

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG  
REPUBLIC OF SOUTH AFRICA**

**Case No: 6027/08**

In the matter between

**The Body Corporate of the Inyoni**

**Rocks Cabanas Scheme No. SS 1/1978**

**Applicant**

versus

**Croxford Corporate Trading 7 (Pty) Ltd**

**1<sup>st</sup> Respondent**

**Errol John Henty Senekal**

**2<sup>nd</sup> Respondent**

**The Trustees of The Mahlangu Trust**

**3<sup>rd</sup> Respondent**

**Inyoni Beach Apartments (Pty) Ltd**

**4<sup>th</sup> Respondent**

**The Registrar of Deeds, KwaZulu-Natal**

**5<sup>th</sup> Respondent**

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**JUDGMENT**

Delivered on: 15 December 2009

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**STEYN J**

[1] Applicant sought the following relief when the matter was argued before me:

- (a) That Fifth Respondent be directed to cancel Notarial Deed of Cession of Development Rights SK 2924/04S;
- (b) That it be declared, in terms of and subject to the provisions of Section 25(6) of Act 95 of 1986, that the right of extension relating to the Inyoni Rocks Cabanas Scheme No. SS1/1978 vests in the Applicant;
- (c) That the First and Second Respondents pay the costs of the application on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved, save that in the event of Third or Fourth Respondent opposing the application, that the Respondent opposing pay the costs of the application on a party and party scale, jointly and severally with the other Respondents against whom a costs order is made.

[2] First and Second Respondents by way of a cross-application sought a declaration that the right of extension has become properly vested in the First Respondent.

[3] The Fourth Respondent was the developer of the relevant Sectional Title Scheme, registered in 1978 under the

provisions of the Old Sectional Titles Act, 66 of 1971. The aforementioned Act was repealed and replaced by Act 95 of 1986. The Fourth Respondent under the then applicable legislation, sold and transferred all the units in the Scheme except one, 'Number 64', of which it remained the registered owner in order to secure its right as a developer to extend the scheme in future.

Under the Old Act the right to develop could not survive the Developer's ceasing, to own a unit in the Development Scheme. Fourth Respondent i.t.o. s 5(3)(d) of the 1971 Act caused the Sectional Plan to be endorsed with conditions of Sectional title, in terms of which the owners from time to time, were obliged to consent to certain extensions of the scheme and to allow the Fourth Respondent to "exercise its positive right to proceed with the development." These rights are the so called section 18 rights (of the Old Act).

[4] The following crisp issues were raised by counsel in their oral arguments:

- i) That in order to transfer there need to have been a real right and without a share in the development the right of

the developer seized to exist;

- ii) The amendment of section 60 of Sectional Titles Amendment Act in 1993 has no application in the present matter before the court;
- iii) Registration of the right did not change the content of the right and hence the right remained a personal right, incapable of transfer.

[5] In my view, what is pivotal to the dispute, is paragraph C.2 of Annexure “A” which contains the conveyancer’s certificate in terms of Regulation 5(2)(a)(x) and section 5(3)(d)(i) of the Sectional Titles Act, 1971. The relevant portion of the aforementioned paragraph reads as follows:

*“C.1 No person whose consent is required in terms of Section 18 of the Act shall be entitled to withhold his written consent to Inyoni Beach Apartments (Proprietary) Limited, being the developer of this Scheme as owner of Section No. 64 or its successors in the title (hereinafter referred to as the developer), preparing and submitting for its own benefit a scheme to the Local Authority in terms of Section 18 of the Act for approval, and upon such approval taking all necessary steps to erect extensions and additional buildings on the land in terms of and as indicated on the sketch plan filed of record in my Sectional Tiles Protocol, .... ”*

[6] In order to decide on the issues it is necessary to consider the right of a developer to reserve and later exercise his right to a

further extension to a scheme. As the law stood in 1992 the right of extension would have been regarded as one which was not transferable because it constituted a personal servitude in favour of the developer and because it could not, under the provisions of s 60(9) of the 1986 Act be considered as a right reserved under the terms of s 25 of 1986 Act.<sup>1</sup>

- [7] The following differences between section 18(1) of the old Act and section 25 of the new Act, have been listed by Grosskopf JA in *Erlax Properties (Pty) Ltd v Registrar of Deeds and Others*:<sup>2</sup>

*“(i) Section 18(1) of the old Act allowed the developer himself a limited right of extension with the consent of all owners of sections and the holders of sectional mortgage bonds ....*

*[W]hen he ceased to have a share in the common property the right of extension passed to the body corporate.*

*Section 25(1) of the new Act, on the other hand, permits the developer to reserve a right of extension with a wider ambit than that allowed by s 18(1) of the old Act, and without the consent of any other Section owner. He may alienate his right freely – the body corporate acquires a right of extension only if the developer did not reserve a right for himself, or if his right has lapsed for any reason (s 25(6)).”<sup>3</sup> (my emphasis).*

- [8] Analysis of the legislative developments:

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1 See *Erlax Properties (Pty) Ltd v Registrar of Deeds and Others* 1992 (1) SA 879 (A) at 887.

2 *Ibid.*

3 *Erlax, supra*, at 891 F-I.

a) Act 66 of 1971

Under the 1971 Act, a developer could only exercise a right of extension if the developer still owned at least one section in the scheme. This can be gleaned from section 18(1)<sup>4</sup> that provided as follows:

*“Where a building, i.r.o. which a sectional plan has been registered under this Act, is to be extended in such a manner than an existing section is to be added to or that the building may be further divided into more sections, the developer, or if the developer has ceased to have any share in the common property, the body corporate, with the consent in writing of all the owners of all holders of sectional mortgage bonds, and other registered real rights, shall–”* (my emphasis).

Accordingly in terms of the 1971–legislation only owners of sections are entitled to have a share in the common property.

b) Act 95 of 1986

Under the 1986 Act, a developer may reserve his right of extension in terms of section 25.<sup>5</sup> The right to reserve includes the right to divide the extended part of the

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4 Section 18(1) prescribed the procedure to be followed by a developer in implementing his right of extension.

5 For a discussion of section 25 see, Lotz and Nagel, ‘Toekomstige (Lug) Kastele: Die verkoop van regte op uitbreidings kragtens artikel 25 van die ‘Wet op Deel-Titels’ TSAR (2007) 3, at 560-568.

building or the additional building into sections, common property and exclusive use areas for the account of the developer.<sup>6</sup> The reservation is done in terms of section 11(2) which allows a developer to impose registerable conditions in the Schedule to the sectional plan.<sup>7</sup>

Furthermore section 25(5) of the Act provides that a right reserved i.t.o. section 25(1) may be exercised by a developer or his successor-in-title thereto, even though the developer or his successor-in-title, as the case may be, has no other interest in the common property.<sup>8</sup>

c) Act 15 of 1993

The preamble to the above-mentioned Act, reads as follows:

*“To amend the Sectional Titles Act, 1986, so as to amend the definition of “Minister”; to provide that a lessee of a part of a building in terms of a lease agreement concluded with a previous owner of the building will continue to enjoy the same protection when the building is bought by a developer; to delete the provision i.t.o. which the Minister may determine certain fees to be paid to architects and land surveyors; and to provide for the alienation and mortgaging of a right to extend a building i.t.o. the Sectional Titles Act,*

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6 See section 25(1) which also deals with right of the body corporate.

7 Section 11(2) read with section 11(3)(b).

8 *Erlax supra* at 890B-C.

*1971; and to provide for matters connect therewith.”*

This Act amended section 60 of the Sectional Titles Act but in my view only to the extent as explained and stipulated in the preamble of the Act.

d) Act 44 of 1997

For the sake of completeness I shall refer to the abovementioned Act only as far as it deals with phased development. (For a comprehensive overview of the 1997 Act, see C G van der Merwe ‘A critical analysis of the innovations’ introduced by the Sectional Titles Amendment Act of 1997 *THRHR* (1998) Vol 61 at 171 – 193).

Most importantly for the purpose of deciding upon this matter, section 25(b) of the Act, makes it clear that if the right of developing the scheme in phases, vests in the body corporate, such phases may extend to land added to the common property in terms of section 26. In terms of section 25(6A) read with section 12(1)(c), the developer (accompanied by the sectional mortgage bond and the written



consent of any bondholder and such of the documents contemplated in section 25(2) that are applicable) may apply for, and the Registrar may issue, a certificate of real right extension.

[9] In terms of the Deeds Registries Act, 47 of 1937, more specifically section 3, all real rights in respect of immovable property are registrable. To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied:

- “(a) *The intention of the person who creates the real right must be to bind not only the present owner of the land but also his successors in title; and*
- (b) *The nature of the right or condition must be such that the registration of it results in a ‘subtraction from dominium of the land against which it is registered.’*<sup>9</sup>

[10] In light of South Africa’s negative system of registration,<sup>10</sup> the

9 See, *Erlax, supra*, at 885B and *Cape Explosive Works Ltd AEKI Ltd and Denel and Others*, SCA, case no: 60/99, delivered on 19 March 2001.

10 See Van der Merwe *Sakereg* (2<sup>nd</sup> ed) at 342 wherein negative system of registration is explained as follows:

*“In die geval van ’n negatiewe registrasiesstelsel word nie gewaarborg dat die inligting wat in die register vervat is, korrek is nie. Indien ’n bona fide derde dus op die registers staatmaak, doen hy dit op eie risiko en word hy die slagoffer van valse inligting in die register. Die ware eienaar verloor in geen omstandighede sy reg ten gunste van die bona fide verkryger nie. Hierdie stelsel bied dus groter sekuriteit aan die ware eienaar as aan die bona fide derde wat die slagoffer van ’n foutiewe inskrywing kan word.”*  
(my emphasis).

And later on the same page:

deeds registry does not necessarily reflect the true state of affairs and a third party cannot place absolute reliance<sup>11</sup> on the fact that because a right had been registered it is binding.

[11] It has been contended by Mr King SC, acting for the first and second Respondent, that the rationale for the amendment to section 60 of the 1986 Act, was to change the nature of a 1971 – right of extension so that it became exactly the same as a right of extension under the 1986 Act. It has been argued that the registration of the right of extension under the 1993 amendment changed the nature of the right. I am not convinced that the registration of the right could change the nature thereof for the reasons that will follow later in the judgment.

[12] It was further contended on behalf of the Respondent that section 60(4) of the 1986 Act<sup>12</sup> makes specific provision for

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*“Hoewel eiendom en beperkte saaklike regte nie sonder registrasie oorgedra kan word nie, word dit nêrens gewaarborg dat die aktesregister ’n juiste beeld van die ware toedrag van sake gee of dat derdes absoluut daarop kan staatmaak nie.” (my emphasis).*

11 See *Knysna Hotel CC v Coetzee N.O.* 1998 (2) SA 743 (SCA) at 753 A – D, *Barclays Nationale Bank Bpk v Registrateur van Aktes* 1975 (4) SA 936 (T), *Standard Bank van SA Bpk v Breitenbach* 1977 (1) SA 151 (T) at 1566 C – E.

12 Section 60 of the Sectional Titles Act, 1986, is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Notwithstanding the repeal of the Sectional Titles Act, 1971 (Act No. 66 of 1971), by section 59 of this Act –

the preservation of existing rights and this, so it is contended, casts in stone the Fourth Respondent's rights in terms of the certificate, including the right to transfer it and including the right to exercise the right of extension, whether or not the Fourth Respondent or the First Respondent still owned a unit in the development. It has been submitted that even though the developer acquired a 1971 right of extension, such right was registered after February 1993, and it became entitled to exercise that right i.t.o. the 1986 Act, which specifically records that the developer, or its successor-in-title; need not

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- a) *the registration of a sectional plan and the opening of a sectional titles register in respect of a development scheme which was prior to the date of coming into operation of this Act (in this section referred to as the commencement date) already approved by a local authority under the provisions of the Sectional Titles Act, 1971; or*
  - b) *a right of extension of a building acquired in terms of section 18 of the Sectional Titles Act, 1971, as if it has not been so replaced: Provided that a right as referred to in paragraph (b) in respect of which a certificate of real right has been issued –*
    - (i) *shall for all purposes be deemed to be a right to urban immovable property which admits of being mortgaged; and*
    - (ii) *may be transferred by the registration of a notarial deed of cession:*

*Provided further that nothing in this Act contained shall prevent –*  
*[(a)] (aa) the registration of a sectional plan and the opening of a sectional title register;*  
*[(b)] (bb) the acquisition of a real right of extension; or*  
*[(c)] (cc) the exercising of a right of extension, in terms of the provisions of this Act.”*

have any interest in the common property.

In my view, however, the legislature's intended meaning must be derived from the ordinary meaning of the words used in the section, with proper regard had to the context and the background and the historical development of the Act.<sup>13</sup>

[13] Mr King SC, in oral submissions strongly contended that the Court should interpret the latter part of section 60, which deals with the registration of the Notarial Deed, to draw a parallel stream between the transfer of a right and the transfer of ownership. So whoever receives the right by way of the transfer of such right, receives it full, complete and intact.

I am not persuaded by this argument. The mere registration of a right does not necessarily mean that ownership can be claimed by the title deed holder due to our negative system of registration.

[14] What remains to be decided is whether the Fourth Respondent was the owner of the right when he transferred

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13 See *Knoetze v Saddlewood CC* [2001] 1 ALL SA 42 (SE) at 42.

the 'right'. Owner in the Deeds Registry Act,<sup>14</sup> however is defined in terms of section 102 as:

*“(a) immovable property, subject to paragraph (b), the person registered as the owner or holder thereof and includes the trustee in an insolvent estate, a liquidator or trustee elected or appointed under the Agricultural Credit Act, 1966 (Act No. 28 of 1966), the liquidator of a company or a close corporation which is an owner and the executor of any owner who has died or the representative recognized by law of any owner who is a minor or of unsound mind or is otherwise under disability, provided such trustee, liquidator, executor or legal representative is acting within the authority conferred on him or her by law;*

*[Para. (a) substituted by s. 22 (d) of Act No. 14 of 1993 and by s. 9 (b) of Act No. 11 of 1996.]”*

Given the facts of this matter, the developer was no longer the owner of section 64, and hence there was no longer an existing right to transfer in my view.

[15] In terms of the sectional plan, the developer also reserved the development right when he registered the sectional plan. It is only upon the registration of the sectional plan and the opening of the sectional title register that a developer receives a certificate of real right to extend the scheme in the manner proposed in the sectional plan and subject to any mortgage bond registered against the title deeds of the land.<sup>15</sup> The

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14 Act 47 of 1937.

15 See C L van Schalkwyk and C G van der Merwe 'A critical analysis of the role

Fourth Respondent, *in casu*, reserved its rights as per the conditions in Annexure A.

[16] Purchasers in a scheme are entitled to know the conditions of the sectional title imposed by the developer, since they may be prejudiced in a number of ways, which would include the right of the developer to extend the scheme and the manner in which the extension will take place.<sup>16</sup> The Fourth Respondent, being the developer, imposed a number of conditions burdening the sections and common property and binding the owners. The conditions as stipulated in the sectional plan no. 1/1978 per annexure “A”<sup>17</sup> show how the owners are all burdened by the conditions and obligations contained in C-I. The owners would not have been entitled to change the conditions unilaterally and neither should the developer be entitled to change the conditions unilaterally. The aforementioned conditions provided extension rights to the developer as being the owner of Section 64, in the following way:

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*of the developer in sectional title developments’* (2008) TSAR 222 at 230.

16 See *Knoetze, supra*, note 12.

17 See page 27 of the papers.

*“H. No subdivision of a section in terms of a section in terms of Section 16 of Act 66 of 1971 shall be permitted. This condition shall be enforceable by the developer as owner of Section No. 64.”<sup>18</sup>*

Accordingly I find that the Fourth Respondent attempted to cede rights he no longer possessed. At the time of the purported cession, such rights as of right vested in the Applicant. I am persuaded by the arguments put forward by Mr Hunt SC that the deed of cession is a nullity and accordingly the relief sought in para 1 of the Notice of Motion has become redundant in light of the finding fact that the ‘right’- registered have ceased to exist.

[17] Cross-application:

In view of the findings made in terms of the application, the cross-application cannot succeed, since the rights of extension relating to the Inyoni Rocks Cabanas Scheme No. SS1/1978 vests in Applicant. Accordingly the cross-application should be dismissed.

[18] Costs

It is trite that costs are awarded to a successful party, who

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18 Condition H, should also be read with C1 of Annexure “A”.

either had to initiate or defend litigation as the case may be. Mr Hunt, correctly in my view, abandoned the application for costs on the scale between attorney and client, since there is no basis for such an order. Applicant has made out a case for the relief sought and that includes costs.

[19] Accordingly I make the following order:

1. Fifth Respondent is directed to cancel Notarial Deed of Cession of Development Rights No. SK 2924/04S.
2. In terms of and subject to the provisions of s 25(6) of Act 95 of 1986, the right of extension relating to the Inyoni Rocks Cabanas Scheme No. SS1/1978 vests in Applicant.
3. First and Second Respondents are directed to pay the costs of the application jointly and severally, the one paying the other to be absolved. The costs awarded to include the costs of senior counsel.
4. The cross application is hereby dismissed with costs.



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Steyn, J

Date of Hearing:	18 May 2009
Date of Judgment:	15 December 2009
Counsel for the applicant:	Adv CP Hunt SC
Instructed by:	E R Browne Incorporated
Counsel for the first and second respondent:	Adv JC King SC
Instructed by:	Francois Medalie & Company