IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[REPORTABLE]

Case number: 10268/2019

In the matter between:

ALLEN DENNIS LE ROUX **Applicant**

and

THE DUNROBIN BODY CORPORATE **First Respondent**

STEPHANI LAURA SCHEER **Second Respondent**

THE REGISTRAR OF DEEDS, CAPE TOWN **Third Respondent**

CORAM: **Wille, J**
DATE OF HEARING: **22nd May 2020 (The date upon which final supplementary submissions were filed)**
DATE OF JUDGMENT: **Delivered via email on the 9th of June 2020**

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an opposed motion for final relief in connection with two parking bays in the Dunrobin Sectional Title Scheme[1], namely parking bay P12[2] and parking bay P13.[3] The first respondent is a body corporate, established in terms of the now repealed, Section 36 (1) of the Sectional Titles Act, 95 of 1986[4], read with Section 2 of the Sectional Titles Schemes Management Act, 8 of 2011.[5]

[2] In view of the restrictions placed upon all of us due to the current lockdown, the parties agreed that this application and also the counter application, would be determined without the need for the hearing of any oral argument[6] and, that the parties would in addition, be given the opportunity of filing additional written submissions, should they wish to do so.

[3] The central issue to be determined is whether the applicant is entitled to receive a cession from the first respondent, alternatively, from the third respondent[7], for the exclusive use rights in relation to parking bay P12. In the event that the applicant is successful on this score, then in that event, the rest of the relief sought in relation to P12, follows as a matter of course. If the applicant does not succeed on the central question, then that relief, too, falls away. The second respondent has instituted a counter application, seeking a declaratory order to the effect that P12 is to remain vested in the first respondent as - *common property* - in terms of Section 27(4)(b) of the STA.

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[1] The scheme
[2] P12
[3] P13
[4] The STA
[5] The STSMA
[6] The application was decided on the papers filed of record
[7] In terms of a belated amendment filed by the applicant

[4] The applicant - *wisely* - concedes that should the main issue be decided against him, then it follows that the relief sought by the second respondent falls to be granted. Initially the applicant also sought certain relief in connection with P13. However, since the launch of these proceedings it has become common cause between the parties that P13 constitutes common property. This - *status issue* - is something mercifully, upon which I do not have to decide. This notwithstanding, the applicant persists in seeking an interdict prohibiting the first respondent from alienating, letting, or allocating P13 as an - *exclusive use area* - for the purposes of the parking of any vehicle by special or unanimous resolution, or by way of a conduct or management rule, or in any other manner. Again, the applicant wisely concedes that, on the facts, this relief could only be granted should the central question in relation to P12, be answered in his favour.

THE APPLICANT'S CASE

[5] The applicant purchased his apartment in 2001. The applicant's title deed refers to an exclusive use area forming part of the transaction. The seller[8], obtained a notarial cession of P12 from the first respondent during 1994. A resolution was passed by the first respondent in 1993, in terms of which various parking bays were ceded to the then owners of the units in question.

[6] P12 was not subsequently ceded to the applicant when he took transfer of his apartment as was required in terms of Section 27(4)(a) of the STA. The applicant purchased his apartment together with P12, by way of one indivisible transaction and he paid transfer duty on the - *value of both* - in order to obtain the transfer duty clearance and registration of transfer into his name.

[8] The applicant's predecessor-in-title

[7] At the critical moment that the transfer was registered, the seller ceased to be a member of the first respondent. P12 accordingly - *vests* - in the first respondent. I will return to this aspect later on in this judgment. The applicant has enjoyed the undisturbed use of P12 and has paid the levies[9], as raised thereon, from time to time, by the first respondent. The first respondent has treated this area as an - *exclusive use area* - to which the applicant was entitled, to the exclusion of all others.

[8] The applicant's case is that in accordance with the provisions of Section 27(6) of the STA the right to the exclusive use of a part of the common property, is deemed to be a right to immovable property.[10] This view is fortified by the fact that when he purchased his apartment the title deed referred to his section and included an *exclusive use area.* It is argued that having regard to the provisions of Section 33[11], the concept - *acquire* - falls to be widely interpreted, as meaning the - *right to acquire ownership of property* - including the personal right to obtain - *dominium* - in immovable property.

[9] It is submitted, that upon a proper interpretation of Section 33 (1), it must include the right to claim ownership of the exclusive use rights, in and to, P12. This is the primary issue.

[10] Further, it is argued that this must be so because, the right to ownership which may be registered in terms of Section 33, of necessity, encompasses the same right that was acquired in the transaction to which effect cannot be given in the usual manner. The sale of these rights, for a moment ignoring the legal status of these rights, appear on the applicant's title deed. The

[9] Imposed by the first respondent
[10] McKersie v SDD Developments (Western Cape) Ltd 2013 (5) SA 471 (WCC)
[11] Of the Deeds Registries Act 47 of 1937 - DRA

problem that faces the applicant, is that the previous owner is now deceased, and it is accordingly not possible to obtain a formal cession of these rights from her.

[11] By way of default, P12 vests in the first respondent in terms of Section 27(4)(b) of the STA, which records;

'*If an owner ceases to be a member of the body corporate in terms of section 2(3) of the Sectional Titles Schemes Management Act, any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond*'

[12] It is contended that this *'vesting'* does not alter the nature of the exclusive use right that exists in connection therewith. P12, is in essence, part of the common property, save for the fact that it was encumbered by an - *exclusive use right* - in terms of a cession to the applicant's predecessor-in-title. It is the applicant's case that this exclusive use right vests in the first respondent only for - *custodial purposes* - and accordingly falls to be relinquished when ownership of the exclusive use right, is properly established.

[13] It is submitted that subsequent to the unanimous 1993 resolution, P12 was ceded to the previous owner as an exclusive use area. The provisions of Section 27(3) of the STA were therefore complied with and the process need not, again be repeated.

[14] Turning now to the issues involving P13. The second respondent is the registered owner of an apartment in the same complex. There is no mention of a parking bay in the second respondent's deed of transfer, or in that of the predecessor-in-title. There is also no mention of any exclusive use area in the second respondent's deed of transfer. P13 has never been dealt

with by the rules[12] and has not been ceded to either of the second respondent's predecessors-in-title, nor to the second respondent.

[15] Further, there is no registered - *notarial deed of cession* - relevant to the second respondent or her predecessors-in-title, in connection with P13. At all material times, since the acquisition of the property by the second respondent, she held the view that parking bay P13 had been allocated to her and that she was entitled to the exclusive use thereof, to the exclusion of all others.

THE FIRST RESPONDENT'S CASE

[16] The first respondent's position is, inter alia, underpinned by the resolution taken at a body corporate meeting held on 14 January 1993,[13] in terms of which various bays were allocated to members in the scheme. Because of the provisions of Section 27(3) and (4) of the STA at the time,[14] exclusive use areas were only capable of being transferred by way of a formal notarial deed of cession. The resolution allocated parking bays to specific owners in the scheme, and the subsequent cessions were done in 1994. This resolution records that P12 was allocated to the applicant's predecessor-in-title. P13 was allocated to the second respondent's predecessor-in-title. The resolution[15], did not allow for the allocation of parking bays to successors-in-title.

[17] During 1994, all of the parking bays in the scheme, except for P13, were formally ceded to the allocated owners by the first respondent in terms of Section 27(3) of the STA. P12 was ceded to the applicant's predecessor-in-title. However, P13 was never transferred to the second

[12] In the scheme
[13] This resolution was never included in the rules
[14] Prior to their amendment in 1997
[15] Passed in 1993

respondent's predecessor-in-title. This in effect means that no exclusive use rights attached to P13 and so this area, falls to be dealt with as - *ordinary common property* - unencumbered by any exclusive use rights. To some extent, the second respondent aligns herself with this stance adopted by the first respondent in the opposition to this application.

THE POSITION ADOPTED BY THE SECOND RESPONDENT

[18] The second respondent asserts that in so much as the applicant has, inter alia, relied on Section 33 of the DRA for the relief that it seeks, it must be accepted that in terms of Section 27(6) of the STA, that the right to the exclusive use of P12, constitutes immovable property. The second respondent maintains the position that the exclusive use right to P12 - *belongs* - to the first respondent. This position is maintained despite the argument that the applicant acquired a right to the ownership of P12, within the - *true meaning* - of Section 33 of the DRA.

[19] The second respondent concedes that the applicant had a right against his predecessor-in-title - *ex contractu* - from the deed of sale. However, the argument is made that it then became impossible to deal with this right, once ownership no longer vested in the applicant's predecessor-in-title, due to her passing. The second respondent submits that Section 33 of the DRA may be invoked by an applicant who is unable to procure registration of immovable property in his name - *according to the sequence of the successive transactions* - in pursuance of which the right to the ownership of such property has devolved upon him. But, not in this case.

[20] In the present matter, it is submitted, that the vesting of P12 in the first respondent, is an - *unqualified* - vesting which transfers unqualified ownership of P12 to the first respondent. The second respondent concedes that an unanimous resolution to enable the first respondent to create an exclusive use area is only required to be passed once.[16] The same applies to the creation of an exclusive use area by a developer.[17] Despite this concession, the second respondent persists with her submission that, absent compliance with Section 27(3) and Section 5(1)(e) of the STSMA, the first respondent is not permitted to transfer P12, to the applicant.

[21] Finally, the second respondent advances that the applicant's reliance on a wide interpretation of Section 33 of the DRA is misplaced as it simply does not contemplate cessions or transfers of rights from one party to another. It is contended that Section 33 cannot be used to - *bypass* - a transaction capable of registration in the usual manner.

THE POSITION ADOPTED BY THE THIRD RESPONDENT

[22] The Registrar of Deeds does not raise any objection to the stance adopted by the applicant and in this connection abides by the decision of the court subject to all statutory and Deeds Office requirements having been met. The Registrar of Deeds specifically records that from a registration - *point of view* - there are no objections to the order being granted as sought, even in accordance with the amended formulation.

[16] A once-off juristic act
[17] In terms of Section 27(1)(a) read with Sections 5(1), 5(3)(f), 11(2) and 11(3)(b) of the STA

DISCUSSION

[23] P12, in the form of an exclusive use area now - *vests* - in the first respondent. However, as a bilateral cession was required to create it, it follows that a bilateral transaction is required to cancel it. Further, and more problematic, is that neither the STA nor the STSMA - *permit* - the first respondent to alienate this right.

[24] In the event that the applicant is successful in relation to his entitlement to a cession, then the applicant is, it is submitted, he is entitled to the interdictory relief sought, namely an order prohibiting the first respondent from allocating P13 as an exclusive use area for the purposes of the parking of any vehicle by special or unanimous resolution, or by way of conduct or management rule, or in any other manner, including alienating or letting P13, for parking purposes. This is so, because the interdict is primarily sought to ensure that the applicant is capable of using P12, for the unhindered parking of a vehicle.

[25] The matter is somewhat more complicated due to the fact that the layout and positioning of the two bays and the configuration of P13, renders it impossible to park two vehicles next to each other simultaneously. It is virtually impossible to gain access to P12, if a vehicle is parked in P13. In the event of a vehicle being parked in P13, access to P12 is not possible, as access can only be facilitated by utilising a turning circle, partly over P13.

[26] The collective space of P12 and P13 can practically only facilitate parking for one vehicle. This is disputed by the respondents, but is not properly engaged with on the papers, save for some attempt at obfuscation of these issues.

[27] In my view, this opposition is of no real moment because of the logical provisions of the Sectional Title Schemes Management Regulations[18], which provide, inter alia, that;

'the body corporate must take reasonable steps to ensure that a member or other occupier of a section or exclusive use area does not do anything to a section or exclusive use area that has a material negative affect on the value or the utility of another section or exclusive use area'

[28] It is accordingly argued that the first respondent is not entitled to grant exclusive use rights over P13 that would impede upon those attaching to P12. I agree. The first respondent may only alienate or let part of the common property in terms of a unanimous resolution[19]. Clearly, such a resolution may not be implemented where it would have an unfairly adverse effect on any member.

[29] The STSMA does not pertinently deal with whether the allocation of exclusive use areas in terms of Section 10(8) would constitute an alienation thereof. The allocation of exclusive use areas by amending the management or conduct rules would in my view, in effect, be tantamount to an - *alienation* - thereof.

[30] The first respondent takes the position that the existing layout plan in relation to P13, may simply be re-instated. However, by implication this will inevitably necessitate a delineation of exclusive use areas. Further, any amendment to a sectional plan and layout plan must take into account the relevant planning and other requirements, including any relevant parking standards. As a matter of simple logic, any allocation of a parking bay in compliance thereof, on

[18] Published under GN R1231 in Government Gazette 40335 of 7 October 2016 - rule 30(e)
[19] Section 5(1)(a) of the STSMA

the space currently represented by P13, will most definitely encroach on the prior delineation of P12.

[31] Further, the first respondent levels criticism in connection with the comments made by Rogers, J in *Mckersie*.[20] In this matter, the observation was made, in my view, correctly so, that an obligation on a body corporate to transfer arises from a contractual obligation delegated to it by operation of law. This must be so, as it cannot be, in these circumstances, that the applicant is only left with a personal right against his predecessor-in-title. The first respondent advances a - *purely clinical argument* - that it was not a party to the sale agreement and accordingly no contractual obligations can be transmitted to it. This approach requires closer scrutiny.

[32] It is significant that in the case of P12, to carefully examine the actual wording of the title deed under and in terms of which the applicant holds his property, The approach by the first respondent, does not take into account - *that in this case* - the title deed under and in terms of which the applicant holds his property, specifically refers to the fact that the seller sold the property to the applicant for R 315 000, 00 which - *includes* - the exclusive use area.[21] By contrast, these words do not appear in any of the title deeds in connection with the transfer of the property to the second respondent as no reference whatsoever is made to any exclusive use areas.

[33] It is important for the purposes of this judgment, to examine carefully the facts and the legal reasoning in *McKersie.* In *McKersie*, the - *developer* - sold a unit together with an exclusive use parking bay to the previous owner, who in turn sold them to the applicant. The provisions of Section 27(1)(b) of the STA were not complied with in respect of the first

[20] McKersie v SDD Developments (Western Cape) Ltd 2013 (5) SA 471 (WCC)
[21] Deed of Transfer – page 41 - (It can never be asserted that P12 was not an exclusive use area)

transaction, so that the exclusive use parking bay vested in the body corporate in terms of Section 27(1)(c) of the STA when the developer ceased to be a member.

[34] In the current matter, P12 vested in the first respondent in terms of Section 27(4)(b) of the STA, when the applicant's predecessor-in-title, ceased to be a member. In *McKersie,* the exclusive use right vested in the body corporate by virtue of the provisions of Section 27(1)(c) of the STA, whereas in the present matter the exclusive use right vested by virtue of the provisions of Section 27(4)(b) of the STA. It may be argued that this makes no difference. However, this case is different, as in this case, the title deed under and in terms of which the applicant - *holds his property* - specifically refers to the fact that the seller sold the property to the applicant for R 315 000,00;

'which includes the exclusive use area'[22]

[35] One of the arguments raised against the relief sought is, that because of the various amendments to the STA over the years, P12 vests in the first respondent - *uninhibited* - from any registered real right. This is so since the amendment,[23] records that;

'*if an owner ceases to be a member of the body corporate … any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond or registered real right*'

[36] It is trite that there is a presumption against the operation of retrospectivity. Even if I am wrong in my interpretation against - *retrospectivity* - and the amendments are regarded as having

[22] Deed of Transfer – page 41 - (It can never be asserted that P12 was not an exclusive use area)
[23] Amended Section 27(4)(b)

had some sort of retrospective effect, then - *once the vesting had occurred* - it could never have been the intention for a re-vesting to take place upon any successive amendments.

[37] In any event, in my view, it could never be argued that the previous amendments apply retrospectively to P12 and in the same breath, ignore the most recent amendment which deleted the reference to any - *registered* - real right. Accordingly, I am of the view, that the rights that vested in the first respondent in 2003, are still so vested, and for that reason, the necessity to re-create the exclusive use rights in relation to P12, finds no application by operation of law.

[38] Further, it could not have been the intention of the legislature to enrich the first respondent at the expense of the applicant, given that he paid for his - *exclusive use rights* - both in relation to purchase price and transfer duty. It is not the applicant's case that the first respondent should grant him exclusive use rights over P12 as a - *new allocation* – rather, it is contended that because of the failure to formally register the cession to the applicant, he has no other mechanism available to him, other than Section 33, to obtain cession of those rights from the first respondent.

THE AMENDMENT PROCEEDINGS

[39] The applicant sought an - *amendment* - at a very late stage in the proceedings. The effect of the amendment is to remedy in the - *alternative* - the formulation of the declaratory order sought by the applicant. This, essentially because the first respondent now contends for the position that the - *exclusive use right* - never vested in the first respondent. It is significant to note that, in any event, on this score, there is no dispute on the papers that a - *declarator* - granted in favour of the applicant would not be binding on the parties. The amendment

proceedings at the instance of the applicant were not opposed by either the first or the second respondent. The third respondent also has no issue with the amendment to the notice of motion as sought by the applicant.

CONCLUSION

[40] In my view, taking into account the provisions of Section 33 of the DRA, read together with the belated concessions by the respondents, that the applicant has demonstrated a - *clear right* - to the unhindered access to P12, which he has exercised, to the exclusion of all others, without interference, over many years. Further, this right is being infringed upon by the second respondent's conduct, and regrettably by the first respondent's acquiescence and tolerance of such conduct.

[41] I say this, inter alia, because in my view, upon the ordinary meaning of the language used and on a proper logical interpretation of Section 33, in these particular circumstances, it must include the obligation to effect a cession of rights from the first respondent, with the right of the applicant to receive a cession of such rights. Section 33(1) of the DRA provides as follows:

'*Any person who acquired in any manner, other than by expropriation, the right to ownership of immovable property registered in the name of any other person and who is unable to procure registration thereof in the usual manner and according to the sequence of the successive transaction in pursuance of which the right to ownership of such property has devolved upon him, may apply to the court by petition for an order authorizing the registration in his name of such property*'

[42] Further, I find that it will not be a - *new allocation* - of rights to grant to the applicant the exclusive use rights over P12. Put in another way, I do not find favour with the argument that the applicant has no right to compel the first respondent to transfer ownership to him, of the exclusive use rights over P12, because he has no - *contract* - with the first respondent.[24] The facts of this case are very different because; the applicant purchased an exclusive use area; this exclusive use area is noted in his title deed; he has a - *clear right* - to unhindered access to P12, which he has exercised, to the exclusion of all others, without interference, over many years and the first respondent must have issued a - *levy clearance certificate* - being well aware of these facts, prior to transfer been effected to the applicant.

[43] In my view, the provisions of Section 33(1) are clear in that they provide that - *any person who acquired in any manner, other than by expropriation, the right to ownership of immovable property* - may proceed to obtain the appropriate relief under this section. Further, in view of my findings above it is not necessary to deal in any detail with the merits of the amendments sought by the applicant. It accordingly follows that the interdictory relief sought in relation to P13 falls to be granted with a dismissal of the second respondent's counter application.

COSTS

[44] I am entitled to take into account the moral[25] obligations of the parties when I exercise my judicial discretion in connection with the costs of this application. The first respondent, albeit in a - *disguised fashion* - concedes that there might be a moral obligation to transfer the -

[24] As set out in McKersie
[25] As opposed to strictly legal obligations

exclusive use area[26] - to the applicant, although it denies any legal obligation to do so. It is so that the second respondent did not oppose the relief sought by the applicant in relation to the issue surrounding P13. Further, the applicant has conceded that it shall bear all the costs of an incidental to the amendment proceedings.

[45] Not only is it an extremely difficult task to apportion costs in a matter such as this, it makes the apportionment (if any) - *practically impossible* - for the taxing master to implement when it solely bears reference to the various prayers requested by the parties as set out in the notice of motion and the counter application. Accordingly, I will adopt a measured, but robust approach to the issue of costs. The applicant has been the successful party in this application, save for some costs that fall to be visited upon the applicant for his belated amendment proceedings. The first respondent has opposed this application despite a plethora of correspondence at the instance of the applicant in an attempt to resolve this matter in an amicable fashion. The second respondent has also to some extent been unreasonable in her opposition to this application, save for a - *volte face* - at the last minute in connection with some of the relief sought by the applicant.

ORDER

[46] In the result, the following order is granted;

1. That the amendments sought by the applicant are granted (in so far as same may be necessary)

[26] P12

2. That the first respondent's allocation of exclusive use rights in relation to parking bay P13 ("P13") in the Dunrobin Sectional Title Scheme SS 64/1980 ("the scheme") to Mrs M Abitz by way of special resolution on 14 January 1993, did not constitute an allocation of exclusive use rights upon Mrs Abitz's successors-in-title, including the second respondent.

3. That no exclusive use rights in relation to P13 have been granted to the second respondent, whether by cession or by resolution of the first respondent.

4. That P13 constitutes common property in the scheme, unencumbered by any exclusive use right.

5. That the first respondent is prohibited from alienating, letting or allocating P13 as an exclusive use area for the purposes of the parking of any vehicle by special or unanimous resolution, or by way of conduct or management rule, or in any other manner.

6. That the applicant is entitled to receive cession of the exclusive use rights registered over parking bay P12 in the scheme by virtue of the provisions of Section 33 of the Deeds Registries Act 47 of 1937 from the first respondent, by way of the unilateral cession of the exclusive use rights held in the name of Ruth Anne Fig under Deed of Cession SK1551/1994S to the applicant and that the applicant, the first respondent and the third respondent are directed and authorised to take such steps under the Sectional Titles Act 95 of 1986, the Sectional Titles Schemes Management Act 8 of 2011, and the Deeds Registries

Act 47 of 1937, including steps in fulfilment of the applicable Deeds Office requirements, as may be necessary to cause the due registration of the cession of the exclusive use rights attaching to parking bay P12 to the applicant within (90) days of the date of an order granted herein.

7. That access to P12 may not be obstructed or infringed upon in any manner.

8. That the first respondent shall pay 75% of the applicant's costs of and incidental to this application. The first respondent shall be prohibited from collecting any of its legal costs associated with this application from the applicant by way of any levies, including, but not limited to, the implementation of any special levy.

9. That the second respondent shall pay 25% of the applicant's costs of and incidental to this application.

10. That the applicant shall be responsible for all the costs of and incidental to the application to amend.

11. That the second respondent's counter application is dismissed with costs and the costs of and incidental to the counter application shall be paid by the second respondent.

12. That all costs shall be on the party and party scale, as taxed or agreed (inclusive of the costs of counsel) and shall include all the costs associated with the filing of the supplementary heads of argument.

WILLE, J
Judge of the High Court