IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 15448/2007

DATE: 11 FEBRUARY 2011

In the matter between:

THE BODY CORPORATE of "THE AVENUES" SCHEME, NO SS120/1987 Applicant

and

BARNEY HURWITZ 1st Respondent

In his capacity as the sole trustee for the time being of The Hurwitz-Smilg Sea Point Trust

LAWRENCE NEIL MILLER 2nd Respondent

In his capacity as the sole trustee for the time being of The High Level Trust

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J U D G M E N T

DESAI, J:

In these proceedings the Body Corporate of a sectional title Scheme, principally seeks a declarator that all rights of extension in respect of the Scheme rest in the Body Corporate and not in the trusts, which together were "the developer".

The relief sought by the Body Corporate is resisted by the sole trustee of one of the trusts, while the other abides the decision of this court.

The applicant is the Body Corporate of "The Avenues" Scheme No SS120/1987 ("the Scheme"). On 6 July 1987 a sectional plan was registered and a sectional title register opened in the Cape Town Deeds Office in terms of section 8 of the Sectional Title Act 66 of 1971 (as amended) ("the 1971 Act").

The first respondent is the sole trustee for the time being of The Hurwitz-Smilg Sea Point Trust and the second respondent is the sole trustee for the time being of The High level Trust. The first respondent opposes the relief sought in this application.

The land to which the Scheme relates is located in High Level Road, Fresnaye, Cape Town and is described as the Remainder of Erf 1651, Fresnaye. The Scheme itself consists of sections, exclusive use areas and common property. There are 54 units, incorporating residential sections, 44 units incorporating garage sections and 2 units incorporating storeroom sections and 2 units incorporating sections for the accommodation of domestic servants. They are referred to in the plan and rules as "maids rooms".

The sectional plan in respect of the Scheme was not endorsed in terms of section 5(3)(d)(i) of the 1971 Act with any servitude, other real right or condition reserving rights to the trusts as developer. The first sheet of the sectional plan in fact contains no reference to terms and conditions imposed by the trusts as developer relating to possible development. There are, however, certain real rights registered over the property in favour of The Sisters of the Holy Family in South Africa ("the Sisters").

What precipitated this application was the following.

On or about 18 April 2005 the applicant concluded an agreement with a Mr Blatcher for the sale of a portion of applicant's right of extension in the scheme, being that part of the common property which is commonly referred to as "the monastery site" and which is the subject of the afore-mentioned servitudes in favour of the Sisters. The sale was subject to the applicant obtaining the written consents of all its members as required by section 25(6) of the Sectional Titles Act 95 of 1986 ("the 1986 Act"). The consents of all members other than the respondents were duly obtained. Contending that the extension rights in question vested in the trusts, the respondents have refused to furnish their consents.

It appears that Mr Blatcher remains willing to proceed with the sale and agreement, which has been agreed with the Sisters for the cancellation of their rights in the event of the sale to Mr Blatcher being implemented. The Sisters, in any event, have already relocated. Furthermore the applicant will have a 30% participation in the development planned by Mr Blatcher for the portion of the common property to which the proposed sale relates. An agreement in principle has been reached by the parties in this regard.

I refer briefly to the relevant statutory framework. Insofar as it may be relevant to the applicant's case, I note certain sections of the 1971 Act (which was repealed by the 1986 Act). Section 5 thereof made provision for the developer, after the approval of the Scheme by the local authority for the opening of a sectional title register "in respect of the land and building or buildings in question and for the registration of a sectional plan relating to the Scheme". The plan was to be endorsed with the servitudes and other rights and conditions burdening or benefiting the land "or as conditions of sectional title imposed by the developer or the local authority or the administrator" [see section 5(3)(d)(i)]. Section 18 of the 1971 Act dealt specifically with the extension of the building or buildings in respect of which a sectional plan has been

registered. Subsection (1) states that:

> "the developer, or if the developer has ceased to have any share in the common property of the Body Corporate, with the consent in writing of all the owners of sections and all holders of mortgage bonds, shall prepare a scheme in respect of the extension and in terms of section 4 submit that scheme to the local authority for approval...."

The regulations promulgated under the 1971 Act require conditions burdening or benefiting the land, to be set out on the first sheet of the sectional plan.

The 1986 Act came into force on 1 June 1988. Though it repealed the whole of the 1971 Act, it recorded that: "a right of extension of a building acquired in terms of section 18 of the Sectional Titles Act, 1971, shall be completed or exercised in terms of that Act as if it has not been so repealed." [See section 60(1)].

The aforementioned section 60(1) of the 1986 Act was amended with effect from 3 October 1997 by the Sectional Titles Amendment Act 44 of 1997. The effect of the said amendment was, *inter alia*:

1. if the right of extension still vests in the developer, a certificate of real-right as contemplated in section 25 of the 1986 Act, had to be issued upon application by the developer; and

2. the certificate could not be issued without the consent of all owners of units in the scheme, save that the consent could not be unreasonably withheld; and

3. the certificate had to be obtained within a period of 24 months.

The 24 month period was subsequently extended to 31 December 2001. No further extensions were promulgated.

As I have already indicated, the first sheet of the sectional plan did not contain any conditions imposed by the trust as developer, nor were any real rights registered with the property, save those in favour of the Sisters. However, a set of rules in substitution for the rules contained in schedules 1 and 2 to the 1970 Act, was adopted by a special resolution of members of the applicant and submitted to the Registrar of Deeds in terms of section 5(3)(f) of the 1971 Act. The rules have not subsequently been amended and remain in force. I

note Rule 77 to 80 in full as they are of some significance to respondent's case.

Rule 77, Rights Reserved to the Developer

1. Notwithstanding the fact that certain buildings and outbuildings indicated as "Existing Monastery" and situated within the servitude area as appears from Annexure A hereto, are part of the common property as reflected on the registered sectional plans in respect of The Avenues sectional title scheme. The Body Corporate acknowledges that the developers, the Hurwitz-Smilg Sea Point Trust and the High Level Trust may, subject to the cancellation of the notarial deed of servitude concluded by the developers with the Sisters of the Holy Family in South Africa, develop at their sole cost and expense the aforesaid buildings, which development shall then be for the benefit of the developers.

2. The nature and extent of the development contemplated (1) above, shall be within the sole and absolute discretion of the developer. The Body Corporate further acknowledges that it is aware of the terms and conditions relating to the said possible development imposed by the developer, which terms and conditions are contained in

Annexure A to sheet 1 of the registered sectional plans of the building, The Avenues Sectional Title Scheme.

3. Notwithstanding (1) and (2) above, it is specifically recorded that the buildings and outbuildings situated within the servitude area aforesaid, which are common property, none of the obligations contained in the notarial deeds of servitude, included by the developers, with the Sisters of the Holy Family in South Africa, shall devolve upon the owners, save the provisions of clauses (1)(d) of the notarial deed of variation and clause (e) of a further notarial deed of servitude which relate to the maintenance of roads, pavements and lighting on the servitude area.

Rule 78, Garages, subsection 78:

The unit in which the section is a garage, shall not be capable of being owned by any person who is not the owner of a unit in which the section is not a garage, that is by person who is not an owner of a residential unit, residential in this instance excluding a maid's room.

Rule 79, storerooms:

The unit in which the section is a storeroom, shall not be capable of being owned by any person who is not the

owner of a unit and which the section is not a storeroom, that is by a person who was not an owner of a residential unit, residential in this instance excluding a maid's room.

Rule 80, maid's rooms:

The unit in which the section is a maid's room, shall not be capable of being owned by any person who is not the owner of a unit in which the section is not a maid's room, that is by a person who is not an owner of a residential unit, residential in this instance excluding a maid's room.

The trusts still have registered in their names, jointly, units 92 to 102 in the Scheme. Each of the units, incorporates a section which is a garage, although the sections incorporated in units 93 and 97 are in fact used as storerooms. However, no other unit, and in particular no residential unit in the Scheme is, or has been, since 1987, registered in the names of either of the trusts and, applicant contends, in terms of Rule 78, the units referred to herein, are not capable of being owned by either of the trusts. I shall revert to this aspect in due course.

The applicant's case was that in terms of section 18(8) of the 1971 Act, a developer - as long as he had a share in the common property - had the right to extend a scheme by adding

further buildings, provided that he obtained the written consents of all owners and mortgagees, otherwise the right vested in the Body Corporate.

The 1986 Act, which came into force on 1 June 1988, repealed the 1971 Act. Section 25 of the new Act, regulates extension rights more fully than in section 18 of the 1971 Act, in particular an extension right does not exist automatically but has to be reserved by the developer as a registered condition. The traditional arrangements, initially preserved with qualification or time limit the extension rights acquired by the developer under section 18 of the 1971 Act. This was later amended with effect from 3 October 1977. An extension right had now to be converted to a certificate of real rights under section 25 of the new Act. A cut off period of 24 months was stipulated, failing which the right would lapse. The 24 months period was later extended to 31 December 2001.

It seems that "all development rights preserved under the 1971 Act for which a certificate of real rights had not been obtained, had lapsed and vested in the Body Corporate". (See in this regard Van der Merwe, Sectional Titles, Share Blocks and Time sharing, Volume 1, paragraph 12.3.6. See also Bandle Investments (Pty) Limited v Registrar of Deeds & Others 2001 (2) SA 203 (SE).)

Applicant contended that the respondents had not "acquired" a right of extension in terms of section 18 of the 1971 Act and by the time the Act was repealed, that is 1 June 1988, as no such right had been reserved by way of a condition registered in terms of section 5(3)(d) of the 1971 Act.

Furthermore the applicant contended that since section 60(1) of the 1986 Act only preserved rights which had been "acquired" under section 18 of the 1971 Act, the respondents' potential rights under section 18 lapsed on 1 June 1988. Even if the potential extension rights had been acquired as at 1 June 1988, it lapsed by not later than 31 December 2001. The right to extend the scheme thus vested in the applicant by not later than that date.

Mr J G Dickerson SC, who appeared with Mr A M Smalberger on behalf of the first respondent, did not dispute the applicant's submission that any right of extension, which the respondents previously had under section 18 of the 1971 Act has lapsed. He also did not dispute that if the extension right vests in the applicant in terms of section 25(6) of the 1986 Act, the respondents had no lawful grounds for withholding the requested consents. He averred that the respondents have a right of extension, which is independent of section 18 and

which is embodied in Rule 77 of the applicant's rules.

It was the fist respondent's case that a right of extension may be validly conferred by a consensual act which operates outside and independently of section 18 of the 1971 Act and the provisions of the 1986 Act.

The respondent's initial contention was that at the time of the opening of the sectional title register applicable to the Scheme, the applicant was amenable to the respondents reserving to themselves the rights to develop that part of the common area, and that the agreement in that regard was recorded in the Rule 77. That, of course, is factually incorrect as was pointed out by applicant's counsel and later conceded by respondent's counsel. The opening of the sectional register predated the establishment of the Body Corporate.

It is common cause that the rules which were adopted by a special resolution of the members of applicant, were submitted to the Registrar of Deeds in terms of section 5(3)(f) of the 1971 Act, have not subsequently been amended and according to the first respondent remain in force. Respondent's counsel contends that the rules represent and embody an agreement concluded between them, members of the applicant and the applicant itself. Mr Dickerson SC referred the court to Van der

Merwe supra, in which the following comment is made:

> "The view that the nature of the rules is contractual is based on the premise that the rules originated as a result of a mutual agreement between the sectional owners." (See subsection 13 to 26(2)).

In a similar vein, the court in Wiljay Investments v Body Corporate, Bryanston Crescent 1984 (2) SA 722 at 727D-E, stated the following:

> "The rules, read with the provisions of the Act, contain a constitution or the domestic statutes of the body corporate. In this sense it would properly be construed as containing the terms of an agreement between the owners *inter se* and between owners on the one hand and the body corporate on the other."

Mr Dickerson SC, argued that in order for the applicant to succeed in the prayers for declaratory of relief, it would have to demonstrate that the content of the rules, and Rule 77 in particular, has no legal force, either because there was no agreement pursuant to which the rules were enacted or if such agreement in fact existed, the agreement itself is

unenforceable or that certain of the rules themselves are unenforceable.

The respondents' allegations that at the time of the opening of the sectional title register, they reached an agreement with the Body Corporate with regard to the right of extensions, as I have already stated is not legally or factually tenable. The Body Corporate only came into existence when a person, other than the developer, became an owner of a unit in the scheme. That could only occur after the opening of the sectional title register. As the Body Corporate was not in existence when the register was opened, it could not at that time have agreed to anything. However, the Body Corporate came into existence some time after the opening of the register and would obviously have been in existence by the time of the adoption of the rules on 17 February 1988.

Mr O Rogers SC, who appeared with Mr J Rogers on behalf of the applicant, argued that section 18(1) read with section 18(8) of the 1971 Act conferred on the respondents the right of extension which could be exercised only "with the consent in writing of the owners of sections and of all holders of mortgage bonds". The applicants, as the Body Corporate, could not confer it on the respondents as it would only acquire the right of extension if and when the respondents, that is the

developer, ceased to have any share in the common property. The result, Mr Rogers SC submitted, was that the arrangements reflected in Rule 77 could not have involved a conferral by the applicant on the respondents of something which vested in the applicant. The respondent, as developer, already had the right of extension by virtue of section 18(1) of the Act and the applicant, by contrast, had nothing to offer.

Although Mr Rogers SC persisted in the argument that Rule 77 was inchoate and that they were entitled to raise this contention, it seems that their primary concern related to the legal effect rather than the validity of Rule 77.

It appears from Rule 77.2 that there may have been an intention on the part of the respondents as developer, to include such a condition in terms of section 5(3)(d). This would explain the reference in Rule 77.2 to the conditions regarding the proposed extension to be reflected in Annexure A to sheet 1 of the registered sectional plan. The said Annexure A appears to be a 5(3)(d)(i) certificate, but it does not contain any conditions relating to the extension right. It does not, so Mr Rogers submitted, change the statutory context within which Rule 77 was adopted. Rule 77, he argued, would not in law have served any greater function than an acknowledgement by the Body Corporate of the right which

the respondents had in terms of section 18(1), together with the added possible advantage for the respondents of a provision which could be argued as constituting the written consent of the owners - through the Body Corporate - to the particular extension scheme described in the rule, albeit inchoate.

Applicant's counsel also contended that the 1971 Act created through section 18 a statutory right which vested in the developer for as long as he was an owner in the Scheme, and thereafter in the Body Corporate. He concluded that no provision was made for a transfer of this right by one to the other or from either of them to an outsider.

It was also argued that Rule 77 served no other function than to record the extension rights which the respondents had under section 18 of the Act and to alert the Body Corporate to such provisions in that regard, which appeared in the sectional title plans. Besides a recordal of rights, which by law vested or were thought to vest, in the respondents, it was argued that Rule 77 does not suggest a consensual conferral of rights.

With regard to Rule 77 - standing on its own - being inchoate, Mr Dickerson SC, correctly pointed out that this was not the case made out by the applicants in its founding affidavit nor

was any attempt made therein to impeach Rule 77. The Rule is referred to in terms in the founding affidavit. The applicant was patently aware of its contents at the time that it launched this application and it must have been aware that the Rules were adopted by a special resolution of members of the applicant.

It is trite law that the necessary allegations upon which an applicant relies must appear in the founding affidavit, as the applicant will not generally be allowed to supplement the affidavit by adducing supporting facts in the replying affidavit. See in this regard Erasmus, Superior Court Practice at B1-39 and also the Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H-636A. The respondents cannot now seek to impeach the validity of Rule 77.

Furthermore, the applicant does not seek in its Notice of Motion to have the Rules, or any of them, declared invalid and unenforceable. This is consistent with the fact that the issue of invalidity of Rule 77 was only raised for the first time in reply. In any event it may be that Rule 77 requires interpretation in order to ascertain its true meaning and import. This does not render it unenforceable. See Vermeulen v Goose Valley Investments (Pty) Limited 2001 (3) SA 986 (SCA).

It was apparent from the notice of motion, the founding affidavit and also from the argument advanced by Mr Rogers SC, that what was not sought from this court and, therefore, not in issue, was the setting aside of the rules, in particular Rule 77. Also not sought from this court was any declaratory relief relating to the interpretation of Rule 77.

The rules are not the original rules. They were rules introduced in substitution of the original rules some seven months after the sectional title register had been opened. The circumstances under which these rules came into being are described by Mr Barney Hurwitz, the sole trustee of first respondent in his answering affidavit.

Mr Hurwitz stated that at the time of the opening of the sectional title register, the two trusts, which were the developer and which then owned the property in its entirety, agreed with each other that the relevant portion be developed by the trusts if and when the servitudes in favour of the sellers were cancelled. He proposed this to the applicant, which was amenable to the developer, reserving to itself the rights to develop that part of the common area. This occurred after the Body Corporate had come into being and an agreement to that effect was recorded in Rule 77. Mr Hurwitz says that the rule

correctly records the agreement and what he says is also consistent with the language of Rule 77.

The development rights to which respondents lay claim pertain to what is an existing building on the property and is described in Rule 77 as a monastery. It is that property in respect of which the applicant concluded a written agreement to sell to Mr Blatcher, subject to certain suspensive conditions. The respondents' case, before the application was launched, was, and is, that it has development rights in terms of Rule 77 and that stands as an insurmountable obstacle to the applicant's intended cause of conduct, namely to dispose of all development rights in relation to the servitude area to Mr Blatcher.

Counsel for the parties, it seems, were in agreement that the right of extension contemplated in subsection 18(1) of the 1971 Act, is a right which concerns the extension of a building in such a manner that an existing section is to be added to or that the building may be further divided into more sections. That is an extension right in the context of the older Act.

The equivalent section in the 1986 Act is subsection 25(1), there it is also clear that the extension rights in question involve a building or buildings or a horizontal or vertical

extension of an existing building and the common property, which will then be divided with a section or sections and confer rights of exclusive use.

The rights of extension governed by these statutory provisions are, firstly, real rights and they pertain to buildings which will result in alterations to sections or the creation of new sections with attendant exclusive use rights. If they fall outside these two criteria, they appear not to be extension rights within the ambit of these two sections.

The right to develop the existing monastery area for its own benefit, which may be done by the developer, may or may not coincide or overlap with the sort of extension rights which are referred to in sections 18(1) and 25(1) of the 1971 and 1986 Acts respectively. But such rights may not - or there are facets of the developments which may not - constitute an extension as envisaged in these sections. The rights which are embodied in Rule 77 are not real rights simply because real rights are acquired either by registration in the ordinary sense, or, in the case of real rights and extension, by the issue of a certificate or in terms of the statutory provisions.

As Mr Dickerson SC has pointed out, the Rules, remaining in force, have certain important consequences. Subsection 60(4)

of the 1986 Act, in effect reserves three categories of rights. Firstly, the exclusive use rights to a part or parts of the common property which were conferred before the commencement date, that is before June 1986 by the rules. Secondly, other vested rights granted or obtained in terms of the 1971 Act. Thirdly, the rights arising from any agreement concluded before the commencement date.

Another important consequence of the rules is that both under the aegis of the 1971 Act, and in terms of the current Act, they are explicitly made binding upon the Body Corporate, the owners of units in the property and also upon tenants. Moreover they impose on the Body Corporate an obligation to enforce the rules.

The rules as between the members of the Body Corporate and the Body Corporate, have the status of a contract as already mentioned earlier on in this judgment.

Rule 77 itself refers specifically to certain buildings and outbuildings and goes on to say that the Body Corporate acknowledges that the developers may develop at their sole cost and expense the aforesaid buildings, which development shall then be for the benefit of the developers. It follows that if there is a right to develop, then such rights, with the

possible exception of the right which qualifies as a real right of extension, is preserved in terms of subsection 60(4) of the 1986 Act.

The provisions of that rule are binding by explicit statutory provision upon the applicant, the owners and the occupants. They are binding on every person who has a right to and in the common property and the to affected area.

The arguments advanced by applicant with regard to the effects of certificates and real rights lapsing in terms of the old and current acts, have been referred in some detail in the course of this judgment. However, they do not overcome the fundamental problem that the respondent relies on in the Rules, the Rules confer on the developer the rights to develop and, it seems, it is that right to develop which they seek to escape by the declaratory relief which is sought and, finally, the sale to Mr Blatcher.

As to the second category of relief sought in these proceedings, namely the consents of the owners, respondents clearly have a reasonable basis in law for withholding such consents. The rules provided that the respondents may develop the affected area. The Body Corporate, on any basis, cannot frustrate their rights without the consent of the persons

who are invested with them.

Finally, the relief sought in paragraph (f) of the notice of motion, warrants some comment. The said paragraph reads as follows:

> "Directing the trust to dispose of and transfer to the owner or owners of a unit or units in the Scheme, comprising a residential section or residential sections not being in any instance a so called maid's room, all units in the Scheme currently registered in the name of the Trusts."

The background leading to this aspect is the following. The trusts have non-residential units in the Scheme registered in their names, and that there is, since 1987, no residential unit in the Scheme registered in the names of the trusts. The applicant submits that by virtue of Rule 78 to 80, the trusts are not lawfully entitled to own non-residential units in the Scheme, without also being the owners of a residential unit or residential units of the Scheme. What is sought, is an order forcing a divesture of existing real rights, which were acquired and are held entirely lawfully. There is no suggestion that there was anything improper or untoward in the acquisition of these rights or the retention of these rights. It is suggested

that the continued retention of their property became unlawful as a result of the developers having disposed their residential units.

The applicant does not identify to whom the sections concerned will be transferred or the price at which they will be transferred. Applicant avers that there will be qualified purchasers, from those who currently own residential units and that the trusts would have no difficulty in obtaining fair prices for the units. No affidavits were annexed from potential purchasers, and they are not identified. In any event there is no indication of what a fair price would be. Assuming such forced sale is competent and were to be granted, it would be marketed only to the limited number of people, who are members of the Body Corporate who own residential units. A forced sale in a close market such as this, make the prospects of obtaining a market related value remote.

I am of the view that the grant of the relief in the form proposed, even as amended in the course of argument, would amount to a *brutum fulmen* and serve no real purpose. I do not think it necessary to deal with the other arguments raised by the parties in this regard.

In the result, **THE APPLICATION IS DISMISSED WITH**

COSTS, SUCH COSTS TO INCLUDE THE COSTS OF TWO COUNSEL.

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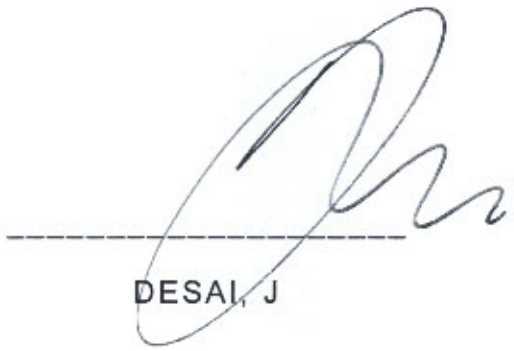

DESAI, J