IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 11020/2018

In the matter between:

MARETHA MINEUR	Applicant
v	
THE BAYDUNES BODY CORPORATE	First Respondent
COMMUNITY SCHEMES OMBUD SERVICE	Second Respondent
THE ADJUDICATOR: ADV BLOCK	Third Respondent

Coram: Justice J I Cloete

Heard: 30 April 2019

Delivered: 24 May 2019

JUDGMENT

CLOETE J:

Introduction

[1] This is an appeal in terms of s 57 of the Community Schemes Ombud Service Act[1] ("CSOS Act") against an adjudication order made by the third respondent on 23 May 2018 dismissing relief sought by the applicant. Section 57 permits an appeal to the High Court, but only on a question of law.

[2] The appeal is opposed by the first respondent. During argument counsel for the parties were *ad idem* that the third respondent's reasoning in reaching his conclusion was generally confusing and indefensible and that no purpose would be served in having regard thereto. *Mr Engelbrecht* who appeared for the applicant contended that the conclusion reached by the third respondent was wrong, whereas *Mr Bridgman* who appeared for the first respondent submitted that, although he could not defend much of the third respondent's reasoning, the conclusion that he ultimately reached was correct.

[3] The appeal essentially relates to the correct interpretation of s 13(1)(g) of the Sectional Titles Schemes Management Act[2] ("the Management Act") and its management rule 30(f). The aforementioned Act came into operation on 7 October 2016, its purpose being to assume all management provisions previously contained in the Sectional Title Schemes Act[3] in a separate

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1 No. 9 of 2011.
2 No. 8 of 2011.
3 No. 95 of 1986

legislative instrument,[4] with its own management rules[5] and conduct rules.[6] The management rules are prescribed in terms of s 10(2)(a) of the Management Act and the conduct rules in terms of s 10(2)(b) thereof.

[4] Section 10(1) of the Management Act provides that:

> *'A scheme must as from the date of establishment of the body corporate be regulated and managed, subject to the provisions of this Act, by means of rules.'*

[5] Sections 10(2) and (3) read as follows:

> *(2) The rules must provide for the regulation, management, administration, use and enjoyment of sections and common property, and comprise-*
>
> *(a) management rules, as prescribed, which rules may subject to the approval of the chief ombud be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, to the extent prescribed by regulation, and which rules may be substituted, added to, amended or repealed by unanimous resolution of the body corporate as prescribed; and*
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> *(b) conduct rules, as prescribed, which rules may, subject to the approval of the chief ombud, be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, and which rules may be substituted, added to, amended or repealed by special resolution of the body corporate, as prescribed: Provided that such conduct rules may not be irreconcilable with any prescribed management rule contemplated in paragraph (a).*

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4 See C G Van der Merwe: Sectional Titles: LAWSA 2nd ed Vol 24 at 206.
5 Contained in Annexure A thereto.
6 Contained in Annexure B thereto.

(3) The management or conduct rules contemplated in subsection (2) must be reasonable and apply equally to all owners of units.'

[6] The applicant seeks the setting aside of the adjudication order together with the following declaratory relief:

6.1 That s 13(1)(g) applies to the conversion of garages to living quarters in the Baydunes Sectional Title Scheme No 297/1993 ("the Scheme");

6.2 That the adoption on 18 December 2017 by the first respondent, at an annual general meeting, of conduct rule 10 for the Scheme be declared unlawful, invalid and set aside; and

6.3 That special resolutions 1 and 3 taken at the same meeting also be declared unlawful, invalid and set aside.

[7] In short, special resolution 1 purported to approve the conversion of garages in the Scheme to living quarters; special resolution 3 to create new exclusive use areas from common property; and conduct rule 10 to confer rights of exclusive use of additional parts of the common property upon members of the body corporate (the registered owners) for parking purposes in accordance with a certain layout plan. These rights were ostensibly conferred pursuant to s 10(7) of the Management Act, which must be read together with s 10(8) thereof and which provide as follows:

'(7) A developer or a body corporate may make management or conduct rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate.

(8) The rules contemplated in subsection (7) must-

(a) include a layout plan to scale on which is clearly indicated-

(i) the locality of the distinctively numbered exclusive use and enjoyment parts; and

(ii) the purposes for which such parts may be used; and

(b) include a schedule indicating to which owner each such part is allocated.'

[8] At the heart of the dispute is the meaning to be ascribed to the word *'section'* in s 13(1)(g) and whether the first respondent followed the correct procedure in adopting special resolutions 1 and 3 and conduct rule 10.

The Baydunes Scheme

[9] The Scheme, of which the first respondent, as previously mentioned, is the body corporate, is situated in the coastal town of Hartenbos. It was initially conceived as a housing scheme built for Mossgas, but was converted into a sectional title scheme in 1993. It consists of 73 sections (or units). The applicant is the registered owner of unit 59 in the Scheme, which she has held since its inception.

[10] The Scheme consists of a number of physically separate buildings or terraced houses (hereinafter referred to as *'cantons'*) within the greater complex. As it was not originally built as a unitary sectional title complex, each canton

differed. Because of these differences it was decided that issues in respect of general appearance and requirements of each canton should be dealt with separately, and firstly, by the respective cantons.

[11] Accordingly, before 2012, a so-called *'Canton System'* was implemented and applied. According to the applicant, this system was intended to ensure that alterations made by owners would be aesthetically pleasing and uniform *intra* canton.

[12] The Canton System was implemented on 18 December 2002 by special resolution. It provided for the following. A canton consisted of a number of defined units. Membership of a canton was automatic and involuntary. It was represented by a canton representative elected by majority vote by the members of each canton from time to time. The board of trustees was required (again from time to time) to appoint members of an *'Aesthetic Committee'*, which would consist of the chairman of the trustees (also chairman of the Aesthetic Committee), the Scheme manager, and a registered architect appointed by the trustees for this purpose. The trustees in consultation with the architect were required to establish aesthetic guidelines, called the *'Baydunes Building and Aesthetic Guidelines'* which would be made available to all owners. The guidelines could contain directives in respect of all aspects of alterations, fixtures, fittings, placement of objects, painting and other aesthetic aspects mentioned in the rules.

[13] Whenever an owner wished to undertake a *'regulated action'* which entailed:

(a) a structural alteration to a section or any part of the common property

(including an exclusive use area), other than an interior alteration; or (b) install, erect or place a fixture, fitting, apparatus or other object outside his or her section; or (c) do anything which affected the exterior appearance of a section or the appearance of any part of the common property (including an exclusive use area), the prescribed procedures had to be followed. They involved the following. Such an owner was required to furnish the canton representative of his or her canton with an application with details of the intended action and any other details the canton representative might require. If so required by the canton representative, or the Aesthetic Committee, the owner was required to obtain the written consent of each member of the canton. If considered necessary by the canton representative or the trustees, the canton representative was required to consult with each member of the relevant canton or call a meeting of members of the canton in order to elicit the views of the members and, if necessary, to vote on the matter. At a meeting, or by written consent, a majority of 75% of all members of that canton could grant provisional consent, including subject to the imposition of reasonable conditions.

[14] As soon as possible after receiving the application, the canton representative was required to compile a report and forward same to the chairman of the Aesthetic Committee, which was in turn required to consider the application together with the report of the canton representative and compile recommendations. The trustees had the authority to approve an application with or without conditions or to refuse it. Where the governing legislation at the time stipulated further requirements, the trustees were required to present

the documentation received together with their recommendations to the body corporate for consideration, to be dealt with in terms of the relevant statutory provisions. Where it was contemplated that additional common property would be built upon (including an exclusive use area), compensation would be determined by dividing the area concerned by the total area of the common property, and multiplying the result by the municipal valuation of the land at the time.

[15] According to the applicant the Canton System did not create or confer any right upon an owner to change the use of, or make alterations to, his or her section, but implemented a process that had to be followed by an owner if he or she wished to do so. There were always a few owners who did not obey the rules of the Scheme, but no serious transgressions were ever reported to the applicant's knowledge. The plans for each section in a particular canton were the same, so there was no need to repeatedly approve the same plan. Accordingly, once permission was granted to one owner for certain alterations, it applied to all other owners in that particular canton as well.[7]

[16] During 2011/2012 the Canton System was abandoned by the trustees elected at the time. From at least 2012, a number of owners have made alterations, improvements or extensions to their sections without any formal approval from the body corporate and/or the local authority. This included certain owners

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[7] The Canton System was described by the applicant in response to averments made by the first respondent's deponent, Mr Frederick Wilhelm Meyer, to the answering affidavit. The applicant sought to strike out Mr Meyer's averments in relation thereto on the basis that he only became a member of the Scheme in 2016 and it thus constituted hearsay. However, this was not pursued with any vigour in argument and it is helpful to refer to the applicant's version in reply for contextual purposes.

converting their garages into living quarters (bedrooms, living rooms etc). The applicant herself converted her garage into a bedroom; however, during 2017 she converted it back to a garage. It is common cause that the alterations, improvements and extensions made by the owners concerned were unlawful.

[17] By December 2016 it was recognised that steps had to be taken to regularise (or *'legalise'*) these unlawful conversions. This came after the local authority (the Mossel Bay Municipality) demanded that the owners of the units concerned provide it with building plans, approved by the trustees of the body corporate by a certain date, failing which they would be required to reinstate their garages and units to the position they were prior to the conversion. In addition, each owner was required to submit proof to the municipality that he or she had the use of two parking bays for his or her section.

[18] The body corporate sought legal advice regarding how to regularise the above state of affairs. It initially intended to seek a special resolution by written consent, ostensibly in terms of management rule 29(2) to *'ratify the existing alterations by owners to the common property who converted their garages (which are registered as part of their sections) into habitable rooms'* and *'to the use of the aforesaid converted garages (forming part of the sections) by the owners of the sections for the purpose of habitable rooms'.*

[19] In the draft *'Written Consent'* prepared by the body corporate's legal advisors at the time, it was expressly recorded that it was uncertain whether s 13(1)(g) was applicable in this case, and that any dispute in this regard might have to be referred to the ombud in terms of the CSOS Act, alternatively the body

corporate could apply to court for an appropriate order. In the same document it was recorded that:

> *'Take notice that the change in use of the aforesaid garages entails the change in use of* ***a part of a section*** *and not the change in use of a* ***section****.*
>
> *Section 13(1)(g)… requires the written consent of all owners to the change in use of a section…'*
>
> (Emphasis supplied).

[20] As the deponent to the first respondent's answering affidavit, Mr Meyer put it:

> '[The trustees' legal advisors] *expressed doubt as to whether section 13(1)(g)… applied to the owners' conversion of the garages as the owners had converted a part of their section and not the whole section and section 13(1)(g) refers to "a section" and does not include reference to "a part of a section". As such they stated that this matter could either be referred to the CSOS or the High Court to obtain clarification…'*

[21] Management rule 29 reads in relevant part as follows:

> *'**29 Improvements to common property***
>
> *(1) The body corporate may on the authority of a unanimous resolution make alterations or improvements to the common property that is not reasonably necessary.*
>
> *(2) The body corporate may propose to make alterations or improvements to the common property that are reasonably necessary; provided that no such proposal may be implemented until all members are given at least 30 days written notice with details of-*
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> *(a) the estimated costs associated with the proposed alterations or improvements;*

(b) details of how the body corporate intends to meet the costs, including details of any special contributions or loans by the body corporate that will be required for this purpose; and

(c) a motivation for the proposal including drawings of the proposed alterations or improvements showing their effect and a motivation of the need for them;

and if during this notice period any member in writing to the body corporate requests a general meeting to discuss the proposal, the proposal must not be implemented unless it is approved, with or without amendment, by a special resolution adopted at a general meeting.'

[22] Although the body corporate ultimately did not proceed to circulate the draft Written Consent to all owners, the applicant sought legal advice in the interim and on 1 October 2017 she lodged an application for dispute resolution with the second respondent. In that application, she asked for a ruling regarding:

22.1 The proper procedure to be adopted for obtaining valid consent and authorisation to approve the change of use of the garages, or, put differently, whether s 13(1)(g) applied, in which event the consent of <u>all owners</u> was required for conversion of the garages in the Scheme to living units; as well as a direction that the owners be informed of all relevant facts relating to the proposed decision, particularly in relation to parking; and

22.2 Relief for owners already affected or to be affected by the proposed formation of so-called exclusive use areas from common property as well as an order preventing further deprivation of such common property.

[23] On or about 17 November 2017 the applicant received a notice and agenda for the annual general meeting of the body corporate to be held on 18 December 2017. The agenda included the deliberation and voting in respect of proposed special resolutions 1 and 3 *'with or without amendments'.*

[24] The proposed special resolution 1 read in relevant part as follows:

> *'Special resolution in terms of management rule 29(2) to approve the alterations and improvements to parts of sections and the common property which had already been done by owners of sections to enable their garages which are registered as part of their residential sections to be converted into habitable space and to authorise all other owners who have not so altered their garages to make alterations and improvements to their sections and the common property to enable their garages to be converted into habitable space…*
>
> *The resolution is subject to compliance with the following conditions:*
>
> *1) Owners who have already converted their garages into habitable space must submit building plans to the trustees by the 15th of January 2018 for approval, before submitting the building plans to Mossel Bay Municipality for approval.*
>
> *2) Owners who want to similarly convert their garages into habitable space must submit building plans to the trustees by the 30th of April 2018 for their approval, before submission of the building plans to the Municipality for approval. An owner must effect the improvements and alterations in accordance with the approved building plans at his own cost.*
>
> *3) The trustees are hereby authorised and instructed to consider and approve the building plans in respect of the garages, and the trustees may attach reasonable conditions to their consent…'*

[25] The draft special resolution 3 read as follows:

> *'Special resolution in terms of section 10(2)(b)… to approve the attached Conduct Rule 10. The proposed resolution is as follows:*
>
> ***RESOLVED:***
>
> *The members of the body corporate hereby by special resolution (with or without amendments at the general meeting) approve the attached Conduct Rule 10 conferring exclusive use areas (yards) to members of the body corporate in terms of section 10(7)… The trustees are hereby authorised and instructed to amend the Pro-plan (plan to scale of the exclusive use areas), if necessary. The trustees are hereby authorised and instructed to submit the Conduct Rule 10 to the chief ombud for approval. The trustees are further authorised to make such reasonable amendments to the Conduct Rule as may be required by the chief ombud.'*

[26] These resolutions were ostensibly passed at the annual general meeting on 18 December 2017 (by a majority of 84.48%) despite the objections of the applicant and certain other owners. Thereafter, the applicant's referral to adjudication in terms of s 48 of the CSOS Act was heard, followed by the adjudicator delivering his ruling on 23 May 2018.

Discussion

[27] Section 13(1)(g) of the Management Act provides as follows:

> *'**13 Duties of owners***
>
> *(1) An owner must- …*
>
> *(g) when the purpose for which a section or exclusive use area is intended to be used is shown expressly or by implication on or by a registered sectional plan, not use nor permit such section or exclusive*

> *use area to be used for any other purpose: Provided that with the written consent of all owners such section or exclusive use area may be used for that purpose as consented to.'*

[28] The Management Act defines *'section'* as meaning *'a section shown as such on a sectional plan'.*[8] It is common cause that, for present purposes, the sectional plan pertaining to the Baydunes Scheme[9] depicts each section as comprising of two separate subsections. Although not clearly specified as such on the plan which was attached to the founding affidavit, counsel were *ad idem* that the two subsections are, by necessary implication, living quarters (the larger rectangle) and a garage (the smaller rectangle), linked by a small exclusive use area. I mention this because, given the definition of *'section'* itself, it was clearly intended by the legislature that a section, for purposes of the Management Act, is not a broad, generic term but is determined by the specific sectional plan in each instance.

[29] *Mr Bridgman* rightly did not suggest that the garage part of a section was intended by the drafter of the plan, or the local authority which approved it, to be used for any purpose other than a garage (also referred to by the local authority as a *'parking bay'*). It is convenient to deal first with *Mr Bridgman's* argument advanced on behalf of the first respondent, and thereafter with that of *Mr Engelbrecht* on behalf of the applicant, since, during *Mr Bridgman's* argument, the issues were somewhat narrowed.

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8 Section 1 of the Management Act.
9 Annexure MM2 to the founding affidavit.

[30] *Mr Bridgman's* argument in respect of resolution 1 may be summarised as follows. Section 13 (1)(g) refers to the change of use of an entire section and not just a part of one. Had the legislature intended that different parts of a section be "classified" according to their use, it would have said so. This interpretation is supported by the definitions contained in management rule 2, as well as management rule 27(2)(c) which makes it incumbent upon a body corporate to keep proper records, amongst others, of sections on a sectional plan, indicating in each instance whether it is a primary or utility section. Management rule 2 provides that:

> *'**2 Interpretation***
>
> *(1) In the interpretation of these rules, unless the context indicates otherwise-*
> *…*
>
> *(m) "primary section" means a section designed to be used for human occupation as a residence, office, shop, factory or for any other type of use allowed in terms of local municipal by-laws, not being a utility section;…*
>
> *(t) "utility section" means a section which, in terms of local municipality by-laws, is designed to be used as an accessory to a primary section, such as a bathroom, toilet, storeroom, workshop, shed, servant's quarters, parking garage, parking bay or other utility area, not being a primary section.'*

[31] This interpretation is also, so the argument went, fortified by the use of the word *'section'* throughout management rule 30, which imposes an obligation upon a body corporate to take all reasonable steps to ensure that a member or other occupier of a section or exclusive use area does not, *inter alia*:

> *'(f) subject to the provisions of section 13(1)(g)… use a section or exclusive use area for a purpose other than for its intended use as –*

(i) shown expressly or by implication on a registered sectional title plan or an approved building plan;

(ii) can reasonably be inferred from the provisions of the applicable town planning by-laws or the rules of the body corporate; or

(iii) is obvious from its construction, layout and available amenities…'

[32] *Mr Bridgman* submitted that given the absence of any provision in the Management Act itself that each and every *'separate room or part of a section must be classified as primary or utility'*, s 13(1)(g) must be interpreted to mean that only when the intended purpose (or use) of an entire section is to be changed must the consent of all owners be obtained; since to interpret it otherwise would lead to absurdity. The examples he gave were: (a) using a spare bedroom for storage purposes; (b) moving a large storage cupboard in a kitchen to another area of the kitchen or other room; and (c) building an en-suite bathroom in a corner of a bedroom.

[33] He argued that because the Management Act applies to a variety of sectional title schemes (including shopping centres and industrial developments), the classification of sections in the management rules as "primary" or "utility" is intended to link uses to those permitted by the local authority zoning by-laws applicable to each particular scheme (i.e. depending upon the local authority in whose area it is situated).

[34] For the reasons that follow I am not persuaded by this argument. First, as mentioned earlier, the definition of *'section'* in the Management Act itself is specifically made dependent upon the applicable sectional title plan in each

instance. In respect of the Baydunes Scheme, each individual section depicted on the plan is comprised, by necessary implication, of two subsections, one for living quarters and the other for parking.

[35] This is not only shown – as stipulated in management rule 30 – by implication on the plan, it can also reasonably be inferred from the provisions of the applicable town planning by-laws, which require two parking bays per dwelling unit.[10] The first respondent does not suggest that one of these bays is anything other than the garage subsection of a unit. Moreover, it is obvious from the construction, layout and available amenities of the Scheme itself that this must be the case. Management rule 30(f) is in turn expressly subject to the provisions of s 13(1)(g).

[36] Secondly, the classification of use of a section into "primary" or "utility" in the management rules does not, in my view, assist the first respondent. This classification appears to envisage the possibility of two subsections of one composite section in a sectional title scheme. They are given separate and distinct meanings, and merely because a utility section is defined as being designed to be used as an accessory to a primary section, this does not mean that its separate and distinct purpose is subsumed into or under the purpose of the primary section which, in the present case, is living quarters. Both are *'designed to be used'* for different purposes.

[10] As confirmed by the Mossel Bay Municipality's Manager (Town Planning) in his email to the first respondent's legal advisers on 10 July 2018, annexure "D" to the answering affidavit, record p208.

[37] Turning *Mr Bridgman's* argument around, had the legislature intended to mean that s 13(1)(g) would only apply to an entire section, no purpose would have been served by the classification of use in the management rules as primary or utility. Moreover, this would lead to absurd results because it begs the question of how one section, comprised of two separate and distinct subsections with different use purposes, could be altered in any manner at all.

[38] Thirdly, in terms of the Mossel Bay Municipality Integrated Zoning Scheme By-Law:[11]

38.1 *'Garage'* is defined as *'a building for the storage of one or more motor vehicles…'*;[12]

38.2 Parking areas must be used for the parking of vehicles and parking areas must be maintained in a state suitable for the parking and movement of vehicles;[13] and

38.3 As already stated, each section in the Scheme is required to have two off-street parking bays available to it.

[39] The absence of any alternative designated parking bays supports the applicant's contention that the garages of sections must be used for their intended purpose, i.e. as parking for a vehicle. A garage is self-evidently not suitable to be used as living quarters.

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[11] Provincial Gazette Extraordinary 7865, 19 January 2018.
[12] Section 1 thereof.
[13] Section 45(1)(e) and (f) thereof.

[40] Fourthly, as persuasively argued by *Mr Engelbrecht*, it is evident that one of the purposes of s 13(1)(g) is to restrict owners from effecting changes to the use of their sections where such change of use might have a negative impact on other owners, hence the requirement of unanimous written consent before such a change may be implemented.

[41] Changing a section's garage into living quarters has the effect of depriving that unit of a parking area for the occupants' vehicle(s), requiring the occupants to find parking elsewhere – in this case on the common property. This directly impacts negatively upon other owners in the Scheme because they are deprived of the free use and enjoyment of part of the common property, and it is likely to increase congestion in the Scheme – particularly where all owners are to be permitted to convert their garages to living quarters. This is clearly the type of scenario that s 13(1)(g) envisaged would require consent from all the owners before it can be implemented.

[42] As pointed out by *Mr Engelbrecht*, at the 2016 annual general meeting of members of the Scheme, it was acknowledged that *'the conversion of a garage into a bedroom is a usage change and must be approved by all owners, after which it is approved by trustees and then the Municipality'.*[14]

[43] As far as could be established, there are no judicial decisions – reported or unreported – which have specifically considered the proper interpretation of s 13(1)(g) and management rule 30(f). It also appears that none of the standard academic texts discuss their import in the present context.

[14] Annexure MM19, applicant's replying affidavit, record p272.

[44] The closest is the decision in *Cuvè-Jakoby and Another v Kaschub and Another*,[15] which concerned an application in terms of s 44(2) of the Sectional Titles Act[16] to have the refusal by one owner to consent to change of use of a garage declared unreasonable. However the court proceeded from the premise that the conversion of the three garages at issue (i.e. to provide ablution facilities for staff, as well as for the gardener employed by the body corporate, to provide a rest and administration room and an ironing room) was in each instance a change of use as envisaged in s 44(1)(g) of that Act, which was the predecessor to s 13(1)(g), and thus required the written consent of the owners of all other units. At para [4] Traverso DJP stated:

> *'In terms of the Act, the written consent of the owners of all the other units is a prerequisite for an application for the change of use of the garage…'*

[45] However, it is not clear from the judgment whether the parties were *ad idem* that what was stated above by the learned Judge was common cause, and I would thus be hesitant to regard this as direct authority on the point.

[46] I agree with *Mr Engelbrecht* that, quite clearly, the type of changes of use cited as examples by *Mr Bridgman* are not those that should be affected by s 13(1)(g) as read with management rule 30(f). The reason for this is self-evident: they do not affect any of the other owners. As *Mr Engelbrecht* formulated it, the appropriate test should be whether or not the relevant change of use envisaged materially affects the other owners in the Scheme. Operating a business would be such an example. Granting permission for the

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[15] 2007 (3) SA 345 (C).
[16] The predecessor to section 13(2) of the Management Act.

conversion of all garages in the 73 units comprising the Scheme to living quarters is clearly, in my view, another. It is precisely for this reason that the consent of all owners should be required. This interpretation fits neatly into the plain wording of s 13(1)(g). It also accords, in my view, with the proper approach to interpretation as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[17] that:

> *'…consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document…'*

[47] To sum up: to my mind the proper interpretation to be placed on s 13(1)(g) of the Management Act (as read with management rule 30(f)) is that, where an owner intends to use a section (or subsection of a section, as the case may be) for a use other than its purpose as shown expressly or by implication on a registered sectional plan, and such intended use will materially affect the other owners in the scheme, the consent of all owners in the scheme is required. It follows that special resolution 1 must be declared unlawful, invalid and set aside.

[48] I should mention, for sake of completeness, that the applicant also submitted that special resolution 1 was invalid in any event because it was ostensibly

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[17] 2012 (4) SA 593 (SCA) at para [18].

passed in terms of management rule 29(2), which permits a body corporate to make alterations or improvements to common property that are *'reasonably necessary'* subject to compliance with certain requirements. *Mr Bridgman* conceded during argument that the alterations or improvements proposed in special resolution 1 – in this instance the common property would be the "outer side" of the median lines of each garage[18] – could not be regarded as reasonably necessary, other than for the purpose of rendering previously unlawful conversions lawful. However it is difficult to conceive of how a statutory instrument could ever be validly used for this purpose, and no more need said about it.

[49] Turning now to special resolution 3 and the consequent adoption of conduct rule 10, which purported to create new exclusive use areas from common property and to confer these upon owners for parking purposes in accordance with a certain layout plan.

[50] *Mr Bridgman* did not take issue with *Mr Engelbrecht's* submission that the adoption of conduct rule 10 does not comply with s 10(8)(a)(ii)[19] of the Management Act in that the layout plan does not clearly indicate the purpose for which such parts of the common property may be used. Nor did he take issue with *Mr Engelbrecht's* argument that, in any event, special resolution 3 and conduct rule 10 are unlawful and fall to be set aside because:

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[18] As provided for in the definition of *'common property'* in s 1 as read with s 5(4) of the Sectional Titles Act 95 of 1986.

[19] See para [7] above.

50.1 The manner in which the new exclusive use areas have been allocated has resulted in certain sections (eg. section/unit 7) being deprived of any off-street parking (other than its single vehicle garage), rendering the allocation of the exclusive use areas in contravention of the applicable by-law, which requires that each section be allocated at least two off-street parking bays; and thus contravenes management rule 30(c) which prohibits the use of sections and common property which contravene the provision of any law or by-law;

50.2 Purporting to confer upon the trustees of the body corporate the power to amend the layout plan contravenes section 10(2)(b) of the Management Act, which stipulates that conduct rules may only be substituted, added to, amended or repealed by special resolution of the body corporate, as prescribed; and

50.3 Arbitrarily allocating some units large, and other units small, exclusive use areas: (a) contravenes management rule 30(e) in that it materially and negatively affects the value or utility of certain owners' sections and/or utility of exclusive use areas allocated to them; (b) contravenes management rule 30(a) in that the unequal division of common property as exclusive use areas will unreasonably interfere with the use and enjoyment thereof by certain owners; and (c) contravenes s 25 of the Constitution by depriving certain owners arbitrarily and unfairly of their share of the common property.

[51] *Mr Bridgman* instead sought to persuade me that special resolution 3 and conduct rule 10 are *'part of a process'* to resolve the difficulties faced by the body corporate in relation to past unlawful conduct. The argument became somewhat circular because, in so doing, he relied on the motivation expressed in the impugned special resolution 3 where reference was made to s 10(2)(b) of the Management Act. However the aforementioned subsection provides, in express terms, that conduct rules may not be irreconcilable with any prescribed management rule, which is, for the reasons advanced by *Mr Engelbrecht*, exactly what occurred.

[52] It follows that special resolution 3 and conduct rule 10 must also be declared unlawful, invalid and set aside. The first respondent (or any member) is not however without a remedy. It is at liberty to invoke s 13(2) of the Management Act which provides that:

> *'(2) Any owner who is of the opinion that any refusal of consent of another owner in terms of the proviso to subsection (1) (g) is unfairly prejudicial, unjust or inequitable to him or her, may, within six weeks after the date of such a refusal, make an application in terms of this subsection to an ombud.'*

[53] Given my findings, it also follows that the third respondent erred on questions of law and that the applicant's appeal must succeed. Insofar as costs are concerned, I agree with *Mr Engelbrecht* that they should be borne by the first respondent, principally for two reasons. First, it elected to ignore its own legal advisers who expressed doubt as to whether s 13(1)(g) applied and suggested that the issue either be referred by the first respondent to the second respondent for decision or to the High Court to obtain clarification.

Secondly, in the knowledge that the applicant had referred the issue to the second respondent and that the CSOS process was still under way, the first respondent proceeded to prepare and cause to be passed the impugned resolutions and to adopt conduct rule 10.

[54] **The following order is made:**

1. The appeal succeeds with costs, such costs to be paid by the first respondent on the party and party scale, including any reserved costs orders.

2. The third respondent's order in terms of sections 53 and 54 of the Community Schemes Ombud Service Act 9 of 2011 under reference CSOS 614/WC/17 dated 23 May 2018 is set aside, save for paragraphs 9.4.1 and 9.4.2 thereof, and is substituted with an order in the following terms:

2.1 It is declared that, in respect of the Baydunes Sectional Title Scheme, No 297/1993 ("the Scheme"), section 13(1)(g) of the Sectional Titles Schemes Management Act 8 of 2011 applies to the conversion of garages to living quarters;

2.2 It is declared that conduct rule 10 of the Scheme (adopted on 18 December 2017) is unlawful, invalid and is set aside; and

2.3 It is declared that special resolutions 1 and 3 of the first respondent dated 18 December 2017 are unlawful, invalid and are set aside.

J I CLOETE