So, references to the garages and the storeroom will be employed when relevant in this order to emphasise the physical structures rather than the conceptualized spaces when referring to the exclusive use areas.

[3] See footnote 1.

3. The Second Respondent is the Body Corporate of Impala Flats. It also has standing in this dispute because it qualifies as a community scheme as defined in section 1 of the Community Schemes Ombud Service Act, 9 of 2011, ("the CSOS Act") and as such is one of the parties against whom the legal relief in terms of the relevant provisions of section 39 the CSOS Act could lie, as set out in paragraph 7, or as sought by the Applicant, hence it could be materially affected by this application.

4. The Third Respondents[4] are the trustees for the time being of the First Respondent and has standing in this matter because it is vested with the obligation to perform and exercise the functions and powers of the Body Corporate in terms of section 7(1) of Sectional Titles Schemes Management Act (''STSMA'') and because most of the interaction regarding this dispute took place between the Applicant and the Third Respondents.

5. This dispute was referred to conciliation by the Ombud in terms of s 47 of the CSOS Act but was not resolved and consequently this matter was referred to the adjudicator for adjudication of the dispute[5] pursuant to the notice issued by the Ombud Service of such referral and service thereof on the parties.

6. This is an Application for dispute resolution in terms of section 38 of the CSOS Act. The Application was made in the prescribed form and lodged with the Community Schemes Ombud Service (CSOS).

7. The Applicant has chosen to set out in the application form the practical relief[6] she sought. She did not attempt to link the formulation of such relief with the

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[4] Any reference to the Third Respondents will be to the trustees for the time being in their statutory capacities. References to individual trustees would be because of the actions they engaged in.

[5] Section 48(1) and (4) of the CSOS Act.

[6] The application form requires an applicant to set out the relief he/she is seeking. Relief, in this context, is a legal, technical term with which most applicants are not familiar. So, they invariably respond in practical terms to the clarifying question on the application form below the heading, reading: ''How do you want the problem to be solved?''. Relief, in its legal technical sense, that can be ordered by an adjudicator, is set out in section 39 of the CSOS Act. However, adjudicators are often called upon to assess how the Applicant wants the problem to be

specific formal legal relief prescribed in section 39 of the CSOS Act but merely stipulated that the following orders be issued:

7.1. "Require that Debra Kirkhus Nicholson vacate the eua allocated to the Applicant;

7.2. Require that the eua be returned to the original state at the cost of Debra Kirkhus Nicholson."

7.3. The Applicant at first submitted that she had acquired, together with ownership of unit 10, the exclusive use rights to three garages (respectively numbered 10, 10B and 10C on the layout plan and schedule annexed to Rule 6 in terms of which the garages were allocated to unit 10) and one store room (numbered 10A on such layout plan and schedule)("the EUAs") in terms of, section 27(1) of the Sectional Titles Act,95 of 1986, ("the STA"). Then, when no evidence thereof could be produced, she accepted it might be in terms of section 27A of the STA, the latter authorising the rule changes by virtue of a special resolution of the Body Corporate on 4 January 2011. She maintains that she is being prevented from such occupation because a lease was concluded with the First Respondent on the basis that such exclusive use rights had reverted to the Third Respondent (it turns out that it was a sublease from a previous owner of unit 10). In effect, the Applicant wants an order to evict the First Respondent from the garage she occupies as one of the EUAs in contention. Such relief is not directly contemplated in section 39.

7.4. Although the Applicant did not cite the Second or Third Respondents as counter parties to this dispute, adjudicators cannot summarily dismiss such applications because section 39 of the CSOS Act contain only a few orders that are competent to be made between other members directly. Such an order is not available in this instance. So, if section 39 does not authorise an eviction order between members of the Body Corporate, a consideration of whether such lease had been lawfully concluded between the First Respondent and the Second

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resolved ("the practical relief") with the evidence therefor submitted aligned with the appropriate order/s in section 39 of the CSOS Act.

Respondent should be considered to determine which relief can be granted to the Applicant. A second approach could be to establish whether the rights purportedly acquired by the Applicant were so acquired by the Applicant and consequently if not lawfully acquired by the Applicant whether she is entitled to the relief she had sought. In the light of such uncertainty, it may be prudent to delay the identification of the correct order to be granted in terms of section 39 at this point until all the evidence submitted by the parties have been assessed.

8. This matter is adjudicated in terms of the CSOS Act and Practice Directive on Dispute Resolution, 2019, as amended by Practice Directive dated 23 June 2020, which provides under paragraph 8.2:- “Adjudications will be conducted virtually or on the papers filed by the parties and any further written submissions, documents and information as requested by the appointed Adjudicator." No adjudication was conducted virtually herein and the parties made further written submissions as requested by the Adjudicator in terms of section 51 of the CSOS Act.

SUMMARY OF RELEVANT EVIDENCE

Applicant’s Submissions

8.1. The Applicant at first claimed that she had acquired exclusive use rights in terms of section 27(1) of the STA and emails were submitted showing correspondence between her husband and the transferring attorney questioning why the sale agreement and other documents did not contain any reference to the exclusive use rights to the EUAs.

8.2. However, her position changed because of her new understanding of the rights she might have acquired to the exclusive use of the common property and her interaction with the Second Respondents regarding such rights as set out below:

8.2.1. Leading up to the registration of section 10 in her name the Applicant was under the impression that the exclusive use rights that she ostensibly had purchased

from Nedbank (Nedbank had foreclosed under the mortgage bond/s registered against section 10 by the previous owner and had intended to take transfer of unit 10 before selling it to the Applicant) were the exclusive use rights to three garages and one storeroom ("the EUAs") in terms of section 27(1) of the STA. The transferring attorneys searched the records of the Deeds Registry at Cape Town and determined that section 27(1) exclusive use rights had not been registered in the Deeds Registry but that section 27A rights had been conferred by way of a rule change on the members of the Second Respondent, noted, and filed at the Deeds Registry on 18 January 2011. This finding seemed to satisfy the Applicant because she seemed to abandon her claim that exclusive use rights in terms of section 27(1) had been sold to her by Nedbank. She became convinced that by taking transfer of unit 10 she had automatically acceded to the exclusive use rights created in Rule 6 in terms of section 27A. She then attempted to have the First Respondent vacate the one EUA she occupied in terms of a lease, as submitted by the First Respondent;

8.3. Such attempt was thwarted by the former chairman of the Third Respondents ("the former chairman") who maintained at first that the EUAs had reverted back to the Second Respondent when the trustees purported to cancel the EUAs because the then owner had failed to pay the levies in respect thereof to the Second Respondent. When challenged by the Applicant the Second Respondents decided to appoint the Practitioners at the cost of the Second Respondent to submit a legal opinion on the issues. They rendered their opinion that the Applicant had indeed acceded to the exclusive use rights in respect to the EUAs. The Second Respondents refused to accept the opinion;

8.4. Subsequently, the Second Respondent elected new trustees and so the former chairman was ousted. The new Third Respondents then voted to accept the opinion of The Practitioners on 24 February 2020. Nevertheless, the First Respondent refused to vacate the garage she occupied and so the Applicant decided to lodge this Application with CSOS on 21 October 2019. No evidence was submitted that the new trustees took any further steps to resolve the dispute after accepting the opinion.

Relief sought by the Applicant

9. The relief sought by the Applicant is more fully set out in paragraph 7.

Respondents' Submissions

10. The former chairman, when he submitted instructions to the Practitioners to enable them to provide an opinion on the issues arising in this matter, submitted the following history of previous dealings with the EUAs:

10.1. The former owners of unit 10 fell into arrears with the payment of their levies to the Second Respondent and with their bond repayments to Nedbank. The latter then attached the property. The former owners then apparently with the consent of Nedbank concluded a lease with a certain Mr Myburgh, who sublet the unit to an employee and two of the three garages to the former chairman (it might be that one of the leases may actually have been concluded with the First Respondent because he refers to the First Respondent in one of the documents as his spouse) and a Mr Renaud respectively, the registered owner of unit 3. Presumably, Mr Myburgh then retained the use of the remaining garage and the storeroom for himself. None of these leases were submitted to CSOS by any of the parties although a copy of the lease concluded with the First Respondent was requested from her by the adjudicator. In her latest response, the First Respondent related the following regarding her lease:

10.1.1. She had concluded a verbal lease with the former owners of unit 10 in November 2017. She had apparently also leased the garage (not identified) from them for about 5 years from about 2009/2010;

10.1.2. The former owners fell into arrears with their levy payments to the Second Respondent, so the Third Respondent instructed all the tenants of the EUAs to pay such rentals owing to the former owners, to the Second Respondent, ostensibly because of the cancellation of the exclusive use rights of the former owners to the EUAs. The First Respondent continued to make such

rental payments to the Second Respondent, the last of which was shown on a statement of 1 December 2021 from the Second Respondent.

10.2. The Applicant only claimed relief against the First Respondent although on the history presented above one should have expected the claim to include the other parties referred to above as well. The Applicant does not explain in any document submitted by her why these other parties were not cited as co-respondents;

10.3. Currently, only Mr Renaud and Ms Nicholson are members of the Second Respondent. No evidence was submitted by the Applicant regarding which of the other garages and the storeroom were occupied by the other parties.

11. The Third Respondents denied that the Applicant had acceded to such rights, maintaining that the rights she claimed she had purchased had reverted to the Second Respondent when the Third Respondents cancelled such rights because of non-payment of levies owed by the previous owner of section 10 and ostensible beneficiary of the rights to the EUAs allocated to such owner in terms of section 27A of the STA pursuant to the rule change in 2011. In the end, the Third Respondents decided to refer the dispute to the Practitioners for a legal opinion to resolve the dispute. The former chairman drafted the instructions to the Practitioners and in such instructions posed a number of questions to the Practitioners of which only those included below are deemed relevant to the issue that might finally determine the dispute between the First Respondent and the Applicant as are set out in paragraph 23. Accordingly, only the following questions are repeated here:

11.1. "If there were section 27(1) or 27A rights, did they revert to the BC ito section 24(4)(b) upon the sale of the section by Van Zyl and Le Roux to Nedbank?"

12. The former chairman also submits his analysis and conclusions regarding the relevant provisions of the STA, although he refers to himself as a lay person. He also refers to Building 2 in which the relevant EUAs are housed and poses the following questions:

12.1. Is it possible to deal with a building that does not appear on the sectional diagram?

13. The Practitioners rendered their opinion on 7 February 2020. They chose to reduce all the questions raised by the Chairman to just two aspects:

13.1. To establish whether any exclusive use rights exist in favour of the owner of unit 10, and if such rights exist;

13.2. To assess the validity of the claim made by the owner of unit 10 in respect of such rights.

14. The Practitioners also conducted a search of the records of the Deeds Registry at Cape Town, which yielded the following results:

14.1. Schedule 1 rules have been made under the 1971 Act, as approved by the members at a general meeting held on 22 April 1983 and filed with the Deeds Registry, conferring rights of exclusive use upon the owners of units 1 to 8 in respect of the cross-hatched areas of common property as indicated on the plan referred to in management rule 73;

14.2. Conduct rules have been made in terms of section 27A of the STA, as approved by the members at a general meeting held on 4 January 2011 and filed with the Deeds Registry, conferring rights of exclusive use upon the owners of units 1 to 10, in respect of the areas of common property indicated on the plan referred to in conduct rule 6;

14.3. No registered exclusive use rights exist in the scheme in terms of section 27(1) of the STA.

15. The Practitioners then make the following findings:

15.1. There is no authority under section 27A of the STA or in any other applicable law for the cancellation of exclusive use rights by the trustees based on the non-payment of levies by the holder of such rights or for any other reason;

15.2. The exclusive use rule created by the Body Corporate in terms of section 27A of the STA contains a layout plan as per the requirements of section 27A of the STA;

15.3. As to the trustees opinion that the schedule does not contain the names of members to which each part has been allocated, the Practitioners contend that in practice the schedules of allocation included into exclusive use rules generally do not refer to the rights as being conferred upon a named person but rather upon the unit or the owner of the unit from time to time. The following reasons are presented to justify this practice:

15.3.1. It avoids the need to amend the exclusive use rule each time that there is a change in the ownership by amending the names recorded in the schedule of allocation;

15.3.2. Where rules confer exclusive use rights on the unit, a transfer of the unit will automatically transfer the exclusive use rights;

15.3.3. Reference is made to the Chief Registrar's Circular 18 of 1997 which accepts that the name of the member need not be disclosed in the schedule. Accordingly, the Practitioners are of the opinion that the schedule of allocation included in the scheme's exclusive use rule is legally compliant.

16. As to the former chairman's claim that it is not possible to deal with a building that does not appear on the scheme's sectional title plans and that therefore any exclusive use rights which have been created in respect of parts of Building 2 may not be legally valid, the Practitioners contended that although Building 2 is not shown on the sectional plans of the scheme does not mean that the building does not exist. They say that the building is considered to be an unregistered improvement to the land included in the scheme and is therefore regarded as

common property. It may therefore be made subject to rights of exclusive use which have been created in respect of the relevant parts of Building 2 and therefore valid.

17. The Third Respondents did not accept the opinion rendered by the Practitioners and continued to engage in email exchanges to contest such findings. Eventually, at the annual general meeting on 24 February 2020 the chairman was replaced by the Applicant's husband who became the new chairman of the Third Respondents. On the same day the Third Respondents voted to accept the opinion of the Practitioners. Despite such acceptance the relevant garage was not vacated by the First Respondent and so the Applicant decided to approach CSOS to decide the issue.

18. The submissions by the Third Respondent deny that any exclusive rights were conferred on the Applicant and questions whether any exclusive use rights were created in terms of section 27A of the STA. The submissions are closely aligned to the submissions contained in the instructions to the Practitioners drafted by the former chairman when the then trustees requested an opinion on the issues raised in this matter. Accordingly, it is not necessary to repeat all such submissions here. The Third Respondents also give an explanation of the state of disrepair of the garage and that the cost of repairing it earlier had been paid by the Second Respondent. Moreover, the First Respondent denies that she was responsible for the current state of disrepair of the garage.

Relief sought by the First Respondent:

19. The First Respondent seek –

19.1. that the Application be declared frivolous, vexatious, misconceived and without substance and therefore the relief sought by the Applicant must be dismissed in terms of section 53(1)(a) of the CSOS Act;

EVALUATION & FINDING

Application not aligned with relief sought

20. The Application submitted by the Applicant lacked clarity regarding the extent of the legal relief she sought from CSOS[7] and the evidence she produced to support such a claim for relief. The following aspects detract therefrom:

20.1. No statement of claim setting out the submissions she would rely on to support the relief she required was attached to the formal Application document, instead she attached, in her own words "more than 100 pages of the documents pertaining to this matter". These documents comprised emails, other documents, and a brief report of events. It required the adjudicator having to trawl through such documents which were not in date order to try and make sense of the evidence relied on to determine the nature of her claim and the relief she requires;

20.2. She has also not specified which garage is occupied by the First Respondent and so were it to be found that such occupation could be deemed to be unlawful, the lack of specificity of the area to vacate would render any order for relief too vague to be enforceable. Moreover, the EUAs comprise three garages and one storeroom, individually identified on the schedule attached to Rule 6. The relief claimed against the First Respondent does not identify which of the EUAs the Applicant requires the First Respondent to vacate, nor was any information furnished of the terms of the lease and the premises that would tie the First Respondent to a particular EUA;

20.3. No explanation was given in the application for her failure to seek relief in respect of any of the other occupiers of the remaining EUAs, if indeed such EUAs were occupied;

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[7] Rapallo Body Corporate v Dhlamini NO and Others (12572/2019) [2020] ZAWCHC 97 (10 September 2020), par. *19: Any notion that the relatively informal and inquisitorial character of proceedings before an adjudicator justifies the conduct of such proceedings on the basis of anything other than a sufficiently clearly stated claim is unfounded.*

20.4. No effort was made by the Applicant to identify the order/s in terms of section 39 that could be aligned to the exclusive use rights that she claimed (by inference) had passed to her and how the evidence entitles her to require action against the First Respondent with whom no legal relationship exists;

20.5. The Application also fails to deal with the occupants of the remaining EUAs as no relief is sought against any other parties that may occupy such premises in terms of leases, as indicated by the former chairman in his instructions to the Practitioners. No submissions were made as to which other members may be in occupation thereof or if any relief is required to obtain occupation thereof by the Applicant. Presumably, the presumption on the part of the Applicant is that once the issue of her acceding to exclusive use rights to the EUAs is determined in her favour, the vesting of such rights would render the occupation by other members of the relevant EUAs unlawful and that would be sufficient, so the Applicant may submit, to remove such members from such premises (if there are any such members, because the Applicant has failed to clarify such a situation). Of course, such relief has to be ordered (if authorised in terms of section 39). No such order was requested. All in all the Application does not clearly and with sufficient specificity enable proper adjudication of the issues.

Investigation in terms of section 51

21. However unclear the formulation of the Application may be, it is still incumbent on the adjudicator in terms of section 50 of the CSOS Act to "investigate an application to decide whether it would be appropriate to make an order". An investigation in terms of section 51 of the CSOS Act is therefore required to establish whether the issues referred to in paragraph 22 can be clarified.

22. The basis on which the issues raised in this dispute concerns how –

22.1. the Applicant became a member the Second Respondent;

22.2. the Applicant purportedly acceded to the exclusive use rights she submitted she had acquired when she took transfer of unit 10 of the Impala Flats;

22.3. the exclusive use rights were created purportedly in respect of the common property of the Impala Flats; and

22.4. the various parties involved in this dispute claimed that such purported exclusive use rights had been transferred to the Applicant.

23. Moreover, such an investigation would require a wide-ranging analysis of the facts that gave rise to this dispute, the contradiction of the claims by the various parties and the complication of the issues surrounding the legality of the use of Building 2[8] to vest those rights. Section 50(b) and (c) of the CSOS Act requires the adjudicator to "act quickly, and with as little formality and technicality as is consistent with a proper consideration of the application". In addition, the courts have consistently emphasized the need to dispose of such disputes expeditiously to minimise the burden on institutions seized with such matters. In pursuance of such consideration, the one aspect of the case that would be dispositive of this matter concerns the process in terms of which the Applicant acceded to the exclusive use rights, irrespective of whether such rights had been created lawfully or not. If it were to be found that the Applicant had not acceded to such exclusive use rights lawfully it would dispose of the matter forthwith because she would not have been vested with rights that might have been infringed by the lease concluded with the Third Respondent.

History of acquisition of unit 10 and dealings with EUAs

24. This process starts with how the ownership of unit 10 was acquired by the Applicant. The Applicant purchased the property from Nedbank as a repossessed property (clause 19 of the sale agreement) (only an unsigned sale

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[8] Building 2 is a building that was used by the Second Respondent in 2011 as the structure within which the exclusive use rights were created with regard to the various rooms within such building. The building itself is not delineated on the registered sectional plan of the scheme due to the building infringing the building lines on two of its boundaries raising concerns about vesting such rights in respect of an unlawful structure.

agreement was submitted to the adjudicator but a signed copy must have been submitted to the transferring attorneys because on a print-out of the records of the Deeds Registry the purchase date is reflected as 26 June 2019). The property was not bought by the Applicant at a sale in execution because the records of the Deeds Registry also show that Nedbank had taken transfer of the property (presumably *in* lieu of payment of the bond debt) in terms of Deed of Transfer ST 19386/2019 and then immediately transferred it to the Applicant in terms of Deed of Transfer ST19387/2019. The consecutive numbering of the deeds means that the registration of the two transfers took place as part of the same batch of interdependent deeds[9] and therefore deemed to be simultaneously registered. The unsigned sale agreement, which is in a pre-printed pro-forma format with options to complete as details of transactions may differ, was completed in every way necessary and although it contained a detailed disclosure of the state of the property it did not contain a cession of the exclusive use rights to the EUAs. In fact, the reference under the heading Property to exclusive use areas is marked n/a.[10] Although the husband of the Applicant queried the fact that the sale agreement and the transfer documents did not reflect the EUAs and their attorney even wrote a letter demanding transfer thereof to the Applicant the matter was eventually abandoned when the transferring attorneys advised the Applicant that such rights had been filed and allocated to section 10 in the Deeds Registry in terms of the rules of the body corporate. The Applicant seemed to have accepted that situation as was indicated in an email to the managing agent stating that "this document (the schedule) does show that unit 10 has 10, 10A, 10B and 10C which is what I'm asking for".

[9] See section 13(1) of the Deeds Registries Act: *Deeds executed or attested by a registrar shall be deemed to be registered upon the affixing of the registrar's signature thereto, and deeds, documents or powers of attorney lodged for registration shall be deemed to be registered when the deeds registry endorsement in respect of the registration thereof is signed: Provided that no such deed, document or power which is one of a batch of interdependent deeds, documents or powers of attorney intended for registration together, shall be deemed to be registered until all the deeds, documents or powers of attorney or the registration endorsements in respect thereof, as the case may be, have been signed by the registrar.*

[10] It is worth observing that Nedbank in providing space in its standard sale agreement for the sale of sectional title property, gives effect to the notion considered later in this order that exclusive use rights should be included in the subject matter of the sale. The failure by the framer of the provisions to specify whether section 27(1) or section 27A rights are contemplated suggests that both are intended.

25. What is more telling is that Nedbank consented to the former owner of unit 10 letting the EUAs to various persons as stated by the former chairman in his instructions to the Practitioners.[11] This is a significant event because such lease arrangements comprised not only the granting of occupation rights in respect of unit 10, which have been attached by Nedbank, but also whatever rights might have been deemed to have remained with the former owner in respect of the EUAs. The purpose of this arrangement seems to have been to generate funds that could be applied to reducing the bond debt owed to Nedbank. Clearly, Nedbank did not obtain the exclusive use rights to the EUAs from the former owner before granting such consent because it then proceeded to sell unit 10 to the Applicant without such rights forming part of the subject matter of the sale as indicated earlier. A further reason Nedbank did not obtain the rights to the EUAs, is that only unit 10 would have been subject to the mortgage bond/s passed in its favour because only real rights are capable of being mortgaged to secure debt. The exclusive use rights to the EUAs as personal rights would not have been legally capable of such securitization. This is clear from section 27A(a), which forbids rules purported to create rights contemplated in section 27(6).[12]

26. So, no proof of the transfer of the exclusive use rights to the Applicant has been provided. Both the Applicant and the Practitioners were of the view that when the Applicant took transfer of unit 10 she automatically became the beneficiary of the exclusive use rights to the EUAs. The Practitioners based their opinion partly on their interpretation of the Chief Registrar's Circular no 18 issued in 2018 and on a practical argument that were it to be otherwise it would mean that Rule 6 would have to undergo an amendment every time the ownership of unit 10 changes. At some point Nedbank must have represented to the Applicant that she also purchased the EUAs because she insisted on having acquired such rights from the start. The schedule attached to rule 6 indicates that the

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[11] This contention is supported by clause 10.3 of the sale agreement which reads as follows: *The Seller does not warrant that the purchaser will obtain vacant occupation and possession of the property, and the purchaser purchases the property subject to any existing leases or right of occupation held by any other party.*

[12] Section 27(6): *A right to the exclusive use of a part of common property registered in favour of an owner of a section, shall for all purposes be deemed to be right to immovable property over which a mortgage bond, lease contract or personal servitude of usufruct, usus or habitation may be registered.*

EUAs had been allocated to unit 10 and that was part of the Applicant's case. The Second Respondent had an alternative explanation, namely, that such rights had been cancelled by them when the previous owner had failed to pay his arrear levies to the Second Respondent. Later they also insisted that the creation of such rights did not comply with the requirements of section 27A and were consequently not lawfully created and therefore continued to vest in the Second Respondent. The Practitioners disagreed with that position, with which I concur, albeit on different grounds. The former chairman based his position on his understanding of section 27(4)(b) of the STA, which reads as follows: "If an owner ceases to be a member of the Body Corporate in terms of section 2(3) of the Sectional Titles Schemes Management Act, any right to an exclusive use area still registered in his or her name vests in the body corporate free from any bond". As is clear from such provisions, it deals with different exclusive use rights, i.e., rights that are required to be registered. Section 27A rights are not registered, so the reliance on section 24(4)(b) is misconceived. In any event, his position is also at variance with the leases which were consented to by Nedbank, as he indicated in his instructions to the Practitioners. The First Respondent could not at the same time lease the relevant garage from the Second Respondent and from the former owner of unit 10. This confusion was clarified by the First Respondent in paragraph 10.1.

Legal framework

27. Before this aspect of the dispute and the conflicting positions thereon adopted by the Third Respondent and the Practitioners are considered it is useful to consider the legal framework within which such rights should be scrutinized:

27.1. The first consideration is to determine the differences between real and personal rights. In their book, Sakereg Vonnisbundel Vol. 5[13], the authors Delport and Olivier, with reference to Professor C G van der Merwe, discuss these differences as follows:

[13] J G Horn: The legal effect of rights specific to sectional title property in South Africa, with reference to selected aspects of the Australian and Dutch law (2017), unpublished LLD thesis, NWU, footnote 87.

27.1.1. The object of the rights differs:

27.1.1.1. The object of a real right is a thing, whereas the object of a personal right is a performance.

27.1.2. The content of the rights differs:

27.1.2.1. The holder of a real right can claim possession over the thing, whereas the holder of a personal right can claim performance from another person.

27.1.3. The remedies of the two rights differ:

27.1.3.1. In the case of a real right the holder of the right may claim the thing with the *rei vindication*. This is not possible in the case of a personal right.

27.1.4. The origin of the rights differs: a personal right originates from an obligation, while a real right originates from other legal facts, such as delivery or prescription.

27.1.5. Another test that was applied in Ex Parte Geldenhuys 1926 OPD 155 at 164: "one has to look not so much to the right, but to the correlative obligation. If that obligation is a burden on the land, a subtraction from the dominium, the corresponding right is a real right and registrable; if it is not such an obligation, but merely an obligation binding on some person other, the corresponding right is a personal right, or a right in personam, and it cannot be registered".

27.1.6. Dr J G Horn, in her doctoral thesis[14] (page 97) states that certain rights may be created either by the developer when he opens the sectional title register or by the Body Corporate when the sectional title scheme is already in

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[14] J G Horn: The legal effect of rights specific to sectional title property in South Africa, with reference to selected aspects of the Australian and Dutch law (2017) unpublished LLD thesis NWU.

existence. These rights may either be real rights and thus registered in a Deeds Registry, or personal rights not registered in a Deeds Registry.

27.1.7. The authors of Sectional Titles and other fragmented property schemes[15] state on page 79: "As those use rights (exclusive use rights created in terms of section 27A of the STA) are not registered and connected to sections in terms of the sectional plan, but only delineated on a layout plan included in the rules of the scheme, such rights are considered personal rights, enforceable against other sectional owners and the Body Corporate".

Analysis of section 27A

28. Finally, it is necessary to analyse the provisions of section 27A of the STA itself to discern what the legislative intent may be deemed to be. It reads as follows:

28.1. *27A. A developer or a Body Corporate may make rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the Body Corporate: Provided that such rules shall – (a) not create rights contemplated in section 27(6); (b) include a layout plan to scale on which is clearly indicated – (i) the locality of the distinctively numbered exclusive use and enjoyment parts; and (ii) the purposes for which such parts may be used; (c) include a schedule indicating to which member each such part is allocated.*

28.2. This analysis will be limited to the first part of the provisions of the section preceding the proviso because it would indicate the manner in which such rights can pass to the person who receives transfer of the unit to which such rights have been allocated. The first distinction to be drawn is how and when the developer and the Body Corporate make the rules:

28.2.1. The developer can make such rules at any time before the establishment of the Body Corporate, which takes place when the first person receives transfer of a unit in the scheme. That means that the developer would have

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[15] G J Pienaar and J G Horn (second edition), p. 79.

made the rules creating such exclusive use areas before he applies for the opening of a sectional title register and the registration of the sectional plan. Once the Body Corporate has come into being (by the transfer by the developer of at least one unit in the scheme to another person[16]) a special general meeting can be convened where by way of a special resolution or an unanimous resolution such rules can be made. The difference between rules created by the developer and that created by the Body Corporate is that the owners who make up the Body Corporate where the developer has made the rules will have received transfer of the undivided share of the common property component of their ownership of a unit subject to such rule changes. Each time such a unit (incorporating the undivided share in the common property apportioned to such owner in terms of his or her participation quota) is transferred, the component of the undivided share in the common property is received by the transferee subject to the rights reserved to all the members of the Body Corporate in terms of the schedule annexed to the amended rule conferring such rights. No further action is required because all the owners by receiving their undivided share in the common property subject to the rules created by the developer are bound to obey the rules containing such rights.

28.2.2. It has already been clarified that where real rights are transferred a document evidencing such rights is registered in the relevant Deeds Registry. The holder of such rights literally has such a registered document to hold in his hand signifying ownership of the rights described therein. Where personal rights are concerned, the transfer is by written document, not registered . Although the cession is also contained in a document, the document itself does not constitute a vesting document in the same way as with real rights. It is really only an instrument of transfer. Therefore a better way to consider such personal rights is to view them as claims vested in the holder thereof to compel performance by the counter party, whether to do something or to

[16] Section 2(1) of the Sectional Titles Schemes Management Act, 8 of 2011: *With effect from the date on which any person other than the developer becomes the owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate.*

refrain from doing something. Such performance would then in the case of section 27A rights be constituted in both a negative sense, i.e., to abide the use of areas of the common property by the member entitled thereto, and a positive sense, i.e., the beneficiary of such rights having the legitimate expectation that he is entitled to exercise such rights.

28.2.3. Had the developer of Impala Flats created the EUAs in terms of the rules he imposed on the scheme, the Applicant would have received such rights to the EUAs automatically when she received transfer of unit 10. However, in this instance the Body Corporate created the rule change in 2011 and then the transfer of such rights follows a different route.

28.2.4. When a Body Corporate wants to implement a rule change in terms of section 27A, the members who pass the relevant resolution to that effect are registered owners of their respective units, which already comprise their undivided shares in the common property, unencumbered by the reservation of rule-based exclusive use rights, as is the case where a developer creates such rights. The common property is therefore not burdened by any reservation of rights in favour of any member of the Body Corporate as is the case when the developer makes such rules. In such an instance, the members of the Body Corporate would, by passing the required resolution to create the new rule, which would confer exclusive use rights on the members of the Body Corporate in respect of certain portions of the common property as delineated on the layout plan and as allocated in the schedule thereto. The amended rule, once it is adopted through the required resolution, confers the exclusive use rights so created on the members concerned. This means that at the first meeting where this takes place two things happen:

28.2.4.1. The exclusive use rights are created by adopting the amended rule; and

28.2.4.2. The amended rule would then confer, at the same meeting on the then members of the Body Corporate such rights.

28.2.5. The effect of this is that –

28.2.5.1. the rule then becomes exhausted of its powers as indicated. It is now *functus officio* and no further application of the rule for the purpose of conferring exclusive use rights in respect of the common property is legally feasible. The sole remaining function of the rule is achieved when the rule is noted and filed in the Deeds Registry, namely, to publicize its existence;

28.2.6. the original beneficiaries vested with such rights when then rule was adopted must alienate such rights, together with the unit, in the sale agreement. Such practice would then comply with the requirements of our law:

28.2.6.1. The real rights comprised in the unit would be sold in terms of the sale agreement and then transferred by registration in the name of the purchaser in the relevant Deeds Registry;

28.2.6.2. The personal rights comprising the section 27A created exclusive use rights would be sold as part of the *mercx* described in the sale agreement and the sale agreement in the form of a bilateral cession becomes the transfer instrument of the rights to the purchaser.

Prevailing practice of automatic transfer of section 27A rights

29. It is necessary to take a closer look at the notion that the exclusive use rights, once created in terms of section 27A of the STA, automatically gets transferred to the beneficiary thereof when the unit purchased by such person is registered in his/her name in the relevant Deeds Registry because it has become a widespread practice in several Deeds Registries, it seems. The logic employed seems to be that because the rule is filed and noted in the relevant Deeds Registry the incoming owner when taking transfer is immediately bound by the rule in the sense that he has to honour the rights of the other beneficiaries of such rights in terms of the rules and at the same time they have to do the same. Apparently, no further action is required from such person to exert his/her rights in this regard.

30. When the transfer of the rights created in terms of section 27(1) of the STA is considered, section 27(3) of the STA prescribes the process involved. No proponent of the above practice seems to be concerned that no such requirement for delivery of the personal rights created in terms of section 27A is prescribed. It seems that the mere existence of the rule when the transfer of the relevant unit to the beneficiary takes place is viewed as sufficient for the rights to pass to such beneficiary. Or maybe the actual transfer triggers a delivery of such personal rights. This view seems to absolve the parties concerned from the delivery requirement of such rights. Personal rights are transferred by bilateral cession.

31. Regarding such practice section 27A works as follows:

31.1. The members of the Body Corporate, through the special resolution, create the rule;

31.2. The rule –

31.2.1. creates the exclusive use rights; and

31.2.2. confers the rights on the members at the time.

31.3. Furthermore, the members on which such rights are conferred, are the members who are members of the Body Corporate at the time that the rule was created. The beneficiaries of such exclusive use rights created by the rule are thus a finite group of persons. So, if there were ten members of the Body Corporate at the time the rule was created and there was one exclusive use area conferred per member, no further rights can be issued. This means that the rule has become exhausted of conferring any further rights, it is *functus officio*. That means the rule has no other function but the publication function which would be achieved when it is noted and filed in the Deeds Registry. The transfer of rights from the first beneficiaries can only take place by bilateral session which can be effected by including it in the sale agreement. If there is no transfer mechanism evidencing the transfer of such rights, whoever claims such rights cannot prove

that such rights have vested in him/her. Certainly, the only beneficiaries who can claim that such rights had vested in him/her by producing the rule as the evidence of such vesting are the members who voted to create the rule in the first place. The reason why such a proposition is possible is because the rule states it. Any beneficiaries after the first beneficiaries have to obtain such rights through bilateral cession thereof.

31.4. The automatic transfer of such rights cannot take place on the back of the transfer of the unit, except as indicated when the rule had been created by the developer. There would be no mention of such rights in the conveyancing documents because that would be mixing real rights with personal rights which is not competent in our law. Then the only other source, aside from a bilateral session, would be the rule itself. Yet, the rule cannot every time a transfer of a unit is registered cause the creation of new rights. The absurdity of such a notion is demonstrated when a beneficiary vested with such rights includes in his sale agreement with his purchaser a bilateral cession of such rights along with his unit. When the purchaser signs the sale agreement, he acquires the right to demand the transfer of the unit to him by the registration thereof in the relevant Deeds Registry, and the cession would vest such exclusive use rights in him when he becomes a member of the Body Corporate upon registration of the unit he has purchased. When the transaction is structured in this way it would not be possible for the rights to also pass by way of the practice because there can't be two ways in which two sets of rights that can be passed. Moreover, when, and how could the automatic transfer of such rights be blocked in the event of a bilateral cession thereof in the sale agreement.

31.5. In the current instance, the Applicant has failed to prove that she had acquired the exclusive use rights from Nedbank and it has been shown that neither the transfer of unit 10 in itself, nor the rule as filed and noted in the Deeds Registry, could vest such rights in her. The mere existence of the rule is also not capable of transferring such rights for the reasons explained before[17].

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[17] See also Sakereg (second edition), C G van der Merwe, p.301, where he deals with the requirements for the transfer of ownership, whether for movables or immovables. The learned author lists seven such requirements. Only one will be referred to in this context: *(ii) The transferor must be legally competent to pass ownership. Because nobody can pass more rights as what he himself have, the transferor must*

31.6. The notion that there is supposedly a link between the transfer of the unit and the automatic passing of the exclusive use rights allocated in the rule to such unit needs analysis. Aside from the allocation in the rule to a unit there is no obvious connection between the two events. The rights to the unit and the exclusive use rights in terms of section 27A are completely different rights in law, the first are real rights and the second are personal rights. As can be seen in paragraph 27.1 the differences are clear. Aside from their overall description as rights they have nothing in common as far as their identifying characteristics are concerned. Yet, they both require to be delivered once alienated. Real rights are delivered through registration in the relevant Deeds Registry, while personal rights are delivered through bilateral cession thereof, the latter of which can be achieved by including it in the description of the merx in the sale agreement. Once that is done nothing further is required for the personal rights to pass to the purchaser. So, by insisting that the transfer of the exclusive use rights automatically pass because of the transfer of the unit, is superfluous because there are no rights available to pass if a bilateral cession had been implemented. If no cession had taken place in respect of such rights, the mere existence of the rule will not cause such rights to pass for the simple reason that only a transaction between a buyer (cessionary) and a seller (cedent) will create the necessary cause of action for such a transaction to take place. If the argument is that the registration of the transfer of the unit merely bestows on the transferee membership in the Body Corporate that would entitle him/her to the rights contained in the rule, such an argument means that once the original conferral of exclusive use rights have taken place in respect of a particular member entitled to a particular unit, the rights are to be restored to the rule to dispose of when the same unit is next sold so that the new owner can be vested with such rights. Such a notion is not known in our law.

31.7. The question of how a purchaser would accede to such rule-based exclusive use rights was considered by Blieden J in the matter of Kmatt Properties (Pty)

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own the thing, otherwise the transferee will not receive ownership of the thing. (Translated from Afrikaans by the adjudicator).

Ltd v Sandton Square Portion 8 (Pty) Ltd and Another[18]. In that matter litigation ensued between the developer and a purchaser in that the purchaser claimed that the developer had failed to create section 27(1) exclusive use rights when it established the sectional title scheme and had also failed to register such rights in the name of the purchaser together with the unit it had purchased, and which was registered. The developer countered that it had created section 27A exclusive use rights in terms of the rules and had thereby complied with its obligations in terms of the sale agreement. The judge deals with the creation of both types of rights and then reasons that by the developer creating the section 27A rights in the rules, the common property of the scheme become subject to those rights from the inception of the scheme. So, when any unit (which includes the undivided share in the common property already subject to the rules-based exclusive use rights) is transferred, those rights would then be "transferred" (as the judge contended) automatically when the unit is transferred and by implication, it seems, all purchasers who take transfer in this manner would be bound to such reservation of exclusive use rights in terms of the rules. The judge refers to the imposition of the rules-based exclusive use rights as a transaction without expanding on what its effect in this context means. Presumably, it would operate as a restriction on the use of the common property by anybody else and as such the transfer of the real rights would comprise the remainder of the real rights diminished by such restriction.

General

31.8. Section 27A exclusive use rights are deemed to be personal rights[19] which, after its conferral at inception, can only be transferred from one person to another by the legal mechanism of a bilateral cession. Aside from the manner in which such rights are to be created, the transfer of such rights to the Applicant is disputed by the former chairman. The Applicant acquired unit 10 from Nedbank who had

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[18] 2007(5) SA 475 (W), paras 19.4.1 and 19.5.2-3.

[19] See Sectional Titles and other fragmented property schemes (second edition) by G J Pienaar and J G Horn, p. 79: *as these use rights are not registered and connected to sections in terms of the sectional plan, but only delineated on a layout plan included in the rules of the scheme, such rights are considered personal rights, enforceable against other sectional owners and the Body Corporate.*

foreclosed on the mortgage bonds registered thereagainst and had taken transfer thereof *in lieu* of the unpaid bond debt by the previous owner. After the EUAs were originally created as shown and conferred on the members of the Body Corporate at the same time, any transfer of such rights thereafter can only be done by cession from the owner of the section to whom such rights were allocated and the purchaser of the unit concerned. In this instance, no evidence of such cession was submitted by the Applicant. The Practitioners submitted in their opinion that such rights pass automatically when the transfer of unit 10 is registered in the name of the Applicant because the EUAs rights were once conferred (in 2011) and when the section to whom such rights are allocated are transferred the transferee accedes to such rights at the same time. They refer to the Chief Registrar's circular 18 2018 on this point as authority in part for their position. They also say it is done in practice to avoid having to change the rules every time a transfer takes place.

31.9. The practice referred to earlier also seem to promote legal uncertainty between purchasers and sellers where rule-based rights form part of the subject matter of the sale, especially where successive sales may neglect the conclusion of bilateral cessions regarding the passing of such rights. Dr Horn, in her doctoral thesis,[20]refers to a number of authors who insist, in the context of protecting section 27A rights to the same extent as the deemed protection for section 27 rights, that when sale agreements are drafted there is a duty on the drafter thereof to "properly and accurately represent what is the subject matter of the sale" and the exclusive use area created in terms of section 27A is "part of the subject matter of the sale". Dr Horn goes on to state that the unregistered exclusive use area should be indicated and described fully in the contract of sale. This emphasis on the inclusion of section 27A rights as part of the description of the subject matter of the sale also complies with another aspect, namely, to ensure the transfer of these unregistered rights, in the case where these rights were created by the Body Corporate as opposed to the developer by way of an express cession thereof. If such rights did exist and had vested in the seller but were not included in the sale agreement, the situation is not clear.

[20] See footnote 12, p. 176.

32. It is clear that the Applicant could not succeed in her Application because she did not purchase the exclusive use rights from Nedbank, nor from any other party when she purchased unit 10 from Nedbank.

33. For the reasons set out above where applicable, the Applicant could not accede to the exclusive use rights in respect of the EUAs by means of the registration of transfer of unit 10 in her name.

34. The current practice of promoting the automatic transfer of exclusive use rights when the unit concerned is registered in the name of the purchaser concerned do not prevail over any legal scrutiny on the grounds set out earlier. It may be that it developed on an incorrect reading of the KMatt Property[21] case.

35. Finally, in terms of clause 10.3 of the sale agreement the Applicant purchased the property "'subject to any existing leases or right of occupation held by any other party". Although no exclusive use rights were alienated to the Applicant in terms of the sale agreement with Nedbank, the property purchased was described as repossessed and therefore Nedbank sought the protection of clause 10.3 in the event of existing leases of the property. This means that even if the exclusive use rights were alienated (which did not occur) such rights would have been subject to the existing lease/s. Although the relief the Applicant sought in her Application was not competent to be granted in terms of section 39 of the CSOS Act, it would also not have been competent to be granted against "any other party" holding a lease or right of occupation.

COSTS

No order as to costs is made.

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[21] See footnote 17.

ADJUDICATION ORDER

The relief sought by the Applicant in terms of paragraph 7 is refused for the reasons set out in this order.

RIGHT OF APPEAL

24. Section 57 of the CSOS Act, provides for the right of appeal-

(1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.

(2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

(3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.

DATED AT CAPE TOWN ON 4 February 2022.

ADJUDICATOR

W T DU TOIT

CSOS ADMINISTRATIVE CHECKLIST

- Relief applied for in terms of the CSOS Act: N/A
- Date Adjudication conducted: 31 January 2022.
- Name of the Adjudicator: W T du Toit

1. Order: The relief sought by the Applicant in terms of paragraph 7 is refused for want of jurisdiction on the part of the adjudicator and the other reasons set out in this order.

- Circulate:
- Authority: Section 27A of Sectional Titles Act, 95 of 1986.
- Legislative Provisions: n/a
- Quality Assured by & date: Ms P Moodley on 2 February 2022.
- Date issued (signed) 4 February 2022.
- Issue or topic: Rule-based exclusive use rights in terms of section 27A of STA.
- Date sent to parties: 4 February 2022.
- Enforcement Notice issued: N/A