



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

NDITA J et DOLAMO J et SHER J

CASE NO: 15175/2019

In the matter between:

DIAZ HOTEL AND RESORT (PROPRIETARY) LIMITED

REGISTRATION NUMBER: 2014/231014/07

Applicant

And

BODY CORPORATE OF THE VISTA BONITA

SECTIONAL TITLES SCHEME NO SS 357/2008

First Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Second Respondent

JUDGMENT DELIVERED (VIA EMAIL) – 31 AUGUST 2021

DOLAMO et SHER JJ (NDITA J concurring)

INTRODUCTION

[1] The applicant brought this application for certain declaratory relief and to compel the first respondent to co-operate with it to achieve the transfer of three exclusive use

areas in a sectional title scheme known as Vista Bonita (the Scheme) in Mossel Bay.

The relief sought in the notice of motion is in the following terms:

- “1. Declaring that the three exclusive use areas in the Vista Bonita sectional titles scheme number SS 357/2008 ("the scheme") owned by S D Commercial Holdings (Proprietary) Limited (in liquidation), namely parking bays number P64, P73 and P74 depicted on sheets 4 and 5 respectively of registered sectional plan S G D No 1065/2007 as amended have not been cancelled by resolutions of the first respondent and are extant.*
- 2. Directing the first respondent to co-operate with the applicant and the second respondent to effect transfer of the above -mentioned exclusive use areas known as parking bays number P64, P73 and P74 in the scheme to the applicant, which co-operation must include, but is not limited to, providing to the applicant all relevant information such as clearance figures and completing and signing all relevant documents and affidavits necessary to register such transfers to the applicant.*
- 3. In the event that the first respondent refuses or fails to comply with the orders in paragraph 2 above, the sheriff appointed for the area of jurisdiction within which the scheme is situated is hereby authorised to complete and sign all relevant documents and affidavits on behalf of the first respondent to effect transfer of the exclusive use areas known as parking bays number P64, P73 and P74 in the scheme to the applicant.*
- 4. Directing and authorizing the second respondent, against payment of the prescribed fees and costs by the applicant, to transfer the exclusive use*

areas known as parking bays number P64, P73 and P74 from S D Commercial Holdings (Proprietary) Limited (in liquidation) to the applicant.

- 5 *Directing the first respondent, as well as the second respondent only if it opposes the application to pay the applicant's costs of suit which costs are to include the costs occasioned by the employment of counsel.”*

[2] The second respondent in the matter did not indicate whether it was opposing or supporting the application nor did it file the customary report in matters of this nature. It is fair therefore to assume that it abides the decision of this court. For the sake of convenience I shall henceforth refer to the first respondent merely as the respondent and where necessary to the second respondent simply as the Deeds Office or Registrar of Deeds.

THE FACTS

[3] The facts giving rise to the application are briefly the following: On or about 2 February 2015 applicant entered into a sale agreement (“the agreement”) on behalf of The Tower Trust in terms of which it purchased all the rights and assets of a business known as the Convenience Centre, Diaz Beach, Mossel Bay. This business was owned by a company called S D Commercial Holdings (Proprietary) Limited (in liquidation) (“the seller” or “S D Commercial”). The purchaser was represented by one Conradie¹ and the seller by its co-liquidator, one Engelbrecht, the latter acting in terms of a Certificate of Appointment issued by the Master of this court. Included in the *merx*

¹ Conradie further concluded a nomination agreement on behalf of the Trust in terms of which the applicant was nominated as the buyer under the agreement and to take over all the trust rights and obligation under the sale agreement.

purchased was unit 73 in the scheme. There were two exclusive use areas which were associated with unit 73, namely, parking bays P73 and P74 and the applicant submitted that it was entitled to obtain transfer of parking bay P64 as well as the two exclusive use areas.

[4] After the conclusion of the sale transaction, the agreement and other related transfer documents were lodged in the Deeds Office to transfer the immovable property into the name of the applicant. After lodgement the conveyancers appointed by the parties to handle the transfer informed the parties that the Deeds Office had rejected the transfer of the three exclusive use areas as these were not expressly cited in the sale agreement. In response to the rejection note, and in order to correct the error, Engelbrecht and Conradie concluded an addendum to amend the agreement so that it expressly included the three exclusive use areas, namely parking bays P64², P73 and P74 in the scheme, as part of the assets sold under the agreement.

[5] Conradie also granted a special power of attorney to Coetzee, the conveyancing secretary, authorising her to sign and execute a notarial deed of cession to enable the transfer of the exclusive use areas to the applicant. In addition, Ms Coetzee submitted to the Deeds Office a duplicate of the original certificate of title to the exclusive use

² The seller was the owner of section 64 of the scheme in terms of sectional title deed number ST12380/2008. The section was transferred to CShell 172 (Proprietary) Limited in term of deed of transfer number ST19534/2014. On 18 May 2018 section 64 was transferred to Norman Stefan Janse van Rensburg, who is an owner and member of applicant. As section 64 was transferred during 2014 when the seller was still a member of the first respondent, it must be accepted that the exclusive use rights to parking P64 did not vest in the first respondent by virtue of either section 27(1)(c) or section 27(4)(b) of the Sectional Titles Act at that time.

areas number SK2348/2008S, and an application for a replacement copy to enable the transfer of these exclusive use areas allegedly by endorsement into the name of the applicant.

[6] All these documents were re-lodged in the Deeds Office and on 11 December 2015 the Deeds office registered the transfer of unit 73 into the applicant's name under Deed of Transfer number ST21604/2015. Paragraph 9 of the deed of transfer reflects that Unit 73 in the scheme was transferred to the applicant together with an undivided share in the common property and other real rights and conditions as contained in the schedule of conditions referred to in section 11(3)(b) of the Sectional Titles Act³ ("the STA"). Applicant submitted that the Deeds Office, however, failed to register the transfer of the exclusive use areas as was intended. According to the applicant this omission in the records of the Deeds Office ought to be rectified. For this reason, the applicant submitted that it requires the co-operation of the respondent to rectify the error in the Deeds Office but the latter has failed and/or refused to provide the necessary information (such as clearance figures) to effect transfer of the aforesaid exclusive use areas to the applicant as the owner of Unit 73.

[7] In terms of the sectional plan there are 74 exclusive use areas registered in respect of the scheme, which areas are designated on the sectional plan as parking bays P1 to P74, respectively. Unit 73, which is on the ground floor, is used for a shop known as the Convenience Centre. The applicant submitted that parking bay P73, the larger of the two parking bays associated with unit 73, was intended for use by the

³ Act 95 of 1986.

customers of this business. The smaller parking bays in the scheme are associated with similarly numbered units and are intended to provide parking for the owners of the respective units. Parking bay P64 is in the latter category, being associated with the ownership of unit 64. The business use is authorised by the local authority in terms of the Zoning Scheme of the erf on which the scheme has been developed. It is stipulated in the Zoning Scheme that:

“Parking according to minimum off-street parking requirements stipulated in the Mossel Bay Municipality Integrated Zoning Scheme By-Law, 2018”

[8] The applicant submitted that the Zoning Scheme requires that at least 22 parking bays be provided on the exclusive use areas allocated to unit 73. Any reduction in the number of parking bays provided for unit 73 in the scheme would result in the applicant, as owner of the unit, contravening the provision of the town planning scheme and the Zoning By-law. Every exclusive use area associated with a unit is to be used as a parking bay by the owner of the related section in compliance with the relevant town planning scheme. These exclusive use areas are registered real rights in terms of section 12(1)(f) of the STA. In terms of the certificate of real rights issued pursuant to this provision S D Commercial was registered as the holder of the exclusive use areas numbers P73 and P74 in the scheme on 16 May 2008. The applicant submitted that when the alleged ‘omission’ was discovered applicant engaged respondent with the view to obtaining transfer of these exclusive use areas into its name, but the respondent refused to assist .

[9] In earlier correspondence between the applicant and the respondent the latter alleged that P73 and P74 were cancelled in terms of a resolution. The alleged cancellation through a resolution occurred in the following circumstances: On 3 January 2011, at an Annual General Meeting (AGM) attended by owners or their proxies of nineteen of the units in the scheme, the respondent purported to pass a special resolution, by 100% vote in favour thereof, to cancel all the exclusive use areas. This purported resolution was recorded in paragraph 14.1 of the minutes of that meeting. Paragraph 14.2 recorded that a resolution to allocate and cede to certain owners new exclusive use areas (parking bays) in the sectional plan was not passed because 80% of the owners were not present and therefore no voting could be held. Applicant submitted that while the purported resolution provided for the cancellation of parking bays P73 and P74 it did not provide for new or existing parking bays to be allocated to S D Commercial, who was the holder of these registered exclusive use rights at the time.

[10] Secondly, the respondent alleged that on 1 September 2015 Conradie signed on behalf of the applicant a unanimous resolution taken by the members of the body corporate to the effect that the members of the respondent, in terms of section 27(2) and (3) of STA, unanimously authorised the delineation on the sectional plan of certain new exclusive use areas and the cession thereof to new owners. Conradie's explanation regarding the document is that, though he had signed it together with other transfer documents in relation to the sale agreement at the offices of the conveyancers who were attending to the transfer of the property, he did not read it before signing. The so-called "*unanimous resolution*" was also not read to him nor did the conveyancer point

out to him that this document was not related to the transfer of the exclusive use areas and other properties but was about a resolution in terms of which S D Commercial lost its rights to P73 and P74. Conradie submitted that he did not intend, by his signature, to give effect to any of the provisions set out in the resolution.

[11] The applicant stated that the purported cancellation of the exclusive use areas by the passing of the so-called “*first resolution 1*” or any subsequent resolution does not comply with the requirements of section 27 (5) of the STA and is accordingly unlawful. It submitted that on 1 September 2015 the applicant was not yet the registered owner of unit 73, which was only registered in the applicant’s name on 11 December 2015. Conradie further alleged that in any event he had no authority to either bind S D Commercial or the applicant to the cancellation of the exclusive use areas associated with unit 73, or to authorise the delineation on the sectional plan of new exclusive use areas (parking bays) and/or the cession of the rights of exclusive use of parking bays from the respondent to the owners of certain sections, as purportedly provided for in the resolution.

[12] Before the conclusion of the agreement, and on 3 November 2011, the managing agent of the scheme circulated a letter to the unit owners in which it requested the owners of certain units listed in the letter to sign a resolution to cancel and reallocate parking bays to various owners. Neither the applicant, nor the seller acceded to the cancellation and/or reassignment of its exclusive use areas. Thus, applicant submitted that these exclusive use areas were still extant as set out in the sectional plan and that it was entitled to obtain transfer thereof into its name.

[13] The STA has been amended by the Sectional Titles Schemes Management Act⁴ (“the Management Act”) which came into effect on 7 October 2016. In terms of section 10(7) and (8) of the Management Act a Body Corporate, such as the respondent, 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.

[14] On 14 June 2019 the applicant’s attorneys addressed a letter of enquiry to the managing agent of the respondent regarding the allocation, if any, of the exclusive use areas P73 and P74 by the respondent under the provisions of the Management Act. The managing agent provided the applicant’s attorneys with a copy of the conduct rules of the scheme. These conduct rules only provided, in terms of clause 33 read with schedule B thereof, for the allocation of certain foyers to the owners of specific sections. The conduct rules do not provide for the allocation of any other exclusive use areas, let alone parking bays. In the premises, it submitted that none of the other owners of units in the scheme had acquired any use rights rights to parking bay numbers P73 and P74.

[15] In opposing the application the respondent raised several points *in limine*. The respondent submitted that S D Commercial has a direct and material interest in the relief sought by the applicant but has not been joined to these proceedings; that S D Commercial was in final liquidation and if it had been deregistered, any property which it owned at the time of its final deregistration has as a matter of law, become *bona*

⁴ Act 8 of 2011 (the Management Act) or STSMA.

vacantia in the hands of the State; that the latter, as such, has a direct and material interest in the relief sought and ought to have been joined to these proceedings. The applicant was similarly obliged to, but did not, join the relevant representatives of the Government in these proceedings, so submitted the respondent.

[16] The respondent further argued that, to the extent that it was suggested that by effecting the transfer of unit 73 into the name of the applicant the exclusive use area were *ipso facto* also transferred to the applicant's name, it was important to note that neither Conradie nor Engelbrecht had suggested that a notarial deed of cession was ever signed or executed, this being the method of transferring exclusive use areas in the sectional title scheme. Respondent further submitted that, when applicant was called upon, by means of respondent's notice in terms of Rule 35(11), (12) and (14) to produce the duly executed power of attorney authorising a public notary, to cede the exclusive use areas together with the draft Deed of Notarial Cession of Exclusive Use Rights and a copy of the duly executed Deed of Notarial Cession, together with a copy of the relevant page from the notary public's protocol register, applicant was unable to do so.

[17] Respondent further submitted that S D Commercial, which was the developer of the scheme, ceased to be the owner of any unit in the scheme on 11 December 2015 when all the sections which it previously owned were transferred to and registered in the name of the applicant, as provided for in section 2(2), alternatively 2(3), of the Management Act. Respondent submitted that on this date, and by operation of law

pursuant to section 27(1)(c), alternatively 27(4)(b) of the STA, any rights to any exclusive use area still registered in the name of S D Commercial, including those forming the subject matter of these proceedings, vested in the respondent free from any mortgage bond or registered real right. Accordingly, it was submitted, S D Commercial was no longer the holder of any rights in and to the exclusive use areas and therefore could not give transfer thereof to the applicant.

[18] The respondent conceded that it was correct that from 16 May 2008 S D Commercial was the holder of the exclusive use areas P73 and P74. As regards the sale agreement respondent argued that it was not a party to that agreement and to the extent that applicant sought to enforce contractual rights, which it holds pursuant to the agreement and the addendum thereto, such rights fall to be enforced against S D Commercial.

[19] Respondent also denied that parking bay P74 was intended for use by customers of the business which is carried out in unit 74 and that the smaller parking bays were associated with similarly numbered units. In this respect respondent argued that it was always possible for exclusive use areas to change hands between its members, subject to compliance with the relevant legislation and/or conduct rules. It is, however, instructive that the respondent did not assert that this exchange had indeed taken place. As regards parking bay P64 respondent denied that the seller was the registered owner of unit 64 and averred that it could therefore not give transfer thereof to the applicant.

[20] Respondent submitted that in signing the relevant documentation including the resolution at the conveyancer's office in Pretoria, Conradie, on behalf of the applicant represented that it would be bound by the contents of that document. As a result of this representation, the other members of the first respondent altered their legal positions as a consequence of such representation. The respondent accordingly argued that applicant was estopped from asserting that Conradie was not duly authorised to act on its behalf, alternatively, that he had actual or ostensible authority so to act. It was however, not explained how the other members of the respondent had altered their respective legal positions or had been prejudiced by the alleged misrepresentation.

[21] The legal question for determination is whether any right to exclusive use areas which were registered in the name of S D Commercial vested in the respondent, in terms of 27(1)(c) of the STA, when S D Commercial ceased to be a member of the respondent, and if not whether they can still be transferred to the applicant, and assuming that they can still be transferred to the applicant, whether section 33(1) of the Deeds Registries Act⁵ can be utilised for this purpose.

[22] I pause here to mention that applicant gave notice, in terms of Rule 16A, of its intention to have section 27(1)(c) of STA declared constitutionally invalid insofar as it arbitrarily and without compensation vests any right to an exclusive use area, still registered in the name of a developer, in the body corporate free from any mortgage bond, if a developer ceases to be a member of the body corporate as contemplated in

⁵ Act 47 of 1937.

section 2(2) of the Sectional Titles Management Act. The applicant also gave notice, in terms of Rule 28, to substantially amend the relief sought in the notice of motion.

[23] The proposed amendments and the constitutional challenge to section 27(1)(c) provoked vehement opposition from the respondent. At the hearing of the matter counsel for the applicant gave notice that applicant was abandoning the proposed amendment and constitutional challenge. This, however, was not to be the last word on this topic. The respondent, post the hearing of the matter and notwithstanding a protest from the applicant that it was not proper for the respondent to file further “*heads of argument*”, drew our attention to the judgment of the Constitutional Court in *EFF and Another v Minister of Justice and Correctional Services and Another*⁶. This was to counter the applicant’s attempts to argue the constitutional point despite its formal withdrawal. I agree with the respondent that the applicant cannot obtain an order pronouncing on the constitutionality of section 27(1)(c) of STA after the express withdrawal of the challenge. To be afforded any relief of unconstitutionality the applicant ought to launch a full, frontal challenge to the constitutionality of section 27(1)(c)⁷. The intractable approach adopted by the applicant, of withdrawing the formal notice yet proceeding to argue the very same issue, is unprocedural and cannot be countenanced. This leaves this Court to deal with the merits of the matter as formulated in the papers filed of record, without the proposed amendment.

⁶ 2021 (2) SA 1 (CC).

⁷ See *EFF v Minister of Justice, supra*, at para [75].

APPLICANT'S SUBMISSIONS

[24] Applicant complained that the respondent was changing tack, from its refusal to provide the necessary information and sign documents to effect transfer of the three exclusive use areas sold to the applicant, to allege ownership of these rights. This prompted the applicant to seek a declaratory order to the effect that these exclusive use rights were not cancelled in terms of section 27(5) of STA. This, the applicant alleged was because of the respondent's ambivalent stance when, for the first time in its answering affidavit, it contended that these rights vested in it in terms of section 27(1)(c) and/or 27(4)(b) of the STA. Applicant argued that this change of tack "*substituted the nature of the application*" and compelled it to meet an entirely different case in its replying affidavits.

RESPONDENT'S SUBMISSIONS

[25] Respondent argued that the effect of sections 27(1)(c), 27(4)(b) and 34(2) taken together is that once a developer has given transfer of the last section held by it, it no longer has a share or interest in the common property and is no longer a member of the body corporate; any exclusive use areas then registered in the name of the developer vest in the body corporate free from any mortgage bond or registered real right which, in *casu*, occurred on 11 December 2015 when S D Commercial sold the last section it owned and gave transfer to the applicant.

[26] On its alleged *volte-face* the respondent submitted that it had always asserted that it was the owner of the exclusive use areas which previously belonged to S D Commercial. Furthermore, it submitted that applicant was well aware that cession of these exclusive use areas had not taken place upon the transfer of unit 73 into its name. The contention that the failure to cede the exclusive use areas was a conveyancing oversight and that steps were taken to rectify the situation was not supported by the evidence, argued the respondent. In this respect it was submitted that no such allegation was made in the founding papers since there was no affidavit by the conveyancer that was placed before court to confirm this alleged oversight and applicant was unable to produce the necessary document when called upon to do so in terms of Rule 35(12), despite being granted a postponement for this purpose. Furthermore, Coetzee did not confirm that, upon being granted a power of attorney by Conradie, she appeared before a notary public where notarial deeds of cession were duly executed and thereafter lodged at the Deeds Office. According to the respondent it was only if the necessary documents were lodged at the Deeds Office that any question of error on the part of the Registrar of Deeds could arise.

[27] Respondent argued further that the submission by the applicant that the certificate of exclusive use right could be endorsed to reflect the applicant as the holder of such rights was incorrect, because respondent has become the holder of such rights and real rights are transferred from one person to the other only by means of a deed of transfer executed or attested to by the registrar. It submitted that other real rights in law may only be conveyed by means of a deed of cession attested by a notary public and

registered by the Registrar, as provided for in section 16 of the Deeds Registries Act, nor could section 100 thereof be utilised since the applicant never sought such relief in its founding papers.

[28] Relying on the authority of *Mckersie v SDD Development (Western Cape) (Pty) Ltd and Others*⁸ (*Mckersie*) respondent submitted that section 33(1) of the Deeds Registration Act was of no assistance to the applicant nor was the argument by the applicant that the vesting under section 27(1)(c) of STA, was for “*custodial purposes*” supported by any authority. It argued that such an interpretation was inconsistent with the clear language of the section and section 27(1)(d). Reliance on the judgment in *Le Roux v Dunrobin Body Corporate*⁹, (*Le Roux*) regarding the possible retrospective effect of section 27(4)(b) of STA, was also said to be misplaced since this section was irrelevant for present purposes, the relevant provision being section 27(1)(c) of STA.

[29] It is common cause that respondent has not yet applied for a certificate of real right of exclusive use in terms of section 27(1)(d) of STA. On the assertion that the Deeds Office’s records were not up to date as they still reflected S D Commercial as the holder of the exclusive use areas respondent argued that this was for the simple reason that these were never transferred from S D Commercial to the respondent after the latter became the holder in terms section 27(1)(c) of STA.

⁸ 2013 (5) SA 471 (WCC).

⁹ *Le Roux v Dunrobin Body Corporate and Others* [2020] JOL 47441 (WCC).

[30] While the respondent did not persist with the points *in limine*, for completeness sake, I briefly deal and dispose of them. The non-joinder argument is a non-starter. Engelbrecht clearly stated that S D Commercial, having sold the properties, no longer had any interest in the matter and had waived any rights in this respect. Nor was its property *bona vacantia* as the respondent, wisely in my view, conceded. There was therefore no need to join S D Commercial or any government department to these proceedings.

[31] Similarly the argument that the respondent has become the owner of the exclusive use rights by virtue of a special resolution of its members, not expressly disavowed in argument, is nevertheless misplaced. There was no compliance with the requirements of section 27(5) of STA. Nothing further need be said in this respect. This leaves the vexed question of whether the respondent became the owner of the exclusive use areas previously registered in the name of S D Commercial by operation of law as provided for in section 27(1)(c), when, notwithstanding the fact that these were part of the *merx* sold to the applicant, they were not transferred by means of a notarially executed deed of cession.

DISCUSSION

[32] Section 27(1)(c) must be read in conjunction with section 27(1)(d) and (e). These provide as follows:

“27 Rights of exclusive use of parts of common property

- (c) *If a developer ceases to be a member of the body corporate as contemplated in section 2 (2) 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.*
- (d) *If a right to the exclusive use of a part or parts of the common property vests in a body corporate in terms of paragraph (c), the body corporate shall, in the prescribed form-*
 - (i) *apply to the registrar for the issuing of a certificate or certificates of real right of exclusive use in its favour; and*
 - (ii) *submit a certificate of compliance with any law dealing with vesting.*
- (e) *The registrar shall, after consideration of the application in paragraph (d), issue such certificate or certificates in the prescribed form."*

[33] A body corporate would acquire rights in terms of section 27(1)(c) if the developer ceases to be a member of the body corporate as contemplated in section 2(2) of the Sectional Title Schemes Management Act. Section 2(2) of the latter Act states that the developer ceases to be a member of the body corporate when he or she ceases to have a share in the common property as contemplated in section 34(2) of STA. Section 34(2), in turn states that when the ownership in every section is held by any person or persons other than the developer, the developer, shall, subject to the provisions of section 25(1) cease to have a share or interest in the common property.

[34] Section 25(1) of the STA then provides that:

"25 Extension of schemes by addition of sections and exclusive use areas or by addition of exclusive use areas only

- (1) *A developer may, subject to the provisions of section 4 (2), in his or her application for the registration of a sectional plan, reserve, in a condition imposed*

in terms of section 11 (2), the right to erect, complete or include from time to time, but within a period stipulated in such condition or such extended period as may be agreed upon (by unanimous resolution of the body corporate and with the consent of the bondholders existing on the date of the taking of the unanimous resolution, which resolution and consent must be obtained by the notary and filed in his or her protocol) prior to the expiry of the stipulated period, by way of a bilateral notarial deed, for his or her personal account-

- (a) a building or buildings;*
- (b) a horizontal extension of an existing building;*
- (c) a vertical extension of an existing building,*

on a specified part of the common property, and to divide such building or buildings into a section or sections and common property and to confer the right of exclusive use over parts of such common property upon the owner or owners of one or more sections, or to delineate exclusive use areas on or in specified parts of the land and buildings in terms of section 5 (3) (f) and to confer the right of exclusive use over such areas upon the owner or owners of one or more sections.”

[35] It is apposite to look briefly on the circumstances that led to the enactment of section 27(1)(c) of the STA. The background is set out succinctly by Prof C G van der Merwe in Sectional Titles¹⁰ thus:

“In terms of the Act, sectional owners are entitled to make reasonable use of the common property comprised in the scheme. They are not, however, entitled to appropriate any part of the common property for their own exclusive use since this would amount to unreasonable use. Developers, however, soon recognised the need for certain portions of the common property to be allocated to individual sectional owners to be utilised as parking bays, courtyards, patios,

¹⁰ *Sectional Titles, Shareblocks and Time-sharing* Vol 1 (2010, service 12 para 11.5.1). .

garden areas, storerooms, servants' quarters, balconies, attics, basements and even outer shells of buildings for advertising purposes. Since the Sectional Titles Act of 1971 did not provide for the creation of exclusive use areas on the common property, developers employed mechanisms such as notarial leases, servitudes and the amendment of the rules of the scheme to establish exclusive use areas for themselves. The most common practice was for developers to reserve exclusive use areas for themselves in the rules of the scheme by inserting a new rule supplementing the model rules to create the areas. In the new rule, reference was made to a sketch plan which indicated the precise location of the various exclusive use areas. This rule was usually inserted into the old Schedule 1 rules so as to render it capable of amendment by unanimous resolution only. In this manner the developer acquired the right to sell or lease exclusive use areas to sectional owners or outsiders. The fact that the creation and exploitation of exclusive use areas were not regulated by the Act led to several malpractices on the part of developers. These were, inter alia, that exclusive use areas were sold to outsiders who had no personal interest in the scheme; that exclusive use areas were let rather than sold and that rents escalated according to demand; that developers collected the cost of maintaining these areas from levies paid by sectional owners for the upkeep of the property; and that developers retained these areas as a lucrative nest egg after they have left the scheme. On account of these malpractices, the new Sectional Titles Act recognised the need for placing all matters pertaining to exclusive use areas on a secure footing by abolishing the mechanism of establishing exclusive use areas by amendment of the rules of a scheme. All exclusive use areas had to be properly registered on the appropriate sheets of a sectional plan".

[36] It was with the intention of eradicating these malpractices by developers that section 27(1)(c) was promulgated. Through the following measures the malpractices perpetuated by the developers were brought to an end¹¹:

¹¹ Id.

“First, exclusive use areas must be transferred to sectional owners and can no longer be sold to outsiders. Second, the developer is obliged to allocate an exclusive use area to an owner (or more correctly to a section) and can no longer lease exclusive use areas to owners or outsiders. Third, the holder of the right of exclusive use is obliged to contribute to rates, taxes, insurance premiums and maintenance costs with regard to the exclusive use area: such costs can no longer be reimbursed from the general administrative fund. Fourth, the developer is no longer allowed to retain exclusive use areas as a lucrative nest egg after leaving the scheme. If a developer 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.”

[37] It is evident that it is only when the developer has ceased to be a member of the body corporate that any rights to exclusive use areas registered in his/her name would vest in the body corporate in terms of section 27(1)(c) of STA. The body corporate must thereafter apply to the Registrar in terms of section 27(1)(d), in the prescribed form for the issuing of a certificate(s) of real rights in its favour. In such an application it must submit a certificate of compliance with any law dealing with vesting¹². The certificate in the prescribed form would be issued by the registration after *“consideration of the application”*.

[38] Reference to *“shall after consideration of the application”* in section 27(1)(e) of STA implies, in our view, that obtaining a certificate to a real right in respect of a right of exclusive use area which has vested in a body corporate by operation of section 27(1)(c) is not a matter of mere formality. The Registrar may after consideration of the

¹² Section 27 (1)(d)(ii).

application grant or refuse to issue such a certificate. To be able to come to a conclusion on whether to grant or refuse the issue of a certificate the Registrar would have to enquire into the circumstances under which the body corporate alleged the rights vested in it in terms of section 27(1)(c) of STA.

[39] The above exposition of the provisions of the relevant sections of STA also demonstrate, in our view, the process which needs to unfold before the exclusive use areas, which were registered in the name of the developer, vest in the body corporate when such developer ceases to be a member of the body corporate. In *casu* it would have been when ownership of unit 73 was registered in the name of the applicant that S D Commercial ceased to have a share in the common property and its rights to the exclusive use area vested in the respondent. But before the occurrence of this and whilst still a member of the body corporate, S D Commercial sold its rights to these exclusive use areas to the applicant; to this effect the necessary documents were purportedly executed and lodged with the Deeds Registries in order to effect transfer of these immovable property rights to the applicant.

[40] It is significant that when the Deeds Office initially rejected the transaction, particularly because the exclusive use areas which were part of the *merx* were not expressly cited, S D Commercial took the necessary steps to rectify the situation by concluding the addendum to ensure that transfer of these rights was effected; Conradie granted Coetzee a power of attorney to appear before a notary public to execute a notarial deed of cession and to apply for duplicate certificates of the exclusive use

areas, all of which were filed with the other transfer documents in the Deeds Office. In this respect the facts of this case are distinguishable from those of *Mckersie, and Le Roux supra*. In *Mckersie* where the applicant alleged that Humphrey, the seller of the property in question was untraceable, and in *Le Roux* the seller was deceased. I shall return to these judgments below.

[41] The steps taken by S D Commercial resulted in the applicant acquiring personal rights which preceded the entitlement of the respondent to have the rights to the exclusive use areas vest in it in terms of section 27(1)(c) of STA. These steps evinced an *animus transferendi domini* on the part of S D Commercial, the subjective element required for the passing of ownership to the applicant¹³. That transfer of these exclusive use areas rights did not happen is an error which ought to be rectified to reflect the correct legal position. We are fortified in this respect by the judgment of Shongwe JA in *Meintjes NO v Coetzer and Others*¹⁴, a case in which rectification of a title deed to reflect the correct owner where transfer was fraudulently obtained, who held that:

“[9] As we know, real rights may be acquired by various modes that are not reflected in the deeds office, for example, by prescription, expropriation, etc. In such circumstances the owner can trump a bona fide possessor who had acquired the property from the person registered as owner in the deeds registry. Under the negative system of registration, which was adopted in South Africa from Roman-Dutch law, the registrar of deeds plays a rather passive role. Although he examines every deed carefully before registering it, mistakes do happen. For example, where the signature of the transferor is forged, as is the case in the matter before us, the court will order rectification of the deeds registry in favour of the original owner. This will be so, even against the bona fide acquirer. In the present case, a fortiori, the first and second defendants are not bona

¹³ See *Du Plessis v Propitilus and Another* 2010 (1) SA 49 (SCA) at para [11].

¹⁴ 2010 (5) SA 186 (SCA) at para [9].

fide acquirers, as they admittedly forged the deceased's signature. (See also Preller and Others v Jordaan 1956 (1) SA 483 (A) at 496.) Mr Bergenthuin SC, for the plaintiff, referred to Kristal v Rowell 1904 TH 66 at 71, where the power of attorney under which the mortgage was executed was forged and it was held that the mortgage therefore conferred no right or title of any sort upon the acquirer, and that the original owner was entitled to have it cancelled.” (own emphasis)

[42] Acquisition by a body corporate of the exclusive use rights in terms of section 27(1)(c), in our view, does not cover instances where a developer expressly, and in a binding agreement intended its rights to be transferred to a purchaser but where through a mistake, negligent or otherwise, these were not so transferred at the time when the last unit owned by the developer in the scheme was transferred.

[43] The respondent made heavy weather of the fact that the applicant did not seek rectification in its notice of motion. This does not preclude the applicant from arguing this point of law. In *Maphongo and Others v Aengus Lifestyle Properties*¹⁵ the Constitutional Court held that:

“[109] The rule in terms of which a court permits a party to raise a point of law is subject to well-known conditions. These conditions ensure fairness to all parties. First, the point sought to be raised must be a point of law in the true sense of the word. Second, if not foreshadowed in the pleadings, it must be supported by the established facts in the record. Third, the entertainment of the point must not prejudice the other parties. Consistent with these requirements, in Barkhuizen this court made it clear that a party will not be permitted to raise a point not covered in the pleadings if its consideration will result in unfairness to the other party. The purpose of this rule is to give a fair hearing to all parties. Therefore, the rule promotes the right to a fair hearing which is entrenched in s 34 of the Constitution.”

¹⁵ 2012 (3) SA 531 (CC) at para [109].

[44] Rectification is truly a point of law and it has been foreshadowed in the papers. The respondent cannot claim any prejudice as this is in essence the relief sought by the applicant, though not couched in such specific terms. Rectification, however, cannot be effected in this matter by endorsement in terms of section 100 of the Deeds Registries Act since the omission to transfer the rights to the exclusive use areas was not a formal defect.

[45] The applicability or otherwise of section 33(1) of the Deeds Registries Act in circumstances where a belated transfer of rights to exclusive use areas was sought resulted in two conflicting judgments in this Division. In *Mckersie supra*, Humphrey, from whom the applicant purchased a unit in the scheme, but had not been cited in the application, was not the registered owner of the exclusive use areas rights. The developer from whom he purchased the unit, was deregistered in 2007. The deregistration of the developer would have made its property *bona vacantia*, but for the fact that it had transferred its last units in 2003. The applicant had purchased his unit from Humphrey in 2005 and transfer took place in that year. A copy of the deed of sale which allegedly was concluded between the developer and Humphrey was not available.

[46] The question was whether the applicant has a right to ownership of the kind contemplated in section 33(1) of the DRA. Rogers AJ held that¹⁶:

“[31] Where a person is not yet the owner of property but is one on whom the 'right to the ownership' of the property has allegedly devolved by way of a transaction, the person must consider establish (sic) that he has an extant right to claim transfer of the property but that it is not possible to obtain registration of transfer in the usual way. This would typically be because the registered owner and (where applicable) intermediate purchasers and sellers of the property are no longer available to give transfer. The Durr case, from which I quoted earlier, affords an example.

[32] The present case is quite different. Ownership of the parking bay vests in the body corporate, a juristic entity which exists, is active and has been cited as a respondent. Although SDD has been deregistered and Humphrey cannot be traced, those circumstances are not the real explanation for the difficulty confronting the applicant. The true obstacle in the applicant's way is that ownership of the parking bay vests in the body corporate, with whom neither the applicant nor Humphrey contracted. Even if SDD were still in existence, this would not alter the fact that in 2003 (about four years prior to its deregistration) SDD lost ownership of the parking bay pursuant to s 27(1)(c) of the STA. The result is that Humphrey, even if he were still on the scene and even if SDD were still in existence, could not obtain transfer of the parking bay from SDD in order to give transfer in turn to the applicant.

...

[34] The above reasoning justifies the further conclusion, also fatal to the application, that the applicant has not demonstrated that he is 'unable' to obtain registration in the usual way.”

[47] In the *Le Roux* matter the applicant purchased an apartment in a scheme in 2001 with the title deed referring to an exclusive use area forming part of the transaction. The

¹⁶ *Mckersie supra* at paras [31], [32] and [34].

sellers had obtained a notarial cession of parking bay P12 from the first respondent during 1994. P12 was not ceded to the applicant when he took transfer of his apartment as was required by the provisions of section 27(4)(a) of the STA. The seller ceased to be a member of the body corporate when transfer was registered resulting in these rights vesting in the body corporate in terms of section 27(4)(b). The error was only discovered after several years and the seller had by then died. The central issue to be determined in that case, as formulated by the court, was whether the applicant was entitled to receive a cession from the first respondent (alternatively the second or third respondents) for the exclusive use rights in relation to parking bay P12.

[48] It was contended on behalf of Le Roux that the vesting in section 27(4)(b) of STA did not alter the nature of the exclusive use right that existed in connection with P12 and that it vested in the body corporate only for custodial purposes and accordingly fell to be relinquished when ownership of the exclusive use right was established. Wille J found that:

“[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. 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 counterapplication."

[49] Can section 33(1) of the Deeds Registries Act be used to transfer the rights to the applicant? This section provides as follows:

"33 Registration of title by other than the ordinary procedure

(1) Any person who has acquired in any manner, other than by expropriation, the right to the ownership of immovable property registered in the name of any other person and who

is unable to procure registration thereof in his name in the usual manner and according to the sequence of the successive transactions in pursuance of which the right to the 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.”

[50] For the purposes of what follows it is imperative to distinguish between ownership rights and exclusive use rights in a sectional title scheme, for this distinction is crucial to a determination of the matter and the relief which is sought, and the basis on which it is resisted. In regard to the former, in *Mobile Telephone Networks (Pty) Ltd and another v Spilhaus Property Holdings (Pty) Ltd*¹⁷ the Supreme Court of Appeal explained the nature of sectional title ownership, as follows:

“[1] Sectional title ownership consists of three elements, namely individual ownership of a section, joint ownership of the common parts of the sectional title scheme and membership of a body corporate. The registered title-holder of a unit is the owner of the section, joint owner of the common parts of the scheme and a member of the body corporate. Thus, a person, buying into a sectional title scheme, enters into a series of interlocking relationships. The STA [Sectional Titles Act] introduced several new concepts into our law. By providing for the division of land and buildings comprising a development scheme into sections and common property, it created an entirely new composite res, called a unit, which consists of a section and an undivided share in the common property. The section is considered the principal component, with the undivided share in the land and other common property inextricably linked thereto as an accessory. The Act also created an entirely new form of composite ownership, namely separate ownership of a section coupled with joint ownership of the common property. Sectional owners own the common property collectively in undivided shares in accordance with the provisions of the Act.”

¹⁷ 2018 (3) SA 396 (SCA) para [1].

[51] In terms of the STA, ownership rights in sectional title schemes are transferred in the same way as ownership rights in land are transferred i.e by way of a deed of transfer which is endorsed as against the title deed of the property (the sectional unit) concerned, by the Registrar of Deeds.¹⁸ An exclusive use right, on the other hand, is a right which is given to an owner of a section in a scheme, to use (a) part(s) of the common property i.e property of the scheme which is owned jointly by all the registered owners of sections in the scheme. In this regard in terms of the STA¹⁹ common property includes the land on which the scheme is situated and those parts of its buildings which are not included in a section i.e which are not individually owned. As in this matter exclusive use rights are commonly conferred over areas such as parking bays, or garages.²⁰

[52] Exclusive use rights are established and provided for in terms of section 27 of the STA. The transfer of such rights can only occur once they have been established, either initially, by the developer of the scheme²¹ or subsequently, at the instance of the body corporate on behalf of all the owners²². A developer establishes such rights at the inception of the scheme by causing them to be registered as conditions of title which will

¹⁸ Section 15(1(a)).

¹⁹ Section 1.

²⁰ Other examples of areas over which such rights are commonly conferred are pathways, corridors, pergolas over or entrances to individual sections.

²¹ In terms of section 27(1)(a).

²² In terms of section 27(2) a body corporate may apply to the Surveyor-General, if duly authorised by unanimous resolution of its members, for the delineation of exclusive use rights on a sectional plan, provided that no such delineation may be effected if it will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use of one or more owners. If such a delineation is approved, the body corporate must ('shall') transfer the use rights to those to whom they have been conferred, by way of the registration of a notarial deed which is entered into by the parties, in which the body corporate represents the owners of all sections as transferor (section 27(3)).

apply in favour of specified owners in respect of designated areas or parts of the common property, as delineated on the sectional plan, when making application for the opening of a sectional title register for the scheme²³. The STA provides²⁴ that once the requirements in this regard have been duly complied with, the Registrar of Deeds shall issue to the developer 'certificates of real right' in respect of such designated exclusive use rights. The developer must ('shall') then transfer such rights to the owners to whom they have been allocated in terms of the sectional plan, by the registration of a unilateral notarial deed of cession in their favour²⁵.

[53] Owners of sections to whom such use rights have been transferred may in turn similarly transfer them to their successors in title, by notarial deeds of cession²⁶. This accords with section 16 of the Deeds Registries Act²⁷ which provides that real rights in land other than rights of ownership may be conveyed from one person to another only by means of a deed of cession which has been attested by a notary public and registered by the Registrar of Deeds.

[54] In terms of section 27(1)(c)²⁸ of the STA, if a developer ceases to be a member of the body corporate by no longer owning any sectional units in the scheme, any right to an exclusive use area which is still registered in its name 'vests' in the body

²³ Sections 27(1)(a) read together with sections 11(2) and 11(3)(b).

²⁴ Section 12(1)f).

²⁵ Section 27 (1)(b).

²⁶ *Vide* sections 27(1)(b), 27(3) and 27(4), provided that where the use rights are held by more than one owner they must give their written consent to such transfer and where the use rights attach to a section which is mortgaged, the mortgagee must similarly provide its consent.

²⁷ Act 47 of 1937.

²⁸ Read together with section 36(2).

corporate, 'free' of any mortgage bond which may have pertained to such rights. A similar stipulation²⁹ exists in respect of the owner of a section. Thus, where he/she no longer is a member of the scheme any exclusive use rights which are still registered in their name, will 'vest' in the body corporate 'free from any mortgage bond or registered real right' (sic).

[55] The respondent seeks to rely on the decision in *McKersie supra*, in which this Court held³⁰ that the effect of section 27(1)(c) was that once a developer company no longer owned any units in a scheme, *ownership* of the parking bay in respect of which exclusive use rights had been registered by the developer (but which had not been transferred to the owner of the section to whom the parking bay had been allocated in terms of the sectional plan before the developer had been deregistered), had vested in the body corporate. On the strength of this dictum the respondent contends that *ownership* of the parking bays, now vests in it, and this Court consequently cannot make orders in the terms set out in paragraphs 2, 3, 4 and 5 of the notice of motion. In this regard the applicant seeks orders which are aimed at effecting the transfer to it of the 'exclusive use areas' being the parking bays number P64, P73 and P74. Thus, the applicant also understood the rights over which it sought to lay claim, as constituting rights of ownership in terms of the *McKersie* judgment, pursuant to their vesting in the body corporate in terms of section 27(1)(c). In our view, and as the Court did in

²⁹ Section 27(4)(a).

³⁰ Per Rogers AJ (as he then was) at paras [23], [32] and [35].

McKersie, the parties in this matter misconstrue the nature of the rights to which claim is laid and which are in issue.

[56] The parking bays have been allocated in terms of the sectional plan, for use by the owner of the section which operates a supermarket, and they never ‘belonged’ to the developer in the sense that they were never *owned* by it. They belonged to and have always been collectively owned by all the owners in the sectional title scheme in undivided shares (*pro rata* their participation quota in the scheme), as part of the scheme’s common property. The developer only held the exclusive *use rights* to the parking bays and was entitled, and indeed compelled³¹ to transfer these rights to the owner of the section in respect of which such rights attached as per the delineation on the sectional title plan i.e the owner of the supermarket for which the use of such parking bays was designated.

[57] As stated *supra* Van Der Merwe points out³² that sections 27(1)(c) and 27(4)(a) were introduced into the Act in 2003³³ in order to prevent developers and former owners of units in a sectional title scheme who had divested themselves of ownership of units in the scheme, from thereafter hanging onto exclusive use rights over parts of the common property in order to exploit these commercially for their own benefit, or for the benefit of other parties who had no interest in the scheme. In this regard it appears that developers would commonly create a scheme and sell-off all units therein whilst

³¹ Section 27(1)(b).

³² CG Van Der Merwe *Sectional Titles, Shareblocks and Time-sharing* Vol 1 (2010, service 12 para 11.5.3).

³³ By way of the Sectional Title Amendment Act 29 of 2003.

retaining exclusive use rights over the parking bays or garages which attached to the units in terms of the sectional plan, thereby compelling the owners to have to rent the bays or garages from them.

[58] Thus, the only rights which vested in the respondent once the last unit which the developer owned was transferred i.e the unit in respect of which the supermarket is being operated from which was bought by the applicant, were rights of *exclusive use*, and not rights of *ownership*. In the circumstances the body corporate could not and did not obtain better rights over the parking bays than those which the developer had, as these bays collectively belong to all the owners of units in the scheme, as part of its common property. To hold that sections 27(1)(c) and 27(4)(a) have the effect of vesting *ownership* rights in respect of the parking bays in the body corporate, would amount to an unlawful and arbitrary expropriation of the property rights of all the owners in the scheme in respect of such bays, contrary to the provisions of section 25 of the Constitution. Consequently, in our view, the court in *McKersie* erred in this regard and what has vested in the respondent were only the exclusive use rights in respect of the parking bays, and not ownership rights.

[59] Flowing from the above the question which then arises is what is the effect of section 27(1)(c), and whether the respondent can now hang onto these rights and do with them as it pleases, as if they 'belong' to, or are owned by it? When affording a

contextual, purposive and sensible interpretation³⁴ to the section one must bear in mind the mischief which it seeks to address viz. to prevent the abuse of parts of the common property of a sectional title scheme, by allowing them to be used exclusively by persons or entities who are not supposed to be using them in terms of the sectional title plan. In terms of the STSMA the body corporate of a sectional title scheme is a juristic person which is responsible for the control, administration and management of the common property of the scheme, for the benefit of all owners, and not for itself.³⁵ As such the body corporate stands in a fiduciary, or at least a quasi-fiduciary position towards its members i.e the owners of units in the scheme, in regard to the common property which belongs to the scheme.

[60] Thus, in terms of the STSMA the body corporate may only alienate common property or any part thereof on the direction of the owners given by way of unanimous resolution i.e by a unanimous vote passed by at least 80% of the value and number of the votes of all members of the body corporate present (or represented) at a meeting.³⁶ As far as exclusive use rights over common property is concerned, in terms of section 27(2) of the Act the body corporate may similarly only request a delineation and cession of such rights to particular owners, upon a unanimous resolution by the owners, and may only do so provided that such a delineation and cession will not encroach upon any prior delineation which is recorded in the sectional plan. And it may similarly only cancel an exclusive use right which has been delineated on the sectional plan, upon a

³⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18].

³⁵ Sections 2(5) and 3(1)(t) of the STSMA.

³⁶ Section 5(1)(a).

special resolution by the owners i.e in terms of a resolution passed by at least 75% of the value and number of the vote of members of the body corporate at a meeting, or as agreed to by them in writing.³⁷

[61] In the circumstances, in our view, when exclusive use rights in respect of common property vest in a body corporate in terms of sections 27(1)(c) or 27(4)(a) it does not have the right to do with them as it pleases, and it holds them and must administer and deal with them, in the interests of and for the benefit of all owners in the scheme and not to serve its own interests. To allow the body corporate to deal with such rights otherwise would be to allow exactly the kind of mischief which the introduction of these provisions sought to do away with, in that it would allow the body corporate to exploit or deal with exclusive use rights when it is not entitled to do so in terms of the delineation and allocation of such rights as provided for in the sectional plan.

[62] It is common cause that in this matter the applicant is the registered owner of unit 73, the section to which the exclusive use rights in respect of the parking bays attach. It is common cause that certificates of real right in respect of such use rights over the parking bays were issued by the Registrar of Deeds to S D Commercial and the title deed(s) were endorsed accordingly. S D Commercial has not been deregistered and the liquidator has indicated that it is still desirous of honouring and giving effect to its contractual obligations in terms of the deed of sale, in which the exclusive use rights

³⁷ Sections 5(1)(f) of the STSMA read together with section 27(5) of the Act.

were listed as part of the *merx* sold and that were required to be transferred to the applicant. As long as such rights remain registered in the name of the company its affairs cannot be finally wound up.³⁸ In effect, until the matter is resolved the winding up of the developer will therefore remain in limbo. The fact that these rights are currently vested in the respondent does not mean that they are owned by it. It has merely been vested with these rights in order to prevent the developer from holding onto and exploiting them, and it merely holds them in a custodial capacity and is required to deal with them in the interests of the scheme and the members of the body corporate i.e the owners of units in the scheme, in accordance with the intended allocation of these rights as per their designation and delineation in terms of the sectional plan, and not to advance its own interests.

[63] Notwithstanding that in terms of the language of the provision, section 33(1) of the Deeds Registries Act is directed at the transfer of ownership rights Rogers AJ held³⁹ that the provision was applicable to the transfer of exclusive use rights by virtue of the provisions of section 27(6) of the STA and section 90 of the Deeds Registries Act. Section 27(6) of the STA provides that an exclusive use right over a part of a scheme's common property must for all purposes be deemed to be a right to urban immovable property which can be mortgaged. As such, it merely confirms that an exclusive use right constitutes a real right over immovable property which may be bonded as security for a loan. Section 90 of the Deeds Registries Act in turn provides for the cancellation by

³⁸ Para [12], replying affidavit.

³⁹ At para [21]. On this strength of this dictum Wille J also held in *Le Roux v Dunrobin Body Corporate & Ors* [2020] JOL 47441 (WCC) at paras [41] and [46], that the provisions of section 33 of the Deeds Registries Act were applicable in relation to the transfer of exclusive use rights in sectional title schemes.

the Registrar of Deeds of registered leases or servitudes, in certain circumstances. To this end section 90(2)(a) provides that for the purposes of the section, a lessor or grantor in the case of a registered lease or servitude means the person who, according to the records in the deeds registry, appears to be the owner of the land concerned. In the circumstances, in our view, neither of these provisions can serve to justify an expansive interpretation of section 33 of the Deeds Registries Act such as to equate the holder of an exclusive use right in a sectional title scheme with the holder of ownership rights in immovable property.

[64] Furthermore, there are provisions in the STA which expressly militate against the applicability of section 33(1) of the Deeds Registries Act, in regard to the transfer and registration of exclusive use rights. In this regard section 3(1) of the STA states that the provisions of the Deeds Registries Act shall only apply in regard to the registration and filing of documents required in terms of the Deeds Registries Act, insofar as they can be applied, and only insofar as the provisions of the STA do not otherwise apply. The STA contains specific provisions⁴⁰ which deal with the establishment, registration, cancellation and transfer of exclusive use rights, and section 2(e) of the STA expressly empowers and authorizes the Registrar of Deeds to register in the deeds registry a title deed whereby ownership and/or any lease of, or any other real right in or over a section or an undivided share or common property of the scheme is acquired. In our view, this section is therefore the operative one which allows for the transfer of exclusive use

⁴⁰ As set out in section 27(1) – (7).

rights in sectional title schemes generally and in circumstances such as those which prevail in this matter, and not section 33(1) of the Deeds Registries Act.

CONCLUSION

[65] Consequently, and subject to what follows, the applicant is in our view, entitled to an Order which will allow for the transfer to it of the exclusive use rights to the parking bays which are still registered in the name of S D Commercial, and which are currently vested in the first respondent i.e which are being held by it in a custodial and fiduciary or quasi-fiduciary capacity on behalf of the members of the scheme. The applicant is not entitled to an Order transferring the parking bays themselves (which it describes in paras 2, 3, 4 and 5 of its notice of motion as exclusive use areas), to it. In this regard, and in the exercise of the Court's ancillary power to grant such further and/or alternative relief as may be required, the necessary amendments must be made to the relief which is prayed for in terms of the notice of motion, in order to reflect this, in the light of the legal position which has been outlined above.

[66] As far as the mechanism by which the transfer of such rights is to be effected, both the Sectional Titles Act and the Deeds Registries Act require the first respondent to execute a notarial deed of cession in favour of the applicant, pursuant to which, on the submission of such further documents as may be necessary (such as a power of attorney) and the payment of such fees as may be prescribed, the Registrar of Deeds can affect the necessary endorsement in the deeds registry.

COSTS

[67] This is a matter where costs, including the costs occasioned by the postponement of the hearing on 20 August 2020 at the instance of the applicant, should follow the result. The respondent, in our view, unreasonably opposed the application for a postponement which was brought when the attorney who was dealing with the matter was gravely ill and in an Intensive Care Unit in hospital. As a result of this illness the attorney was in no position to give instructions to counsel or his professional assistant who was still too junior at the time to handle a matter of this magnitude. We are of the view that it matters not that the applicant was unable to file the documents from the Deeds Office, which was the main reason why the application was sought.

[68] In the result the following Order is hereby granted:

68.1 It is declared that the exclusive use rights in respect of parking bays numbered P 64, P 73 and P 74, as depicted on sheets 4 and 5 of registered sectional plan SGD number 1065/2007, as amended, in the Vista Bonita sectional title scheme number SS 357/2008, which are currently registered in the name of SSD Commercial Holdings (Pty) Ltd (in liquidation), and which are vested in and held by the first respondent, are extant and have not been cancelled by resolutions of the first respondent.

68.2 First respondent is directed to co-operate with the applicant and the second respondent and do all things necessary to effect transfer of the aforesaid exclusive use rights to the applicant, which co-operation must include, but is not limited to, providing such information to the applicant

and completing and signing and submitting all such documentation as may be necessary in order to effect and register such transfer in the name of the applicant.

68.3 In the event that the first respondent refuses and or fails to comply with the preceding paragraph the Sheriff appointed for the area of jurisdiction within which the scheme is situated is authorized and directed to complete and sign all relevant documentation on behalf of the first respondent as may be necessary or required, in order to effect transfer of the aforesaid exclusive use rights to the applicant and to register such rights in its name.

68.4 In terms of section 2(e) of the Sectional Titles Act 95 of 1986, second respondent is authorized and directed (as against payment of the prescribed fees and costs by the applicant and the submission of all documents required), to transfer the exclusive use rights in respect of parking bays numbered P 64, P 73 and P 74, as depicted on sheets 4 and 5 of registered sectional plan SGD number 1065/2007 in the Vista Bonita sectional title scheme SS 357/2008, which are registered in the name of SSD Commercial Holdings (Pty) Ltd (in liquidation) and which are currently vested in and held by the first respondent, to the applicant.

68.5 First respondent shall be liable for the applicant's costs of suit.

NDITA J

DOLAMO J

SHER J

ATTENDANCES/APPEARANCES

Attendances:

Heard on: 9 November 2020, 26 February 2021.

Supplementary written submissions received : 23 March 2021

Appearances:

Applicant's counsel: CF Van Der Merwe SC

Applicant's attorneys: HJ Van Rensburg Inc (Vanderbijlpark, Gauteng)

First Respondent's counsel: P White

First Respondent's attorneys: Mostert & Bosman (Bellville)

