IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20645/08

In the matter between

DOLPHIN WHISPER TRADING 10 (PTY) LTD	Applicant
and	
THE REGISTRAR OF DEEDS	First Respondent
THE BODY CORPORATE, SKILLIEPARK 2	Second Respondent

JUDGMENT DELIVERED ON 23 MARCH 2009

ZONDI, J

Introduction

[1] In this application the applicant, a property developer, seeks an order reviewing and setting aside the first respondent's refusal to register the sectional plans of extension in the Sectional Title Scheme known as Skilliepark 2 and to extend the sectional title register in the Scheme to include certain sections and an order directing the first respondent to register certain sectional plans of extension and extend a sectional title register.

[2] The first respondent opposes the relief sought by the applicant. The second respondent does not oppose the application.

Factual Background

[3] It is common cause that the applicant developed a sectional title scheme known as Skilliepark 2 ("the Scheme") on erf 473 Dwarskersbos situated in the Berg River Municipality, Division Piketberg, Province of the Western Cape, in accordance with the provisions of the Sectional Titles Act, no 95 of 1986 ("the Act"). The scheme was registered in the Deeds Registry, Cape Town on 1 April 2008.

[4] It was envisaged by the applicant that the development of the Scheme was to proceed in eight phases. The first phase comprises flats and garages which were transferred to purchasers as one section.

[5] The applicant effected the second phase by amending the Sectional Title Plan relating to the first phase by the inclusion of flats on the top floor. These flats in the second phase were transferred together with a garage as one section to the purchasers on 19 June 2008.

[6] The extension of section was effected in accordance with the provisions of section 24(6) of the Act. Section 24(6) provides as follows:

"(6) An application to the registrar for the registration of a sectional plan of extension of a section, shall be accompanied by-

(a) two copies of the sectional plan of extension of a section;

(b) a schedule certified by a conveyancer of any registrable conditions imposed by the local authority or Premier when approving the extension;

(c) the sectional title deed in respect of the section to be extended;

(d) any sectional mortgage bond to which the section may be subject, together with a certificate by a conveyancer stating that there is not a deviation of more than 10 per cent in the participation quota of any section as a result of the extension, or if there is a deviation of more than 10 per cent, that the mortgagee of each section in the scheme has consented to the registration of the sectional plan of extension of a section; and.

(e) such other documents and particulars as may be prescribed".

[7] The applicant, however, decided to extend the third and fourth phases of the development in terms of section 25 in stead of section 24(6). Extending the sections in terms of section 24(6) would have involved a cumbersome and an expensive process due to the fact the there were now considerably more owners and bond holders participating in the scheme whose consent had to be obtained before the extensions could be registered.

[8] The practical implications of proceeding in terms of section 25 are that the sections in the third and fourth phases of the development could be registered without the consent of all the owners and bond holders of the sections registered in the first and second phases of the development, provided that the applicant complied with all the relevant provisions of section 25 when exercising its right to extend.

[9] It is common cause that the applicant, in its original application for the registration of a sectional plan, reserved to itself a right of extension as contemplated in section 25(1) of the Act. A copy of the applicant's certificate of real right under section 12(1)(e) of the Act is annexure "AM2(a) – (c)" to the founding affidavit and this right is reflected in paragraph 2 of the schedule of conditions imposed in terms of section 11(3)(b) as Annexure "AM3(a) – (b)" to the founding affidavit.

[10] When the applicant reserved a right of extension in terms of section 25(1) and in compliance with the provisions of section 25(2) it submitted a plan to scale of the proposed building or buildings and a plan to scale showing how the proposed building or buildings were to be divided into a section or sections. It also filed with the first respondent a schedule (Annexure "AM4" to the founding affidavit) indicating the estimated participation quotas of all the sections in the scheme after such section or sections had been added to the scheme.

[11] On 15 October 2008 and in terms of section 25(9) of the Act, the applicant lodged the necessary documents relating to the extension of its development with the first respondent and applied for the registration of its plan of extension and the inclusion of the additional sections in the sectional title register.

[12] The applicant submitted an amended participation quota (Annexure "AM7 a – b" to the founding affidavit) with its section 25(9) application. The amended participation quota differed to the original proposed participation quota (Annexure "AM4" to the founding affidavit) in that it had more sections than those reflected in annexure "Am4". The additional sections in the amended participation quota were to be from 324 – 395.

[13] According to the applicant the amendment became necessary as the purchaser in phase 4 of the development would receive transfer of two sections (a garage and a flat), each with its own participation quota, in stead of one section (a flat and a garage) reflected as one participation quota.

[14] The amendments did not involve physical changes to the building nor did they decrease the shares of the owners of phases one and two in the common property.

[15] On 22 October 2008 the first respondent rejected the applicant's section 25(9) application on two grounds. Firstly, it was rejected on the ground that there was a discrepancy between the applicant's certificate of real right and the

schedule of conditions in terms of section 11(3) of the Act, and secondly, on the basis that the amended participation quota contained more sections than what was reflected in the original participation quota.

[16] In an attempt to address concerns raised by the first respondent, the applicant's attorney of record made various representations to the first respondent on behalf of the applicant pointing out to it that there was no discrepancy between Annexure "AM2" to the founding affidavit (the developer's certificate of real right, SK 1921/2008) and Annexure "AM3" (the schedule of conditions in terms of section 11(3)(b) of the Act) as both documents indicated that Developer (the applicant) reserved his right to extend the scheme by the addition of building(s) and the horizontal and/or vertical extensions of buildings within a period of five (5) years.

[17] He also pointed out to the first respondent that Annexures "AM2" and "AM3" to the founding affidavit serve different purposes. Annexure "AM2" reflects the actual right to extend whereas Annexure "AM3" indicates the applicant's intention to reserve a right to extend in terms of section 25 of the Act.

[18] With regard to the first respondent's second ground for rejecting the applicant's deeds the applicant's attorney of record pointed out to the first respondent that section 25(2)(c) of the Act merely provides for a Schedule of estimated participation quotas. He further pointed out to the first respondent that

in terms of section 25(13) of the Act the developer may deviate from the strict compliance if there are changed circumstances which make strict compliance impracticable. He indicated to the first respondent that there were changed circumstances which necessitated amendment to the schedule of participation quotas.

The Issue

[19] The question is whether the first respondent acted unlawfully in rejecting the applicant's section 25(9) application.

Discussion

[20] It is common cause that on or about 15 October 2008, the applicant purporting to act in terms of section 25(9) of the Act, lodged a batch of documents relating to the extension of its development at the Deeds Registry, Cape Town, and thereby applied for the registration of its plan of extension and the inclusion of certain additional sections in the sectional title register.

[21] In terms of section (25)(11) of the Act when a developer has complied with the requirements of section 25 of the Act and of any other law, the Registrar of Deeds must register the sectional plan of extension, extend the sectional title register to include the sections depicted on the plan of extension and simultaneously with the registration of the sectional plan of extension issue to a

developer a certificate of registered sectional title in respect of each section depicted on the sectional plan of extension.

[22] Section 25(13) of the Act creates certain obligations on the part of a developer desiring to exercise a right reserved in terms of section 25(1) of the Act. The provisions of the section require him to erect and divide the building or buildings into sections strictly in accordance with the documents submitted to the registrar in terms of section 25(2) of the Act due regard being had to changed circumstances making strict compliance impracticable.

[23] An owner of a unit in the scheme who is prejudiced by a developer's failure to comply with the provisions of section 25(13) is not without a remedy. He may apply to the Court for an appropriate relief.

[24] The provisions of section 25(13) will be quoted in full as the dispute between the parties is about their application. It provides as follows:

> *"(13) A developer or his successor in title who exercises a reserved right referred to in subsection (1), or a body corporate exercising the right referred to in subsection (6), shall be obliged to erect and divide the building or buildings into sections strictly in accordance with the documents referred to in subsection (2), due regard being had to changed circumstances which would make strict compliance impracticable, and an owner of a unit in the scheme who is prejudiced by his failure to comply in*

this manner, may apply to the Court, whereupon the Court may order proper compliance with the terms of the reservation, or grant such other relief, including damages, as the Court may deem fit".

[25] It is also common cause that the first respondent refused to register the documents submitted by the applicant to it in terms of section 25(9) of the Act on the ground that the applicant failed to comply with the provisions of section 25(13) read with section 25(2) of the Act in that it had failed to erect and divide the building into sections strictly in accordance with the documents submitted in terms of section 25(2) and that the applicant had not established the existence of "changed circumstances" justifying non-compliance.

[26] It is common cause that the first respondent's refusal constituted an administrative action, as contemplated in section 1 of the Promotion of Administrative Justice Act, no 3 of 2000 ("PAJA") and which may be reviewed on the grounds set out in section 6 of PAJA (**Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others** 2004(4) SA 490 (CC)).

[27] *Mr Papier*, who appeared for the applicant, submitted that the first respondent acted unlawfully when it rejected the sectional plan of extension on the ground that it was not in accordance with the plans referred to in section 25(2) of the Act and secondly in determining that "the changed circumstances" had not been established.

[28] It was contended by *Mr Papier* that the Act does not require the Registrar of Deeds to make sure that the draft or sectional plan of extension corresponds with the original plan of the first phase.

[29] In support of his contention he sought to place reliance on the Deeds Registries Registrars Conference Resolution no. 4/1994 which stipulates that it is not the responsibility of a registrar to ensure that the exercise of a right of extension in terms of section 25 of the Act is in accordance with the plans submitted in terms of section 25(2) of the Act and also on the passage in an article by Lotz and Nagel in TSAR 2007.3 at 566 :

> *"Die registrateur het in Desember 1993 in 'n omsendbrief bepaal dat dit nie die plig van die akteskantoor is om hierdie konsepplanne na te gaan nie, maar dié van die plaaslike owerhied. Derhalwe is daar geen ondersoekplig op die registrateur om te kontroleer dat 'n uitbreiding van 'n deeltitelskema streng ooreenkomstig die konsepplan geskied nie (Van der Merwe 12-27). In die praktyk beteken dit dat die (deel)plan wat met die reg op uitbreiding handel (nuwe fase), nie met die konsepplan vergelyk word om afwykings te bepaal nie. Eweneens is die plaaslike owerheid prakties gesproke ook nie in só 'n kontroleposisie nie. Daar is regtens ook nie 'n plig op die landmeter-generaal om die konsepplan met die nuwe (konsep) deelplan rakende die nuwe fase te ondersoek en te vergelyk nie."*

[30] Secondly, it was contended by *Mr Papier* that the first respondent's decision to reject the applicant's section 25(9) application on the ground that there existed no "changed circumstances" was materially influenced by an error of law. He submitted that the Act does not empower the first respondent to determine what constitutes "changed circumstances" for the purpose of section 25(13) of the Act.

[31] I may as well mention that the case which was argued by the applicant slightly differed to the one made out in its founding affidavit.

[32] At para14 of its founding affidavit the applicant admits that the amended participation quota differed to the original proposed participation quota in that the amended one contained more sections than those in the original participation quota. At para 25 the applicant explains how the differences in the two participation quotas came about:

> *"the amendments of the participation quota was necessary as a result of a mere technicality in the registration process. It is therefore clear that strict compliance with the original proposed participation quota was therefore impracticable in the circumstances..."*

In other words technicality in the registration process was relied upon as a factor which rendered strict compliance with the original proposed participation quota impracticable.

[33] In the reply the applicant cites "changes in the current property market where buyers demand more fluidity and freedom in their purchase in the sectional title market" as a factor which necessitated changes to be effected to the original proposed participation quota.

[34] The general rule is that an applicant in the motion proceedings must stand or fall by his founding affidavit and the facts alleged in it and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that respondent is called upon to meet. It is not permissible to make out new grounds for an application in a replying affidavit.

[35] Be that as it may it seems, however, to be clear upon a perusal of "AM4" and "AM7(a)" to the founding affidavit that there are material differences between the two documents. Annexure "AM7(a)" now reflects additional sections numbered 324 – 395 being the garages that the applicant now seeks to transfer as a separate section and which were not previously reflected on annexure "AM4".

[36] The explanation given by the applicant is that the additional sections, relating to garages, were not reflected on the original schedule (annexure "AM4"), and that the schedule was amended "... due to the fact that the purchasers in

phase 4 of the Development (the top floor) will receive transfer of two sections (a garage and a flat), each with its own participation quota, instead of one section (a flat and a garage), reflected as one participation quota, as had been the case in respect of owners who received transfer in the first two phases of the development." The applicant then says that annexure "AM7(b)" reflects "a comparative participation quota", comparing the participation quota reflected in annexure "AM4" with the participation quota reflected in annexure "AM7(a)". The applicant then assures this Court that no physical changes have been effected to the building and that there has not been a decrease in the share of the owners of phases one and two.

[37] It is submitted by the applicant that the amendment of the participation quota was necessary as a result of a mere technicality in the registration and that in the circumstances strict compliance with the original proposed participation quota was therefore impracticable.

[38] The question is whether the applicant has shown that there were "changed circumstances" which made strict compliance with the documents lodged in terms of section 25(2) of the Act impracticable.

[39] It is clear that the Act does not define changed circumstances. In **Knoetze v Saddlewood CC** [2001] ALL SA 42 (SE) the term was held to be wide enough to

embrace changed market conditions having regard to the commercial context of the legislation and further that it was not confined to a physical state of affairs.

[40] It is also correct that the Act does not make it clear whether it is the registrar or a Court which is empowered to determine what conditions will constitute "changed circumstances".

[41] I agree with *Mr Papier's* contention that the registrar of deeds is not in a position to determine whether "changed circumstances would make strict compliance impracticable". It is for the Court to make that determination.

[42] It is correct that in terms of the Act the sections must be divided strictly in accordance with the documents submitted when the right was reserved. Where, however, it is not practicable to do so because of the existence of "changed circumstances" the Court, may on application by a developer, condone non-compliance with the provisions of the Act. The *onus* is on a developer pleading "changed circumstances" to set out fully facts indicating the nature and extent of the "changed circumstances" relied upon and how they came about.

[43] *Mr Papier* submitted that changes in the property market conditions constituted "changed circumstances" within the meaning of section 25(13) which made strict compliance impracticable. In support of his contention he sought to place reliance on **Knoetze v Saddlewood CC**, supra at 48D where the following was said:

"No developer of a sectional scheme would regard it as practicable to build units which he is unable to sell. The advice given to Mr Mendes by his marketers was that potential purchasers of units at Mirimar were no longer interested in buying double-storey units. In my opinion the term "changed circumstances" is wide enough to embrace changed market conditions, regard being had to the commercial context of the legislation".

[44] **Knoetze v Saddlewood CC,** supra is, however, distinguishable from the facts of the present case. The issue in **Knoetze** case was whether or not the admitted deviations from the original sectional plan were as a result of changed circumstances which would have made strict compliance with the original plan impracticable within the meaning of section 25(13) of the Act.

[45] The defendant in **Knoetze** case had pertinently pleaded the changed circumstances upon which he relied and these were:

- the natural slope of the relevant property would have resulted in severely limiting the sea view of the plaintiff and that of the other owners of phase 1 units and some of whom had either insisted on or agreed to the erection of single storey units so as to afford them a better sea view.

- it was no longer economically viable to build further units in strict compliance with the original section plan and;

- Natural slope of the property and the natural slope of the adjoining properties would have rendered strict compliance impractical.

[46] Expert evidence in the form of estate agents and property valuers was tendered in order to show that the erection of double storey units in accordance with the original sectional plan was no longer economically viable in the light of changed marketing conditions and on the basis of that evidence and other evidential material the Court found that there existed changed circumstances justifying a deviation from original sectional plans.

[47] In the present case the applicant presented no evidence to indicate why strict compliance was no longer possible or practical.

[48] I agree with *Mr Newdigate's* contention that there is absolutely nothing in the founding affidavit and nor were any factual circumstances provided to the first respondent, which would support the notion that there have been changed circumstances which would make it impracticable for the applicant to have complied with the original division of the relevant building into the sections described in annexure "AM4" to the applicant's founding affidavit.

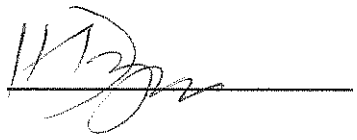
[49] In my view the first respondent cannot be said to have acted unlawfully when it refused to register the sectional plan of extension. It did not comply with

the requirements of section 25(13) and no satisfactory explanation was given for non-compliance.

[50] In the circumstances I find that the first respondent did not act unlawfully when it refused to register the applicant's section 25(9) application.

The Order

[51] The application is dismissed with costs.



ZONDI, J