IN THE CAPE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE CASE NO: 12901/2008

In the matter between:

ORIBEL PROPERTIES 13 (PTY) LTD	First Applicant
INTERACTIVE AFRICA (PTY) LTD	Second Applicant

vs

BLUE DOT PROPERTIES 271 (PTY) LTD	First Respondent
GOSSOW HARDING CONSTRUCTION (PTY) LTD	Second Respondent
RANK SHARP (PTY) LTD	Third Respondent
THE BODY CORPORATE OF THE THEBE HOSKEN HOUSE SECTIONAL TITLE SCHEME	Fourth Respondent
THE REGISTRAR OF DEEDS	Fifth Respondent
THE SURVEYOR GENERAL	Sixth Respondent
XANTHA PROPERTIES 16 (PTY) LTD	Seventh Respondent

JUDGMENT BY : JAMIE, AJ

For the Applicant(s) : Adv. D R MITCHELL SC
Adv. R D VAN HELDEN

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Date(s) of hearing : Friday 25 NOVEMBER 2008 &
Wednesday 10 DECEMBER 2008

Judgment delivered : Friday, 13 MARCH 2009

IN THE HIGH COURT OF SOUTH AFRICA [Reportable]
(CAPE OF GOOD HOPE PROVINCIAL DIVISION) [Of interest to other Judges]

CASE NO.: 12901/08

In the matter between:

ORIBEL PROPERTIES 13 (PTY) LTD	First Applicant
INTERACTIVE AFRICA (PTY) LTD	Second Applicant

and

BLUE DOT PROPERTIES 271 (PTY) LTD	First Respondent
GOSSOW HARDING CONSTRUCTION (PTY) LTD	Second Respondent
RANK SHARP (PTY) LTD	Third Respondent
THE BODY CORPORATE OF THE THEBE HOSKEN HOUSE SECTIONAL TITLE SCHEME	Fourth Respondent
THE REGISTRAR OF DEEDS	Fifth Respondent
THE SURVEYOR GENERAL	Sixth Respondent
XANTHA PROPERTIES 16 (PTY) LTD	Seventh Respondent

JUDGMENT DELIVERED ON: 13 MARCH 2009

JAMIE AJ:

[1] This matter concerns a sectional title development in Mill Street, Gardens, Cape Town. In particular it concerns section 401 of the Thebe Hosken House Sectional Title Scheme. The First Applicant is the registered owner of section

401 while the Second Applicant is the occupier thereof. Because of the commonality of their interest in this matter, I shall refer to them as "the Applicants". The First Respondent is the developer of the scheme. The Third Respondent, who together with the First Respondent is the only Respondent to oppose the application, occupies section 302, immediately below section 401.

[2] The principal relief sought by the Applicants is an order:

> *"2.1 Declaring void, alternatively invalid and unenforceable, the purported real right of extension registered in favour of the First Respondent by the Fifth Respondent on or about 28 November 2007 in respect of the common property adjacent to section 401 of the Thebe Hosken House Sectional Title Scheme (SS 846/2007) ("the scheme") and which is identified as the highlighted area on the plan annexed as "LS7" to the Applicants' founding affidavit ("the plant area");*
>
> *2.2 Declaring void, alternatively invalid and unenforceable, the Sixth Respondent's approval of the subdivision of section 301 of the scheme in terms of which sections 302, 303 and 304 of the scheme ("the subdivision sections") were created and depicted on an approved amended sectional plan of subdivision (SG drawing number D238/2008, dated 8 May 2008)."*

[3] In addition to the aforementioned relief Applicants seek interdictory relief preventing the First Respondent from transferring to the Third Respondent any real rights that the First Respondent contends it has to extend the scheme to incorporate the plant area.

[4] Finally, Applicants seek an order directing the First and Second Respondents (the latter being the contractor) to demolish the brick wall constructed on the common property immediately adjacent to the First Applicant's section in contravention of the Sectional Titles Act No. 95 of 1986 ("the Act"), the scheme's management rules and the rights granted to the First Applicant in terms of the sale agreement with the First Respondent.

[5] The Fifth and Sixth Respondents are, respectively, the Registrar of Deeds and the Surveyor-General.

[6] As will be apparent from what I have set out above, the application was brought without reference to the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA"). At the commencement of the hearing I enquired from counsel whether this matter was not one that was subject to PAJA. The matter then stood down for counsel to consider their positions. At the recommencement of the hearing, Applicant, who was represented by Mr Mitchell SC and Mr van Helden, submitted that it was not necessary to decide whether or not the matter was governed by PAJA. In any event, however, Applicants' submitted that PAJA was no bar to the relief sought, which could and should be considered as relief sought in terms of sections 6(2)(a)(i), 6(2)(b), 6(2)(f)(i) and 6(2)(f)(ii) of PAJA.

[7] However, and it would appear, *ex abundante cautela*, the Applicants lodged a conditional application in terms of section 9 of PAJA to extend the period of 180 days within which the application for review under PAJA had to be brought.

[8] The First Respondent, not unsurprisingly, adopted with enthusiasm the Court's suggestion that PAJA might be applicable and further argued that there was no basis for an extension of the 180 day period within which an application for review under PAJA had to be brought, and for this reason submitted that the application fell to be dismissed.

[9] During argument Mr Mitchell submitted that, should the invocation of PAJA mean that the Court had a discretion as to whether or not to grant the relief, then he would submit that PAJA was not of application. Given the view I take of the matter I consider it necessary to decide, at the outset, whether PAJA applies to the impugned conduct of, respectively, the Registrar of Deeds and the Surveyor-General. I will accordingly commence with this question.

Does PAJA apply to the impugned conduct of the Fifth and Sixth Respondents?

[10] Section 1 of PAJA defines an administrative action as-

> "*Any decision taken, . . . , by –*
>
> *(a) an organ of state, when-*

(i) . . . ;

(ii) exercising a public power or performing a public function in terms of any legislation;

. . . which adversely affects the rights of any person and which has a direct, external legal effect, ...”

[11] Significantly, a decision for the purposes of PAJA is defined as-

“*Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-*

. . .

(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

(c) issuing, suspending, revoking or refusing to issue a license, authority or other instrument;

(d) imposing a condition or restriction;

....”

[12] Section 11(2) of the Act provides as follows:

"*When making application for the opening of a sectional title register and the registration of a sectional plan, a developer may in the schedule referred to in subsection (3)(b) impose registrable conditions.*"

[13] Section 25(1) provides as follows:

"*A developer may, subject to the provisions of section 4(2), in his application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11(2), the right to erect and complete from time to time, but within a period stipulated in such condition, for his personal account-*

(a) a further building or buildings;

(b) a horizontal extension of an existing building;

(c) a vertical extension of an existing building,

on a specified part of the common property, and to divide such building or buildings into a section or sections and common property and to confer the right of exclusive use over parts of such common property upon the owner or owners of one or more sections."

[14] Section 25(2) provides as follows:

"*In the event of a reservation in terms of subsection (1), the application for the registration of the sectional plan shall, in addition to the documents referred to in section 11(3), be accompanied by-*

(a) a plan to scale of the building or buildings to be erected and on which-

(i) the part of the common property affected by the reservation;

(ii) the siting height and coverage of all buildings;

(iii) the entrances and exits to the land;

(iv) the building restriction areas, if any;

(v) the parking areas;

(vi) the typical elevation treatment of all buildings, are indicated.

(b) a plan to scale showing the manner in which the building or buildings to be erected are to be divided into a section or sections and any exclusive use areas;

(c) a schedule indicating the estimated participation quotas of all the sections in the scheme after such section or sections have been added to the scheme;

(d) particulars of any substantial difference between the materials to be used in the construction of the building or buildings to be erected and those used in the construction of the existing building or buildings;

(e) particulars of such applicable expenses as are specified in section 37(1)(a), which will be borne by the developer from the date of

establishment of the body corporate until the sectional plan of extension is registered;

(f) the certificate of real right which is to be issued in terms of section 12(1)(e); and

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

[15] Section 25(4) provides as follows:

"*A right reserved in terms of subsection (1) or vested in terms of subsection (6), and in respect of which a certificate of real right has been issued –*

(a) shall for all purposes be deemed to be a right to urban immovable property which admits of being mortgaged; and

(b) may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right: . . . ." (Emphasis supplied).

[16] Section 25(11) provides as follows insofar as is relevant:

"*When the requirements of this section and of any other law have been complied with, the registrar shall-*

(a) register the sectional plan of extension;

(b) extend the sectional title register to include the sections depicted on the plan of extension;

(c) simultaneously with the registration of the sectional plan of extension issue to the developer, his or her successor in title or the body corporate, as the case may be, a certificate of registered sectional title in respect of each section depicted on the sectional plan of extension and its undivided share in the common property, subject to any mortgage bond registered against the title deed of the right of extension, furnish the local authority concerned with a copy of such plan of extension and notify the Surveyor-General of the registration of such plan of extension, and thereupon the Surveyor-General shall amend the original sectional plan and the deeds office copy of the sectional plan to reflect such extension;

....”

[17] Finally, section 25(13) provides as follows:

> “*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.”*

[18] As appears from what is said above, the Registrar’s principal duties, when it comes to the extension of a scheme, is to satisfy himself that the requirements of section 25 and any other law have been complied with, and then to register

the sectional plan of extension and thereafter to issue the relevant certificates of registered title in respect of the extension. It is furthermore clear from section 25(4) that it is only upon the issuing of the certificate of real right that the right of extension becomes a right in immovable property which is capable of being transferred.

[19] Furthermore, the right of extension is characterised in the Act, with reference to section 11(2), as the imposition of a registrable condition.

[20] On a plain reading of the relevant provisions of the Act then, regard being had to the definition of a decision in PAJA, the registration of a real right of extension, and the issuing of a certificate pursuant thereto, which gives outside manifestation to the essentially internal process of registration, amounts to administrative action as defined in PAJA.

[21] This conclusion is fortified by an examination of the case law.

[22] In Gamevest (Pty) Ltd v Regional Land Claims Commissioner[1] the Court dealt with an application for the restitution of land rights in terms of the Restitution of Land Rights Act 22 of 1994. In terms of section 6(1)(a) of that Act the Commission was required to receive and acknowledge receipt of all claims for the restitution of land lodged in terms of the Act.

[1] 2003(1) SA 373 (SCA)

[23] In terms of section 11(1) of the Restitution Act, and once a claim had been lodged, the Regional Land Claims Commissioner had to satisfy himself that the claim had been lodged in the prescribed manner, was not precluded by the provisions of the Act, and that the claim was not frivolous or vexatious, whereafter notice of the claim had to be published in the Government Gazette.

[24] In the application the Applicant contended that the receipt of a claim by the Commission in terms of section 6 constituted administrative action and that it was accordingly encumbent upon the Commission, even at the lodgement stage, to take a decision as to whether to accept the claim, which decision could be reviewed and set aside.

[25] The Court rejected this argument and held that, at the lodgement stage, the duties of the Commission or its representatives were formal in nature and that there was no discretion to refuse to accept receipt of a claim, and accordingly no administrative decision that could be reviewed[2]. The Court found however that, at the stage that the requirements of section 11 came to be considered, the Commissioner did exercise a discretion and that his decisions amounted to administrative action.[3]

[26] Mr Mitchell submitted that the Registrar carried out a purely formal function and that the reservation was the act of the developer. He based this submission on

[2] At para 7.
[3] At para 7. The notion that the existence of administrative action depends on whether there is an element of discretion has been criticised. See for example Hoexter Administrative Law in South Africa at p. 183, who points out that the exercise of even so-called mechanical powers can amount to administrative action.

the wording of section 25(1). I am unable to agree. I have already referred to the fact that, in terms of section 25(4), it is only upon the issue of a certificate, that the right reserved attains the status of a real right. Furthermore, and before he may register the right and issue the certificate, the Registrar must apply his mind to what is required in terms of section 25(11).

[27] In my view the requirement of section 11 of the Restitution Act that the Commissioner satisfy himself as to certain peremptory statutory requirements is analogous to the position when it comes to section 25(11) of the present Act where the Registrar must be satisfied that the requirements of the section and any other relevant law have been complied with before he may issue the relevant certificate of extension.

[28] In Pieterse NO & Another v The Master & Another[4] Waglay AJ (as he then was) held that the issuing of a certificate of completion of duties by a liquidator and the consequent cancellation of the security lodged amounted to administrative action. The relevant portion of section 385(1) of the Companies Act 61 of 1973 provided for the Master to issue such a certificate once the liquidator has "*performed all the duties prescribed by the Act and complied with all the requirements of the Master . . .*"

[29] Once again, the wording of the relevant empowering provision is analogous to that which we are dealing with here.

[4] 2004(3) SA 593 (C)

[30] Finally, in Maleka v Health Professions Council of South Africa[5] the Court found that even the correction of an error in the maintenance of medical records amounted to administrative action. The basis of the finding was the fact that the Registrar of the Council was under a statutory duty to keep accurate records, he had issued a certificate of status as a private practitioner to the applicant, and now sought to withdraw the certificate on the basis that there had been an internal error which had led to the issue of the certificate in the first place. The Court found that the attempt to cancel the registration and thus render invalid the certificate that had been issued was not analogous to the correction of an in-house mistake in-house, before anyone became aware of it and before rights were affected, but was an action taken consequent thereto and which had legal consequences, namely disentitling the Applicant from practising as a medical practitioner, and was thus susceptible to judicial review under PAJA.

[31] Similarly, here the issue of a certificate of real right has important consequences. The right reflected therein becomes a right in immovable property, capable of being mortgaged and transferred. It also effects, or may effect, a change in the rights and obligations of owners of sections within the scheme.

[32] Accordingly, and for the reasons aforestated, I find that the actions of the Registrar of Deeds in terms of section 25 of the Act, and the actions of the

[5] [2005] 4 All SA 72 *(EC)

Surveyor-General which flow therefrom, amount to administrative action for the purposes of PAJA.

[33] I now turn to deal with the question of whether the aforementioned decisions of the Registrar of Deeds and the Surveyor-General ought to be set aside in this application.

The application to review and set aside the decisions of the Fifth and Sixth Respondents

[34] It was common cause at the hearing of the matter that there had only been partial compliance with section 25(2) on the part of the First Respondent. In particular, there was no plan to scale of the building or buildings to be erected (s 25(2)(a)), no plan to scale showing the manner in which the building or buildings to be erected were to be divided into a section or sections and any exclusive use areas (s 25(2)(b)), no schedule indicating the estimated participation quotas of all the sections in the scheme after the extension (section 25(2)(c)), and no particulars of the expenses to be borne by the developer as a result of the extension (s 25(2)(e)).

[35] The question is what are the legal consequences of these shortcomings in the documentation that was lodged with the Fifth Respondent.

[36] Contrary to the argument adduced by Mr Mitchell, it has never been the invariable position in our law that failure to comply with peremptory statutory requirements results in a nullity. In Standard Bank v Estate Van Rhyn[6] Solomon JA held that the consequence of non-compliance with the statutory requirement that all cheques written out by executors state the cause of payment and the names of the persons in whose favour they are drawn, was not to invalidate the cheques. Instead, the legislature was satisfied with the criminal penalty imposed upon an executor who was in breach of the peremptory requirements of the Act at issue there.[7]

[37] The *locus classicus* with regard to the compliance required by a statute is to be found in Maharaj v Rampersad[8] where Van Winsen AJ expressed himself as follows:

> "*The enquiry, I suggest, is not so much whether there has been 'exact' 'adequate' or 'substantial' compliance with [the] injunction but rather whether there has been compliance therewith. This enquiry postulates an application of the injunction to the facts and a resultant comparison between what the position is and what, according to the requirements of the injunction, it ought to be. It is quite conceivable that a Court might hold that, even though the position as it is is not identical with what it ought to be, the injunction has nevertheless been complied with. In deciding whether there has been a compliance with the injunction the object sought*

[6] 1925 AD 266.
[7] At 274 – 275. See also Stadsraad van Vanderbijlpark v Administrateur, Transvaal 1982(3) SA 166 (T) at 191 – 193 and Municipality of Butterworth v Bezuidenhout 1986(3) SA 543 (Tk).
[8] 1964(4) SA 638(A)

to be achieved by the injunction and the question of whether this object has been achieved are of importance."[9]

[38] This approach was endorsed by the Supreme Court of Appeal in Weenen Transitional Local Council v Van Dyk[10] where the Court said the following as to the correct approach:

> "*It seems to me that the correct approach to the objection that the appellant had failed to comply with the requirements of s 166 of the ordinance is to follow a common-sense approach by asking the question whether the steps taken by the local authority were effective to bring about the exigibility of the claim measured against the intention of the legislature as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular. ... Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have* a posteriori, *not* a priori *significance. The approach described above, identified as '... a trend in interpretation away from the strict legalistic to the substantive' by Van Dijkhorst J in Ex parte Mothuloe (Law Society, Transvaal, Intervening) 1996(4) SA 1131 (T) at 1138 D – E, seems to be the correct one and does away with debates of secondary importance only."* (Authorities omitted)[11]

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[9] At 646 C – E.
[10] 2002(4) SA 653 (SCA).
[11] At para 13.

[39] A similar, purposive, approach has been adopted by the Constitutional Court in African Christian Democratic Party v Electoral Commission[12] where the Court, per O'Regan J, expressly found that the enquiry as to whether there had been compliance with a provision in the Local Government Municipal Electoral Act 27 of 2000, that a prescribed deposit be paid, had to be undertaken in the light of the purpose of the provision in question.[13]

[40] In the present case, and notwithstanding the non-compliance with section 25, the fact of the matter is that the reservation of the right of extension in respect of the so-called plant area adjacent to section 401 of the scheme occurred at the express instigation of the Applicants. The facts in this regard that I must accept for the purpose of motion proceedings for final relief, are the following:

40.1 When the Applicants first considered purchasing section 401, their representatives acquainted themselves with the section. They immediately noticed certain opaque windows on the eastern wall of the section. These windows could not be opened as the area beyond it contained air conditioning plant and ducting and constituted what is referred to in the papers as "*the plant area"*.

40.2 The deed of sale concluded by the parties expressly excluded the so-called plant area. Accordingly, it was always understood that the plant

[12] 2006(3) SA 305 (CC).
[13] At para 25.

area did not form part of the section, although the Applicants were interested in acquiring and redeveloping it for their exclusive use.

40.3 The air conditioning plant and ducting referred to, although not in use at the time that the Applicants purchased section 401, had been utilised in the past to supply air conditioning to the floor below. The plant area was at all material times *de facto* part of the area below given that there was no access thereto from what became section 401, and because the plant area was separated from the area below by what were in essence thin ceiling boards, rather than a permanent separation.

40.4 Notwithstanding the fact that the plant area did not form part of section 401, the Applicants made it clear that they were interested in acquiring exclusive use rights in respect of the area. For this purpose they, *inter alia*, presented the First Respondent with plans depicting their proposed usage of the area which included the casting of a concrete slab to replace the aforementioned ceiling boards.

40.5 It is the First Respondent's case that the whole question of a right of extension being reserved by the First Respondent in order to accommodate the Applicants' desire to obtain exclusive use over the plant area was extensively canvassed by the First Respondent's conveyancer with the Applicants' representatives.

40.6 In particular, the First Respondent's conveyancer has stated under oath that, prior to the registration of the right of extension, the fact that such a right was to be reserved on behalf of the First Respondent was specifically discussed with the Applicants' representative, Ms Shah, the latter however indicating that she did not wish to pay for the acquisition of the plant area, this in response to a suggestion by the conveyancer that the Applicants make an offer in respect of the area. It was pointed out that the right was being reserved expressly in order to accommodate the Applicants' desire to obtain exclusive use rights in respect of the area.

[41] On the basis of the above facts, I now return to a consideration of the consequences of the non-compliance with section 25 that, it is common cause on the papers, occurred.

[42] The purpose of the provisions of section 25(2) of the Act are, in my view, clear. Where a developer is reserving a right to extend the scheme by erecting further buildings or extending existing buildings, the required information has to be conveyed, primarily for the protection of existing owners of sections. It would be of the greatest moment to purchasers or owners in the original scheme to know, in as much detail as possible, what the intentions of the developer are for the future as these would, or might, impact upon their use and enjoyment of the sections that they have purchased.

[43] In the present case, the position is however somewhat different. Here, and regardless of whether or not what is being proposed by the incorporation of the plant area into an exclusive use area can be construed as the erection or extension of a building for purposes of section 25(1), a proposition that was however accepted by the Fifth Respondent, and by the First Respondent for that matter, the fact of the matter is that the actual physical alteration is of a very limited nature and scale. Thus, had the Applicants achieved their purpose of acquiring exclusive use rights in relation to the plant area, they would have cast a concrete slab to form a floor and would obviously have obtained access from section 401 onto such area as was now underlaid by the new concrete floor. On the other hand, and if, as is now the case, the plant area is to be incorporated into the unit below, the resultant area might or might not be used as a double volume area, alternatively the owner of the unit below could gain access to the upper level by one or other means which might include, I would imagine, the erection of a floor of some sort.

[44] In either case however, the actual physical alterations would be of a minimal nature and would not, on any basis set out in the papers, materially affect any other of the owners of sections in the scheme. Thus, on the facts of this case, the non-compliances with section 25 are of little practical consequence.

[45] Accordingly, and on the facts that I must accept for present purposes, the Applicants, through their representatives, were aware of the intention to reserve the right to incorporate the plant area. Indeed, there was no other way for them

to obtain the desired exclusive use. Furthermore, they were entirely amenable to this being done, except that they were not prepared to pay for the plant area. It was on this point, and not because of any non-compliance with section 25, that the parties could not reach agreement.

[46] Subsequently, as is apparent from e-mail correspondence between the parties, the Applicants were aware of the fact that the First Respondent, given its inability to reach agreement with the Applicants, was now in negotiation with the Third Respondent, being the owner of the section below the plant area, for the area to be incorporated into that section. It was this knowledge that finally spurred the Applicants to make an offer for the plant area. The response to this however by the First Respondent was that it would first have to complete negotiations with the Third Respondent, although, if these failed to deliver agreement, the Applicants' offer would be considered.

[47] In the light of the above, it would to my mind serve no purpose at all, and in fact would only lead to the plant area remaining a "*dead area"*, to insist that, because of the relative minor non-compliances with section 25, that the right of extension should be impugned. I say a "*dead area"* as, practically, the plant area could only be incorporated into section 401 or section 302.

[48] On the facts of this case, the Applicants knew, or should have known, that a right of extension could only be registered together with the registration of the scheme as such. Accordingly, and once the scheme had been registered,

allowing transfer to the First Applicant, the Applicants must have known, and on the facts did know, that a right of extension in respect of the plant area had been registered. The location of the plant area, and its proposed utilisation, was primarily, if not exclusively, of interest at that point to the Applicants. The Applicants also knew precisely what utilisation of the plant area by themselves would encompass, and accordingly suffered no prejudice whatsoever as a result of the non-compliances with section 25(2). In the circumstances, and in the exercise of the discretion that I have under PAJA[14], I accordingly decline to review and set aside the administrative decisions of Fifth and Sixth Respondents respectively insofar as they pertain to the reservation of the right of extension in respect of the so-called plant area.

[49] Before leaving this question I should mention two related aspects that were argued before me.

[50] Firstly, the First Respondent maintained that Applicants had no *locus standi* to bring the application in relation to the reserved real right, and argued that only the body corporate could do so. This argument was premised on sections 36(6) and 41(1) of the Act. The Applicants resisted the contention and argued on a number of bases why they, as opposed to the general body of sectional owners represented by the body corporate, had a legal interest in these proceedings. In the light of the conclusion that I have reached in relation to the principal issue however, as discussed above, I find it unnecessary to decide the

[14] Section 8(1) of PAJA requires me to make an order that is just and equitable.

locus standi issue and I shall assume, without deciding, that the Applicants have the necessary standing to bring these proceedings.

[51] Finally, the Applicants applied, as I have already said, for an extension of the period within which a PAJA review application had to be brought. For present purposes, section 7(1) of PAJA required the application to be brought without unreasonable delay and not later than 180 days after the date that the person concerned became aware of the administrative action and the reasons for it or might reasonably have been expected to have become so aware.

[52] The present application was launched in August 2008. The First Respondent contended that there had been an unreasonable delay, exceeding the 180 days referred to in PAJA, given that the registration of the real right occurred in November 2007. The Applicants countered this argument by submitting that it was only in May 2008 that the Applicants' conveyancer ascertained the defects complained of, and that, in all the circumstances, the application was brought within a reasonable period thereafter.

[53] In terms of section 9(2) of PAJA I may extend the aforesaid period of 180 days where the interests of justice so require. This is a wide discretion governed by what, in all the circumstances of the particular matter, would be in the interests of justice. In this particular case, I do not regard the period between May and August 2008 as being excessively long. The principal reason however why I am inclined to grant an extension of the 180 day period until the date of

institution of the proceedings is that none of the parties, and this includes the Registrar of Deeds, was aware of the defects in the process of registering the aforementioned real rights. Given this circumstance, it would to my mind be unjust to have expected the Applicants, prior to May 2008, to have been put on their guard and to have made enquiries at the Deeds Office in order to ascertain whether or not there had been proper compliance with section 25. On the facts found by me, the Applicants understandably were quite happy with the reservation of the real right until, of course, they realised that it would no longer accrue to them.

[54] In the circumstances, I will extend the period of 180 days referred to in section 7(1)(b) until the date of institution of these proceedings, namely 12 August 2008.

[55] I now turn to the remaining issues in this matter.

The application for the demolition of the brick wall

[56] Part of the relief sought by the Applicants related to a brick wall that had been constructed immediately adjacent to section 401. The facts in regard to the wall, once again on the basis that has to be accepted for purposes of final relief in motion proceedings, are these.

56.1 As already stated, the eastern wall of section 401 was observed by the Applicants' representatives at the initial inspection to contain opaque windows which could not, or at least could not easily, be opened.

56.2 The wall containing these windows comprised the exterior boundary of section 401.

56.3 During June 2007 it was agreed between the parties that the opaque windows might be replaced, at the Applicants' expense, by clear glass windows. It was expressly agreed that the replacement of the windows would be entirely without prejudice to any of the First Respondent's rights, and specifically that the agreement conferred no more rights than existed in favour of the Applicants while the windows were in their original state.

56.4 Although it appears that the Applicants also inserted sliding doors in the wall, the First Respondent denies having agreed thereto and says that these doors do not comply with building regulations.

56.5 There is a dispute between the parties as to whether the replacement of the windows led to an increase in the natural flow of light into section 401. To the extent that this dispute needs to be resolved, it would have to be resolved on the basis of the First Respondent's version,

particularly given the fact that there was no agreement in relation to the sliding doors.

56.6 Some time after the installation of the aforementioned windows and doors, it came to the First Respondent's attention that these constituted a fire hazard and also possibly a safety hazard. In order to secure the position the First Respondent then erected a brick wall immediately adjacent to the doors and windows, on what was common property as it was built in the so-called plant area.

[57] Mr Mitchell advanced a number of reasons why the construction of the brick wall was unlawful, and thus why it should be demolished.

[58] Firstly, it was argued that the construction of the wall was undertaken without having obtained the prior approval of the trustees of the body corporate, contrary to rule 9.1 of the Conduct Rules registered in respect of the scheme. The difficulty with this contention is that, per excellence, this would be a breach, if such it was, that would be exigible at the instance of the trustees and the body corporate, and not of an individual owner of a section.

[59] Section 41 of the Act provides expressly for the circumstances whereunder an individual owner may institute proceedings where it is alleged that both he and the body corporate have suffered damages or loss or has been deprived of any benefit arising from the operation of the scheme. In particular, and where the

body corporate has not instituted proceedings, an individual owner may do so but only after having given the notice referred to in section 41(2)(a) to the body corporate, and the body corporate having failed to comply therewith, as provided for in section 41(2)(b). Furthermore, and before proceedings may be instituted by an individual owner, the Court must be approached for the appointment of a provisional curator *ad litem*, and only in the event of a positive report, may the Court issue directions as to the institution of proceedings by the individual owner in the name of the body corporate.

[60] It is clear that none of these provisions have been complied with, and accordingly the cause of action cannot be based on rule 9.1 of the aforementioned Conduct Rules.

[61] In a second, and presumably alternative, string to his bow Mr Mitchell relied on clause 1.3 of the sale agreement between the First Applicant and the First Respondent, and which required the First Applicant's prior consent to alterations. The problem with this argument though is that it pertains only to alterations to the premises purchased, namely section 401, not to the plant area which, as we have already seen, falls outside section 401. This basis for the order requiring the demolition of the wall can thus also not succeed.

[62] The third argument advanced by the Applicants was that, by agreeing to the installation of windows and doors, at great expense to the Applicants, the First Respondent must have tacitly agreed that it would not thereafter negate the

utility of the renovation by constructing a brick wall adjacent to the newly installed windows and doors. This argument too, self-evidently, cannot succeed given the requirement that the First Respondent's version be accepted, namely that the indulgence given to the Applicants was made expressly without prejudice to the First Respondents rights. In any event, as we have seen, there is also a dispute as to whether there was any permission given in relation to the sliding doors. Accordingly, I cannot find there to have been any tacit agreement as contended for by the Applicants, and which would render the subsequent erection of the wall unlawful or a breach of contract.

[63] Finally, the Applicants relied on section 25(13) of the Act which, as we have seen, permits an owner of a section who is prejudiced by the developer's failure to comply with the terms of any reserved right, to approach the Court for an order of proper compliance with the terms of the reservation, or for such other relief, including damages, as the Court may deem fit.

[64] In my view, the qualification contained in section 25(13), namely changed circumstances which would make strict compliance impracticable, is of application. As we have seen from the facts that I have outlined, and on the First Respondent's version, the necessity to erect the brick wall arose because of the installation of windows, and principally glass sliding doors, thereby replacing what had previously been the solid wall. It will be recalled that the First Respondent denied having agreed to the installation of the doors, as opposed to the windows. The First Respondent also had no knowledge as to

whether, and did not accept that, the necessary municipal approvals had been obtained for these alterations.

[65] However, the alterations having been effected, the First Respondent was advised that they constituted both a safety and a fire hazard, and accordingly erected the wall in order to put an end to the safety and fire risks presented as a result of the alterations. In my view, the aforesaid risks constitute changed circumstances which made strict compliance with the terms of the reservation impracticable. Accordingly, the First Respondent was excused from such strict compliance, in relation to the erection of the wall. Accordingly, and on this basis too, the relief in relation to the brick wall cannot be granted.

Application to reopen the Applicants' case

[66] After I had reserved judgment in this matter, the Applicants launched an application to reopen their case. The purpose of the application was to submit in evidence a further report received from the Registrar of Deeds after I had reserved judgment.

[67] In this report the Registrar of Deeds expressed the view that neither the Act or Deeds Office practice or procedure allowed for a discretionary departure from the requirements of sections 25(2)(a) to (g) of the Act.

[68] The Registrar further stated that the Deeds Office does not examine the plans referred to in section 25(2)(a) of the Act but files same for recordal purposes.

[69] The question of whether a further set of affidavits should be permitted is essentially a question of fairness to both sides. The Applicants have furnished a satisfactory explanation for the late tendering of the evidence, the First Respondent has elected not to file an affidavit in response thereto, and I am satisfied that no question of prejudice to it arises. The evidence is also, at least potentially, material. I will accordingly allow the late report by the Registrar of Deeds, which report is dated 18 December 2008.

[70] Having considered the new evidence, I have no reason to depart from the conclusions set out above. Firstly, I have concluded, for the reasons set out above, that the Registrar exercises a discretion when carrying out the functions referred to in section 25(11) of the Act. The Registrar's views of his powers cannot, with respect, affect the legal position. Secondly, the fact that the Registrar did not exercise a discretion to condone the non-compliances in this matter is not a new fact but was in fact common cause. It certainly is a departure point of this judgment, as appears from paragraph 53 above.

[71] The real issue is not whether the Registrar may condone non-compliance with the Act, an issue that does not arise here, but whether a Court should set aside the Registrar's actions for non-compliance with the Act. That is not a question of Deeds Office practice or procedure, but one of statutory interpretation.

Remaining issues

[72] Applicants also sought interdictory relief in various forms. All of this relief was however premised on there being a legal right that the Applicants were able to insist upon and enforce. As I have endeavoured to demonstrate, there is no such right, and accordingly none of the subsidiary relief can be granted.

Order

[73] For the aforesaid reasons, there will accordingly be an order as follows:

73.1 The period of 180 days referred to in section 7(1)(b) of the Promotion of Administrative Justice Act 3 of 2000 and within which this application was to be brought is extended to 12 August 2008;

73.2 The application is dismissed with costs.

JAMIE AJ