**IN THE HIGH COURT OF SOUTH AFRICA**

**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**CASE NO: 10089/2005**

In the matter between:

**UNIT 1501 TWIN TOWERS SOUTH (PTY) LTD** Applicant

And

**THE TRUSTEES FOR THE TIME BEING OF THE TWIN TOWERS BODY CORPORATE** 1st Respondent

**THE TWIN TOWERS BODY CORPORATE** 2nd Respondent

**THE REGISTRAR OF DEEDS** 3rd Respondent

**THE OWNERS OF TWIN TOWRERS** 4th Respondent

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## JUDGMENT: 25/07/07

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## VAN REENEN, J:

1] The applicant, a company with a share capital and incorporated in accordance with the company laws of

the Republic of South Africa is the registered owner in terms of Title Deed No ST 18730/1998 of Sections 81 and 184 in the sectional title scheme established in respect a block of flats consisting of residential and commercial components known as Twin Towers (The Scheme) and situated in Sea Point.

2] The first respondent is the Trustees for the time being of the second respondent.

3] The second respondent is the Body Corporate of Twin Towers (the Body Corporate) established during 1979 in accordance with the provisions of the Sectional Titles Act, No 66 of 1971 (the 1971 Act) and as such has perpetual succession as well as the capacity to sue and being sued in its own name in respect of, inter alia, any matters arising out of the exercise of any of its powers or the performance or

non-performance of any of its duties.

4] The third respondent is the Registrar of Deeds, who has been joined herein pursuant to the provisions of Section 97(1) of Act 47 of 1937. Other than having filed a report, the third respondent has not participated in these proceedings. The owners of the other residential units in the said sectional title scheme are the 4th to 106th respondents.

5] Section 27 of the 1971 Act (which was repealed by the Sectional Titles Act No 95 of 1986 (the 1986 Act) as from 1 June 1998) provides as follows as regards the control and management of bodies corporate: -

> "(1) A building and the land on which it is situated shall as from the date of the establishment of the body corporate be controlled and managed, subject to the provisions of this Act, by means of rules.
>
> (2)(a) The rules shall provide for the control, management, administration, use and enjoyment of sections and the common property, and shall include
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> (i) the rules contained in Schedule I which shall not be added to, amended or repealed except by unanimous resolution of the members of the body corporate;
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> (ii) the rules contained in Schedule 2 which may be added to, amended or repealed by special

resolution of the members of the body corporate.

b) Until such time as special rules are made for the control and management of a building and the land on which it is situated, the rules set forth in Schedules 1 and 2 shall, as from the date of the establishment of the body corporate, be in force in respect of such building and land.

c) When any such special rules have been made, or when any rule has been added to, amended or repealed, the body corporate shall lodge with the registrar a notification in the prescribed form of such special rules, addition, amendment or repeal, and the registrar shall in the prescribed manner make a reference thereto on the schedule to the relevant sectional plan referred to in section 5 (3) (f).

3) No addition to or amendment or repeal of any rule pursuant to subsection (2) (a) (i) shall be of any force or effect until the body corporate has lodged with the registrar a notification in the prescribed form of such addition, amendment or repeal and the registrar has in the prescribed manner made a reference thereto on the schedule to the relevant sectional plan referred to in section 5 (3)(f).”

6] The members of the second respondent at an extraordinary meeting held on 5 September 1979 by

unanimous resolution adopted rules in substitution of the rules contained in Schedule 1 of the 1971 Act and in terms of Section 5(3)(f) thereof duly submitted them to the third respondent..

7] Rule 31.1 of the 1979 rules provides as follows: -

> "31.1 The liability of owners to make contributions, and the proportions in which the owners shall make contributions for the purposes of section 30(1) of the Act, or may in terms of section 35 of the Act, be held liable for the payment of a judgment debt of the body corporate, shall be modified in terms of Section 24(3) of the Act as follows:
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> 31.1.5 The residential owners shall contribute to the costs of maintenance of the lifts in the residential towers on the basis that the owners of sections on each floor shall contribute one one hundred and twentieth part of the cost of lift maintenance multiplied by the number of the floor in each case. The amount allocated to each floor in terms of the above formula shall be borne by the owners of

> sections on that floor in proportion to their participation quota."

8] Whilst Section 24 (2)(c) of the 1971 Act provided that the participation quotas of sections in a sectional title scheme would determine the proportion in which the owner of any section had to make contributions to an administrative expenses fund for the purposes of Section 30(1) thereof and in terms of Section 35 thereof could be held liable for the payment of any judgment debt of a body corporate of which he/she/it wass a member, subsection 24(3) thereof empowered the members of a body corporate to make rules by means of unanimous resolution whereby, inter alia, the liability of an owner of any section to make contributions for the aforementioned purposes could be modified. As the rules passed in 1979 were intended for inclusion in Schedule I of the

1971 Act in substitution of those originally promulgated, it upon lodgement with the third respondent constituted an implied repeal thereof merely by virtue of compliance with the procedural requirements of Section 27(2)(a)(i) of the 1971 Act and the exercising of the powers conferred upon members of bodies corporate by the provisions of subsection 24(3) thereof. In terms of the provisions of subsection 27(5) the rules so made were binding on bodies corporate and the owners and occupiers of any sections in such a scheme.

9] Section 59 of the 1986 Act repealed the laws specified in the schedule thereto, one whereof was the 1971 Act. However, Section 60(7) thereof provides that notwithstanding such repeal and subject to the provisions of subsection 60(4) thereof, any unaltered rules that were contained in Schedules

1 and 2 of the 1971 Act shall lapse and would be deemed to have been replaced, subject to addition, amendment or appeal by the Management and Conduct rules contemplated in subsections 35(2)(a) and (b) of the 1986 Act. As the resolution adopted by the members of the second respondent on 5 September 1979 in effect repealed the rules that were contained in Schedule I and introduced rules additional to those contained in Schedule 2, the provisions of subsection 60(70)9a) of the 1986 Act do not find application at all and the provisions of subsection 60(7)(b) of the 1986 Act apply only to the unamended rules. In the premises the provisions of subsection 60(8) of the 1986 Act, which provides as follows, apply only to rules made in substitution of the rules originally promulgated in Schedule 1 and 2 as they constitute rules "… other than those referred to in subsection (7)".

> "(8) Subject to the provisions of subsection (4) of this section, any rules other than rules referred to in subsection (7) of this section, applying in respect of a scheme immediately prior to the commencement date, shall, subject to such substitution, addition, amendment or repeal as contemplated in paragraph (a) or (b) of section 35(2) of this Act, as the case may be, remain in force after the said date, except to the extent that any such rule may be irreconcilable with any prescribed management rule contemplated in section 35(2)(a), in which case the management rule concerned shall apply. Provided that any such rules shall as from the commencement date be deemed to be supplemented by any rule for which it does not make provision but for which provision is made in the prescribed rules."

10] Accordingly, unless the provisions of subsection 60(4) of the 1986 Act found application or one or more of them are irreconcilable with any prescribed Management and Conduct rules as contemplated in subsections 35(2)(a) and (b) of the 1986, namely the management rules that have been promulgated as

Annexures 8 and 9 to the regulations promulgated in Government Notice R 664 of 8 April 1988 and subsequently amended the 1979 rules, would have remained in force.

11] The aforegoing constitutes the statutory and regulatory matrix against which the applicant, on 6 October 2005, instituted proceedings in this court by way of notice of motion against the respondents in which it claimed an order in the following terms: -

> "1] Declaring that Rule 31.1.5 (**"the offending rule"**) of the Rules of the Sectional Title Scheme known as Twin Towers (**"Twin Towers"** registered in terms of Act No. 66 of 1971 under no. 25/1979, is irreconcilable with Rule 31 of the Prescribed Management Rules referred to in Section 35(2)(a) of Act 95 of 1986 and that the aforesaid Rule 31 of the Prescribed Management Rules applies to the costs of the maintenance of the lifts in the residential towers of Twin Towers.
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> 2] Alternatively, an Order that the offending rule is not reasonable as contemplated in Section 35(3) of Act No. 95 of 1986 and I set aside.
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> 3] Costs of suit only in the event of this matter being opposed.
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> 4] Further and/or alternative relief."

12] The provisions of subsection 60(8) of the 1986 Act

are stated to be "subject to the provisions of subsection (4)". The expression "subject to" does not have an **a priori** meaning (See: **Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd** 1996(1) SA 1182 (A) at 1187 J - 1188 A). Whilst it is sometimes used to signify what is dominant and what is subservient in a statutory context (See: **Chevron Engineering (Pty) Ltd v Nkambule** 2003(5) SA 206 (SCA) at 210 E – F) it is also frequently used to introduce a qualification or limitation and means "except as curtailed by" (See: **Premier, Eastern Cape and Another v Sekeleni** 2003(4) SA 369 (SCA) at 375 H – I).

13] I am in agreement with the submission of Mr Gamble SC - who with Ms Cowen, appeared for the respondents - that the said expression is in

subsection 60(8) of the 1986 Act used in the first of the aforementioned senses. That being the case, it appears to me to be axiomatic that any enquiry into whether the applicant is entitled to the relief claimed in prayer 1 alternatively, prayer 2 of the notice of motion, should be preceded by an inquiry into whether the provisions of subsection 60(4) of the 1986 Act, which provides as follows, find application: -

> "(4) No provisions of this Act shall affect any vested right in respect of any exclusive use by an owner of a part or parts of common property conferred before the commencement date by rules made under the Sectional Titles Act, 1971, or any other vested right granted or obtained in terms of that Act, or arising from any agreement concluded before the commencement date."

14] That enquiry is facilitated by the fact that the respondents' counsel restricted their argument that Rule 31.1.5 remained unaffected by the provisions of

the 1986 Act, to the submission that it determined that the individual members of the second respondent would contribute to the maintenance costs of the lifts (as well as the other costs mentioned in rule 31.1) on a basis different to the participation quota - which in terms of the provisions of Section 24(2)(c) of the 1971 Act was the default position - and submitted that the fact that such members' financial obligations were limited and defined in that manner brought into being a legal right to make contributions on that and no other basis and constituted a "… vested right granted or obtained in terms of that [the 1971] Act …" within the meaning thereof in subsection 60(4) of the 1986 Act.

15] I am of the view that that submission does not have merit. The concept "right" has not been defined in

the 1986 Act. The term "right" is sometimes used in statutory enactments as meaning a "legal right" in the sense of the correlative to a duty or obligation and at other times in a wider sense of a legally recognised interest whether it corresponds to a legal duty or not (See: **Secretary for Inland Revenue v Kirsch** 1978(2) SA 93 (T) at 94 D – F). Despite the fact that the legislature refrained from using the concept "legal rights", I am of the view that the contextual setting in which the word "right" is used in subsection 60(4) of the 1986 Act strongly suggests that it was used in the sense of a legal right ie. a "justifiable claim on legal … grounds, to have or obtain something or to act in a certain way" or "a legal … title or claim to the possession of property or authority, the enjoyment of privileges or immunities etc" (See: **Shorter Oxford English Dictionary on**

**Historical Principles** (3rd Edition by CT Onions)).

16] As in terms of subsection 60(4) of the 1986 Act the vested rights ie. "one the title of which is complete and unconditional" (See: **D.V. Cowen: "Vested and Contingent Rights"** 1949 SALJ 404 at 406) on which the respondents' counsel placed reliance, must have been granted or obtained under the 1971 Act it, in my view, is necessary to have regard to its provisions and not those of the 1986 Act. Sections 27(1) and (2) of the 1971 Act provide that the building and the land on which it is situated, and in respect of which a body corporate has been established shall, subject to the provisions thereof, be controlled and managed by means of rules providing for the control, management, administration, use and enjoyment of sections and the common property and in terms of

Section 27(5) would bind their owners and all people occupying any sections.

17] Section 28(4) of the 1971 Act provided that bodies corporate were, subject to the provisions of that act, responsible for the enforcement of any rules and for the control, administration and management of the common property. **CG van der Merwe: Sectional Titles, Share Blocks and Time-Sharing,** volume 1, at 3 – 12 expresses the, in my view, correct opinion, that lifts form part of the common property of sectional title schemes. Section 29 of the 1971 Act imposed an obligation on bodies corporate to carry out the duties assigned to them by or under the act and to, inter alia, properly maintain the common property and keep it in a good state of repair (subsection (1)(e)); control, manage and administer

the common property for the benefit of the owners (subsection 1(j)); and keep in a state of good service, repair and properly maintain the machinery, fixtures and fittings (including elevators) used in connection with the common property.

18] Section 30 of the 1971 Act empowered bodies corporate, in the exercise of the powers conferred upon them to, inter alia, establish an administrative expenses fund sufficient for the repair, upkeep, control, management and administration of the common property; the payment of rates and taxes and other local authority charges on the buildings and land; any charges for the supply of electric current, gas, water, fuel and sanitary and other services to the building and land; any premiums of insurance; and the discharge of any duty or other obligations of a body corporate (subsection (1)(a)). Bodies corporate were empowered to require the owners of sections to make contributions to such a fund for the purposes of satisfying any claims against it (subsection (1)(b)) and to determine the amounts to be raised for such purposes from time to time (subsection (1)(c)). Subsection 30(2) of the 1971 Act provided that all contributions so levied would be due and payable upon the passing of a resolution to that effect by the trustees of a body corporate and recoverable by it from the owners of sections at the time of the passing of such a resolution by an action instituted in any court of competent jurisdiction. Section 32(b) of that act, in turn, in imperative terms placed a duty upon owners of units to, inter alia, "… pay all charges, expenses and assessments that may be payable in respect of his section". The

provisions of section 35 of that act underlined the dominance of that duty in that it provided that if a creditor of any body corporate obtained judgment against it, which remained unsatisfied despite the issuing of a writ of execution, such creditor could apply to the court which granted the judgment to have the members thereof joined in their personal capacities as a joint judgment debtors and thereafter could recover the outstanding amount thereof from such members on a pro rata basis in proportion to their respective quotas but subject to such member's right to claim a refund from the body corporate of any amount paid to such a creditor.

19] What is apparent from the aforegoing is that, as regards the expenditure incurred by bodies corporate in the discharge of their duties of controlling, managing and administering the use and enjoyment of sections and common property in sectional title schemes, those provisions of the 1971 Act to which reference have been made in the preceding paragraphs signified bodies corporate as the only parties responsible for the discharging the obligations incurred in connection therewith and not only brought

into being an obligation on the part of individual owners of sections to reimburse them for amounts so expended pro rata to their respective quotas, but also empowered them to determine the quantum of the amount to be paid by the individual owners of sections for that purpose. Those provisions, in my view, established a statutory frame-work for the creation a clearly defined debtor and creditor relationship between the individual owners of sections and the body corporate of which they were members. Rule 31.1.5 of the 1979 Rules established a formula according to which the liability of the respective owners of units in the Scheme in respect of the costs of maintaining the lifts would be calculated and, upon determination of the quantum thereof by the body corporate, created a right in its favour to demand payment thereof from the respective owners of sections. The correlative of

such right was a corresponding obligation on the part of the individual owners of sections to make payment of any amount so determined to the body corporate. In my view, the entitlement of respective owners of sections to pay the amounts so determined and no other is no more than a logical consequence of the delineation of a particular body corporate's claim and the respective owners' obligations in respect thereof and did not, as was argued by the respondents' counsel, constitute a corresponding legal right not to pay on any different basis.

20] Having arrived at the conclusion that the provisions of Sections 60(4) of the 1986 are inapplicable I proceed to consider whether the provisions of Rule 31.1.5 are irreconcilable with the provisions of Rule 31 of the Prescribed Management Rules referred to

in Section 35(2)(a) of the 1986 Act (the 1986 Rules) and are contained in Annexure 8 to the Regulations promulgated in terms of Section 55 of the 1986 Act and provides as follows: -

> "31. (1) The liability of owners to make contributions, and the proportions in which the owners shall make contributions for the purposes of section 37 (1) of the Act, or may in terms of section 47 of the Act be held liable for the payment of a judgment debt of the body corporate, shall with effect from the date upon which the body corporate comes into being, be borne by the owners in accordance with a determination made in terms of section 32 (4) of the Act, or in the absence of such determination, in accordance with the participation quotas attaching to their respective sections."

21] Section 37(1) of the 1986 Act, which delineates the functions of bodies corporate, provides inter alia, for the establishment of an administrative expenses fund sufficient in their view for, inter alia, the repair,

upkeep control, maintenance and administration of common property; the competence of requiring the owners of sections to make contributions to that fund, whenever necessary, for the purposes of inter alia, satisfying any claims of that nature against any body corporate; and authority for the raising of any amount so determined by levying contributions on owners in proportion to their participation quotas. Section 47 of the 1986 Act furthermore establishes a procedure whereby creditors who have obtained unsatisfied judgments against bodies corporate can procure payment thereof from their members in their personal capacities on a pro rata basis in proportion to their participation quotas or in terms of any determinations made pursuant to Section 32(4) of the 1986 Act. Both Sections 37(1) and 47 of the 1986 Act have almost similarly worded counter-parts in the 1971 Act. In the case of the former, Section 29 read

with section 30 and in the case of the latter, section 35. As regards the liability of owners in sectional title schemes to make contributions to administrative expenses funds or to be held responsible for the payment of unfulfilled judgment debts against bodies corporate of which they are members, section 32(4) of the 1986 Act provides as follows: -

> "(4) Subject to the provisions of section 37 (1) (b), the developer may, when submitting an application for the opening of a sectional title register, or the members of the body corporate may by special resolution, make rules under section 35 by which a different value is attached to the vote of the owner of any section, or the liability of the owner of any section to make contributions for the purposes of section 37 (1)(a) or 47 (1) is modified. Provided that where an owner is adversely affected by such a decision of the body corporate, his written consent must be obtained:"
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> (The two further provisos are not relevant for the purposes of this judgment)

Save that the reference to the numbers of the sections therein differ, the underlined passages are identical to the provisions of Section 24(3) of the 1971 Act, the implementation whereof gave rise to the passing of the 1979 Rules which encompassed Rule 31.1.5 and remained in force in terms of the provisions of Section 60(8) of the 1986 Act unless irreconcilable with present Management Rrule 31.1.

22] As the phrase "irreconcilable with" (the Afrikaans equivalent whereof is "onbestaanbaar met") in subsection 60(8) of the 1986 Act has not been statutorily defined, it must be given its ordinary everyday dictionary meaning namely "not able to be reconciled; uncompromisingly conflicting; incompatible" (Complete and Unabridged Collins English Dictionary, sv "irreconcilable"); "of

statements, ideas, etc that cannot be brought into harmony or made consistent; incompatible" (The Oxford English Dictionary); "incapable of being brought into harmony or adjustment; incompatible …" (The Random House Dictionary of the English Language (Unabridged Edition) sv "irreconcilable"); "strydig met; … onverenigbaar met" (Handwoordeboek van die Afrikaanse Taal sv "onbestaanbaar").

Bearing in mind that the present Management Rule 31.1 merely echoes the provisions of subsections 32(3)(c) and (4) of the 1986 Act, and Rule 31.1.5 is the result of the application and implementation of the almost identically worded subsections 24(2)(c) and (3) of the 1971 Act, they in my view are clearly harmonious, consistent and compatible.

23] Advocate Gassner, who appeared for the applicants, based her submission that those Rules are irreconcilable thereon firstly, that Rule 31.1.5 provides for the collection of contributions to the costs of the maintenance of lifts in the residential component of the Scheme on a basis other than the participation quotas of the respective sections; secondly, that the present Management Rule 31.4 provides for a deviation from the norm that contributions are determined on the basis of the participation quotas of sections only if the provisions of Section 32(4) have been complied with and that they have not; and thirdly that the formalities prescribed by Section 24(3) of the 1971 Act permitting a deviation from the norm that contributions are to be determined on the basis of the

participation quotas of the different sections are materially different to those required by Section 32(4) of the 1986 Act.

In my view the first ground of objection does not have substance because the provisions of Section 24(3) of the 1971 Act specifically permitted the making of rules that deviated from the default position that contributions were to be made on a basis of the participation quotas of sections. The second ground of objection, in my view, also does not have merit. Whilst the statement that the provisions of Section 32(4) have not been complied with is factually correct it is of no significance as its provisions apply only to special resolutions taken after the commencement on 1 June 1988 of the 1986 Act and Rule 31.1.5, which derives its continued existence from the savings and transitional provisions contained in Section 60 of the

1986 Act, had not been in operation before then. In my view, also the third ground of objection cannot be upheld. Whilst it must be conceded that the requirements for the passing of unanimous resolutions under the 1986 Act appear to be less stringent that those under the 1971 Act, and Section 32(4) of the 1986 Act introduced the requirement of the written consent of any owner adversely affected by any decision taken in terms thereof, subsection 60(8) of the 1986 Act envisages merely reconcilability and not absolute similarity. I in view of the aforegoing, incline to the view that Rule 31.1.5 has remained of full force and effect and that the applicant has failed to show that it is entitled to an order in terms of prayer 1 of the Notice of Motion.

24] That conclusion necessitates an enquiry into whether, as claimed in the alternative, Rule 31.1.5 of

the 1979 Rules offends against the requirements of reasonableness contemplated in Section 35(3) of the 1986 Act which provides as follows: -

> "Any management or conduct rule made by a developer or a body corporate shall be reasonable, and shall apply equally to all owners of units put to substantially the same purpose."

It is to be noted that the 1971 Act did not contain a similar provision.

25] In my view the legislature intended the provisions of Section 35(3) of the 1986 Act to operate only **in futuro**. That conclusion is predicated on the following considerations. Firstly, its compatibility with the provisions of Section 12(2)(b) and (c) of the Interpretation Act, No 33 of 1957. Secondly, its harmoniousness with the well-known rule of construction that no statute is construed so as to

have retrospective operation - in the sense of taking away or impairing vested rights acquired under existing laws - unless the legislature manifested a clear intention to that effect (See: **Bartman v Dempers** 1952(2) SA 577 (A) at 580 B – C; **Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman National Transport Commission and Others: Transnet Ltd (Autonet Division) v Chairman National Transport Commission** 1999(4) SA 1 (SCA) at 7 A). If Section 35(3) were to be construed as operating retrospectively its effect would derogate from the right vested in members of bodies corporate by Section 24(3) of the 1971 Act to have modified the liability of owners of sections to make contributions for the purposes of Sections 30(1) or 35 thereof by means of unanimous resolutions and without having

had to adhere to considerations of reasonableness and equal applicability to all owners of sections. Thirdly, the absence of any features indicative of a contrary intention in the transitional provisions of the 1986 Act. The effect of a retrospective operation of the provisions of Section 35(3) of the 1986 Act would be to introduce an additional requirement for the continued operation of rules passed under the 1971 Act. It not only appears to be logically implausible that the legislature could have intended the preservation of rules which would immediately become assailable on the basis of non-compliance with the provisions of Section 35(3), but one at the least would have expected an express reference thereto in Section 60(8) of the 1986 Act if that had been the intention.

26] I have accordingly come to the conclusion that the provisions of Section 35(3) of the 1986 Act do not find application to rules which derive their continued existence from the transitional provisions contained in Section 60(8) of the 1986 Act. Accordingly, the applicant, in my view, is not entitled to an order in terms of prayer 2 of the Notice of Motion either.

26] In the premises the application is dismissed with costs. Such costs are to be determined on a party and party basis and shall include the costs of the employment of two counsel.

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**D. VAN REENEN**