**HIGH COURT OF SOUTH AFRICA**

**WESTERN CAPE DIVISION, CAPE TOWN**

Case 13312/2021

In the matter between:

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| **GUIDO BARUCH SCHRAGE RAUCH** | First Applicant |
| **MAVE CATHLEEN SAMOON** | Second Applicant |
| and | |
| **THE REGISTRAR OF DEEDS, CAPE TOWN** | First Respondent |
| **XANDRA BOLLIGER** | Third Respondent |
| **THE FOLRENTIA BODY CORPORATE** | Second Respondent |

**Coram:** Rogers J

**Heard:** 20 April 2022

**Delivered:** 28 April 2022 (electronically at 09h30)

**JUDGMENT**

ROGERS J:

*Introduction*

[1] This is a fight about a parking bay. More precisely, the applicants, Mr Guido Rauch and Ms Maeve Shamoon, are in dispute with the second respondent, Ms Xandra Bolliger, over the use of parking bay 19 (PB19) in the sectional title scheme Florentia in Bantry Bay.

[2] On 13 April 2022 the applicants served an application for a postponement in order to allow them to undertake further investigations at the deeds office and to amend their notice of motion. They tendered wasted costs. Ms Bolliger consented to the amendment but opposed the postponement. In their replying papers in the postponement application, the applicants stated that they had now completed their further investigations, and they attached a supplementary affidavit containing their further evidence. They also attached a further proposed amendment to their notice of motion. Again they tendered wasted costs if this necessitated a postponement. When argument began, Ms Bolliger's counsel said that his client did not object to the further amendment, did not object to the new affidavit, and did not seek an opportunity to answer the new affidavit. The applicants' counsel indicated that he would still like a short postponement to prepare argument on the new issues. This was resisted by Ms Bolliger's counsel. I expressed a provisional view against a postponement. The applicants' counsel chose not to try to persuade me to grant a postponement, and argument proceeded on the merits.

[3] Florentia's sectional title register was opened in August 1982. This was in terms of the now repealed Sectional Titles Act 66 of 1971 (1971 Act). The scheme comprises 29 sections and common property. Sections 1-15 are simplex flats.

Sections 16-18 are garages. The remaining sections are storerooms or quarters for domestic workers. In addition to the three garage sections (individually owned), part of the common property on the basement and ground levels is set aside for use as parking bays. PB19 is one of them. The applicants jointly own Section (Unit) 7. Ms Bolliger owns Sections 2, 11 and 17. It is her ownership of Section (Unit) 11 which has brought her into conflict with the applicants.

[4] In terms of the 1971 Act, a scheme had to be governed by rules once a body corporate was established. The default rules were those contained in Schedules 1 and 2 to the 1971 Act, but they could, by unanimous or special resolution respectively, be substituted, supplemented or amended. No express provision was made in the 1971 Act or in the default rules for common property to be reserved for the exclusive use of particular section owners. However, it was permissible for a body corporate to adopt rules creating exclusive use areas.

*Florentia's 1983 rules*

[5] The rules which initially applied to Florentia were the default rules. At the inaugural meeting of Florentia's body corporate, held on 14 March 1983, the body corporate adopted new Schedule 1 and 2 rules, by unanimous and special resolution respectively, in substitution for the default rules. At that time, Unit 7 was owned by Mrs Stella Lipsitz and Unit 11 by Mrs Marion Back. At the meeting of 14 March 1983, Dr Max Lipsitz held Mrs Lipsitz's proxy while Mr Wilfred Back held Mrs Back's proxy. Dr Lipsitz and Mr Back were among five trustees elected at the inaugural meeting.

[6] Rule 73 of the new Schedule 1 rules set aside parking bays for the exclusive use of identified section owners. The parking bays were delineated on a plan (PB plan) annexed to the rules.[1] The PB plan included a table allocating particular parking

[1] The plan is at record 35-6. There was some suggestion in the papers that the PB plan was part of the registered sectional plans. However, by the time of the hearing it was common cause that the PB plan was not part of the registered sectional plans but simply an attachment to the Schedule 1 rules adopted in March 1983.

bays to particular sections. This table was replicated at the end of rule 73. PB19 was allocated to Unit 11. No parking bay was allocated to Unit 7.

[7] In terms of section 27 of the 1971 Act, the new rules were of no force or effect until they were duly notified by the body corporate to the registrar of deeds and until the registrar had made reference to them, in the prescribed manner, in the rules schedule of Florentia's sectional plans. On 9 May 1983 the body corporate gave the registrar the prescribed notification of the new rules. On 8 July 1983, after two minor queries from an examiner had been resolved, the registrar recorded the substitution of the rules.

[8] During argument, counsel on both sides accepted that as a matter of probability both the Backs and the Lipsitzes were aware, in March 1983, that the new rules allocated PB19 to Unit 11 and that no parking bay was allocated to Unit 7. It has not been alleged that the PB plan and rule 73 suffered from a drafting error. The contentious issue is how to account for the way in which PB19 was actually used. Before summarising the evidence on this question, it is convenient to sketch some legislative developments.

*Legislative developments*

[9] The 1971 Act was repealed when the Sectional Titles Act 95 of 1986 (1986 Act) came into force on 1 June 1988. The 1986 Act, unlike its predecessor, made express provision for the creation of exclusive use areas on common property. Section 27 set out a procedure by which the developer or the body corporate could create registrable exclusive use rights. Section 27(6) provided that such a right was for all purposes deemed to be a right to immovable property over which a mortgage bond could be registered.

[10] Initially, the 1986 Act did not expressly regulate the alternative method for creating exclusive use areas by way of rules. However, section 35 of the 1986 Act, which made provision for default rules and for the adoption of substitute or amended

rules in terms broadly similar to section 27 of the 1971 Act, did not preclude this alternative method, and it received statutory recognition when section 27A was inserted into the 1986 Act with effect from 3 October 1997.[2] Section 27A(a) contained a proviso to the effect a right of exclusive use contained in rules did not create the real right contemplated in section 27(6).

[11] In the case of Florentia, the body corporate did not avail itself of section 27 of the 1986 Act, nor were any new rules made in terms of section 35 read with section 27A of the 1986 Act. The substitute rules adopted in March 1983, under the 1971 Act, continued in force by virtue of section 60(8) of the 1986 Act.[3] Section 60(4) of the 1986 Act provided that nothing in the new Act affected any vested right in respect of any exclusive use conferred by rules made under the 1971 Act or any other vested right granted or obtained in terms of the 1971 Act or arising from any agreement concluded before the commencement of the 1986 Act. Section 60(3) of the 1986 Act provided that where, under the 1971 Act, an owner had acquired by agreement, or been granted by way of rules, the right to the exclusive use of part of the common property, the body corporate was obliged, on request by the owner, to transfer such right to the owner by registration of a notarial deed. There is no evidence that any Florentia owners availed themselves of this right. At any rate, no such request was made in respect of PB19.

[12] Various provisions of the 1986 Act, including sections 27A, 35, 60(4) and 60(8), were repealed with effect from 7 October 2016 when the Sectional Titles Management Act 8 of 2011 (Management Act) came into force. The making of rules for the regulation and management of sectional title schemes is now governed by section 10 of the Management Act. Sections 10(7) and (8) replicate the repealed section 27A of the 1986 Act, save that the proviso to the effect that a right of

[2] This was by way of section 21 of Act 44 of 1997.

[3] Section 60(8) provided that substitute rules in force immediately before the commencement date of the 1986 Act remained in force after the commencement date, except to the extent that they were irreconcilable with any prescribed management rule contemplated in section 35(2)(a) of the 1986 Act, and provided that any such existing rules were deemed to be supplemented by any rule for which the existing rules did not make provision but for which provision was made in the default rules prescribed in terms of the 1986 Act.

exclusive use created by way of rules does not create the real right contemplated in section 27(6) of the 1986 Act has not been repeated. Section 27 of the 1986 Act remains in force as a means of creating registrable exclusive use rights.

[13] Florentia's body corporate has not made new rules in terms of section 10 of the Management Act. In terms of section 10(11) of the Management Act, the rules adopted in March 1983, under the 1971 Act, have continued in force.[4]

*How PB19 was used*

[14] I turn now to the evidence on the use of PB19. Mrs Back owned Unit 11 and Section 17 (a garage) from inception until 2016. In 2016, Mr Back became the registered owner of Unit 11, perhaps as Mrs Back's executor.[5] On 7 October 2016, Mr Back sold Unit 11 and Section 17 to Ms Bolliger for R9 million. Transfer was passed to her on 1 February 2017.[6]

[15] Mrs Lipsitz owned Unit 7 and Section 26 (a storeroom) until her death in about 1998. Dr Lipsitz predeceased his wife. Mrs Lipsitz bequeathed Unit 7 and Section 26 to her great-niece, Ms Nina Hart.[7] Because Ms Hart was at that time a minor, the property was held in a testamentary trust for her benefit. Ms Hart's father, Dr Michael Scher (the late Mrs Lipsitz' nephew), was the trustee. Because Ms Hart has at all material times lived overseas, Dr Scher continued to administer Unit 7 and Section 26 for her benefit after she attained majority and took transfer on 9 July 2008. On 22 April 2016, Ms Hart sold Unit 7 and Section 26 to the applicants for R12.995 million. They took transfer on 5 August 2016.

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[4] Section 10(11) provides for the continued operation of substitute rules which were in force immediately prior to 1 June 1988, i.e. immediately prior to the commencement of the 1986 Act. It thus continues to do the work that the repealed section 60(8) of the 1986 Act did.

[5] The deeds office search at record 709-10 indicates that Mrs Back held Unit 11 under a 1982 title deed and that Mr Back held it under a 2016 title deed, with the search narration "ESTATE".

[6] The deed of transfer at record 705-8 confirms that Mr Back held Unit 11 and Section 17 under the 2016 title deed recorded in the search at 709-10.

[7] The founding affidavit refers to Mrs Lipsitz as Ms Hart's aunt, but she must have been the latter's great-aunt, because Dr Scher refers to Mrs Lipsitz as his aunt (see the letter at 114, the content of which he confirmed in para 3 of his affidavit at record 220).

[16] By not later than December 1984, Mrs Lipsitz, as the owner of Unit 7, was paying the levies attributable to PB19. This appears from the minutes of a meeting of trustees held on 21 December 1984. That meeting was attended by four of the five original trustees, including Dr Lipsitz. Mr Back was not present. Whether he was still a trustee does not appear. The meeting resolved to implement a 20% increase in levies. The revised levies were set out in a handwritten schedule to the minutes. The levies attributed to Mrs Lipsitz included levies in respect of Unit 7 and PB19. The levies attributed to Mrs Back as the owner of Unit 11[8] did not include any levies in respect of a parking bay. She was, however, responsible for levies in respect of her garage, Section 17. This garage section accommodated two parking spaces, identified as 12 and 21 in the handwritten schedule.[9] These were not parking bays located on common property; they were parking spaces in a garage section owned separately by Mrs Back.

[17] The applicants allege that the Lipsitzes occupied Unit 7 from 1975 onwards (that is, both before and after Florentia became a sectional title scheme) and that from 1975 onwards they used PB19. Although the applicants do not have personal knowledge of this, this allegation is one of several paragraphs Dr Scher has specifically confirmed in his affidavit.[10] Dr Scher was Mrs Lipsitz's nephew. Mr and Mrs Lipsitz are deceased, but later events point to the strong likelihood that throughout the period from 1984 until Mrs Lipsitz's death in 1998, they paid the monthly levies in respect of PB19.

[18] From 1998 until 2016, the management of Unit 7 – first on behalf of the Stella Lipsitz Testamentary Trust and then on behalf of Ms Hart – was in the hands of Dr Scher. His evidence is that throughout this period, he leased Unit 7 to tenants for

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[8] The schedule actually lists the responsible person as Mr W Back.

[9] The schedule of sections and participation quotas at record 85 identifies parking spaces 12 and 21 as contained in Section 17 and as belonging to "Back".

[10] Para 3 of Dr Scher's affidavit at record 220, confirming para 26.6 of the founding affidavit at record 11.

the benefit of Ms Hart, that throughout this period the tenants used PB19; and that throughout this period, the body corporate invoiced the owner of Unit 7 for the levies in respect of PB19, and the owner paid them.[11] Ms Marion Lange, who took up residence at Florentia in 2004, has testified that since that time the owners or tenants of Unit 7 exercised the right to park in PB19. Ms Lange herself leases the adjoining parking bay from Mr Gavin Tagg.[12] Ms Tanya Loutfie, the tenant who occupied Unit 7 in the period 2012-2016, has filed an affidavit confirming that during that period she used PB19.[13]

[19] The estate agent who showed the applicants Unit 7 in 2016, Ms Jolene Alterskye, pointed out PB19 as the parking bay which accompanied Unit 7. The applicants told her that they would not buy the flat without a parking bay. Ms Alterskye gave them the assurance that PB19 was for the exclusive use of the owner of Unit 7. Although Ms Alterskye has not stated the source of her information, it almost certainly came from Dr Scher. The applicants also requested, and were shown, a copy of the levies payable in respect of PB19.[14] The deed of sale between Ms Hart and the applicants identified one "covered parking bay" as an exclusive use area linked with Unit 7,[15] and in context this must have been intended by the seller and the buyers as a reference to PB19. Upon taking transfer of Unit 7, the applicants used PB19 when they were in South Africa. They were charged and paid levies in respect of PB19. This continued until April 2019, when Ms Bolliger asserted the right to use PB19, based on rule 73..

[20] Ms Bolliger, while criticising the adequacy of the applicants' evidence, has not alleged that, in the period 1984 to April 2019, PB19 was used by the owner of Unit 11

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[11] Para 3 of Dr Scher's affidavit at record 220, confirming the content of his letter at record 114 and confirming the content of paras 26.7-26.10 of the founding affidavit at record 11-12. See also Dr Scher's affidavit at 636-7. Although the levy statements at record 116-23 refer simply to a "parking bay", it is clear from the other evidence that this must have been a reference to PB19.

[12] Para 27 of the replying affidavit at record 608-9, confirmed by Ms Lange at 625-6.

[13] Para 19 of the replying affidavit at record 607, confirmed by Ms Loutfie at record 623-4.

[14] Paras 26.1-26.4 of the founding affidavit at record 10-11, confirmed by Ms Alterskye at record 214-15.

[15] Record 112.

or by any owners or tenants other than those associated with Unit 7. She did not put up the deed of sale by which she bought Unit 11 and Section 17 in October 2016, but her counsel agreed that I could safely infer that the deed of sale did not identify any parking bay as linked with Unit 11. If it were otherwise, Ms Bolliger would have produced the deed of sale as evidence that the seller, Mr Back, believed that the right to the exclusive use of PB19 vested in him. Furthermore, if Ms Bolliger had believed she was buying a flat which came with the right to the exclusive use of PB19, she would have asserted the right to use that parking bay as soon as she took occupation of Unit 11 in February 2017.

*A transfer of PB19 from Mrs Back to Mrs Lipsitz?*

[21] The formulation of the applicants' claims has undergone some change over time, though the underlying factual foundation has remained the same. By the time the case was argued, the applicants' primary contention was that the most probable inference to be drawn from the proven facts is that, at some stage before December 1984, Mrs Back must have transferred her right to the exclusive use of PB19 to Mrs Lipsitz. Reliance was placed on rule 73(6), which allows the owner of a Florentia flat to freely dispose of any right to the exclusive use of a parking bay, provided that the right must first be offered in writing to all other Florentia owners before being offered to outsiders. Rule 73(6) provides that

> "upon disposing of the rights of exclusive use of a parking bay as set out above, the owner shall give notice in writing to the body corporate of such disposition and the trustees of the body corporate shall record the rights of the person acquiring such exclusive use to such parking bay."

[22] The documents contemplated in rule 73(6) have not been adduced. This could be because there was in truth no disposal; or because, although there was a disposal, the documents either did not come into existence or have been lost with the passing of time. The applicants' counsel submitted that the formalities in rule 73(6) are not a prerequisite for a valid disposal, but are post-disposal procedures. That submission is supported by the formulation of the rule ("Upon disposing of the rights …"). This

interpretation also makes better commercial sense. The notification obligation is imposed on the disposer, not the acquirer, and it would seem unfair for a failure by the disposer to prejudice the acquirer's position.

[23] If there was no disposal, one would have to conclude that the use made of PB19 over the period 1984-2016 by Mrs Lipsitz, the Stella Lipsitz Testamentary Trust and Ms Hart occurred with the ongoing permission of Mrs Back. It was suggested on behalf of Ms Bolliger that Mrs Back might have granted such permission on the basis that the owner of Unit 7 pay the levies on PB19. There are, however two circumstances which militate against this inference. First, Dr Scher's evidence of the use of PB19 over the period 1998-2016 is irreconcilable with use based on permission. He clearly understood that the right of exclusive use of PB19 vested in the owner of Unit 7.[16] He even mentions that some years ago the previous property managers showed him a plan indicating that Unit 7 had the exclusive use of a "garage/parking section".[17] That Dr Scher, representing the Stella Lipsitz Testamentary Trust and Ms Hart, believed that the right of exclusive use of PB19 vested in the owner of Unit 7 is shown unequivocally by the fact that an exclusive-use parking bay was expressly included in the deed of sale concluded between Ms Hart and the applicants.

[24] Second, the deed of sale concluded between Mr Back and Ms Bolliger did not expressly include the right to an exclusive-use parking bay. Although Ms Bolliger has not disclosed anything of the negotiations leading to her purchase of Unit 11, it is clear, from the fact that she did not lay claim to PB19 until April 2019, that nothing led her to believe that the owner of Unit 11 had the right to the exclusive use of a parking bay. This would have been an attractive feature for a buyer, and would thus have been highlighted by the seller. From this one can infer that Mr Back did not

[16] He specifically confirmed para 34.5 of the founding affidavit to the effect that Unit 7 had the "exclusive use" of PB19. He also confirmed, in general, the founding affidavit insofar as it concerned him. This would have included the allegations in the founding affidavit that the owner of Unit 7 used PB19 openly and as an "owner" (see paras 27, 69 and 70.1 of the founding affidavit).

[17] See Dr Scher's letter at record 114, confirmed in para 3 of his affidavit at record 220.

believe that the right to the exclusive use of PB19 had vested in the late Mrs Back as the owner of Unit 11 or that any such right vested in him.

[25] The applicants can be criticised for not filing an affidavit by Mr Back or explaining the absence of such an affidavit. There is hearsay evidence that one of the Florentia owners, Mr Daryl Sherwood, spoke with Mr Back in November 2019.[18] Mr Back would have been 85 at that time. If he is still alive, he would now be 87.[19] When I raised the question of Mr Back's evidence, the applicants' counsel told me from the bar, after taking instructions, that Mr Back is in a care home.[20] The fact (if such it be) that Mr Back is in a care home does not mean that he is incapable of giving evidence by affidavit. But if he is able to give evidence, he has been equally available to the applicants and to Ms Bolliger. He was the person who sold Unit 11 to Ms Bolliger. If she thought he might support a contention that the exclusive right to use PB19 at all times remained vested in Mrs Back, one might have expected her to solicit his evidence. The applicants have put up substantial evidence rendering it most unlikely that Mr Back believed that the right to PB19 vested in him or in the late Mrs Back.

[26] What is puzzling is that, according to Dr Scher, the Lipsitzes used PB19 from the time they took up occupation of Unit 7 in 1975.[21] If that is so, why did the Lipsitzes and the Backs, eight years later in in March 1983, agree to the adoption of a rule which allocated PB19 to Unit 11? Whatever the explanation for this conundrum, the evidence satisfies me that, as a matter of probability, the right to PB19, which was allocated to Unit 11 by way of the rules adopted in 1983, was soon thereafter surrendered by Mrs Back to Mrs Lipsitz. Perhaps the post-disposal formalities

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[18] Para 2 at record 181.

[19] His age can be inferred from his ID number in the deed of transfer at record 705, which indicates a birth date of 7 August 1934.

[20] In the replying affidavit, Mr Rauch stated that affidavits could not be obtained from the Lipsitzes because Mrs Lipsitz was dead and Mr Lipsitz was in a care home (para 10 at record 604-5). However, Dr Scher's affidavit, filed as part of the replying affidavits, corrected Mr Rauch, stating that Dr Lipsitz in fact predeceased Mrs Lipsitz. Perhaps the applicants and their attorney had confused Dr Lipsitz with Mr Back.

[21] Founding affidavit para 26.6, specifically confirmed by Dr Scher in para 3 of his affidavit at record 220.

contemplated in rule 73(6)(c) took place, and this may explain the floorplan to which Dr Scher made reference[22] and other (admittedly hearsay) evidence of the existence of a plan allocating PB19 to Unit 7.[23] Alternatively, the post-disposal formalities were overlooked. The disposal was nevertheless implemented *de facto*, not only through the conduct of the owners of Units 7 and 11 but also through the conduct of the body corporate in invoicing the owner of Unit 7 for the levies in respect of PB19.

[27] The disposal was probably expressly agreed between the Backs and the Lipsitzes. But even if it was not, a tacit agreement could be inferred from the facts. In analogous circumstances, our law recognises that a servitude can be tacitly abandoned (waived) by the dominant owner in favour of the servient owner. In *Vermeulen's Executrix*,[24] Innes J said that the inquiry in such a case was whether there has been, on the dominant owner's part, "such acquiescence in the doings of things necessarily obstructive to the use of his servitude, as would justify the inference that

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[22] Record 114.

[23] On 19 September 2018, Ms Teresa Pinto addressed an email to all owners, attaching a plan which she described as an "extract from the registered management and conduct rules page 27", supposedly showing that PB19 was allocated to Unit 7 (record 142-4). The attached plan is, in fact, the PB plan of 1983, but there are handwritten unit numbers against the parking bays indicating *inter alia* that PB19 was allocated to Unit 7, contradicting the typed allocation table forming part of the PB plan. Ms Pinto has not made an affidavit. The management rules to which Ms Pinto was referring appear to be those forming part of a welcome pack which the applicants received in August 2016 upon taking transfer of Unit 7. The applicants produced the full welcome pack as annexure "GR10" (record 356-407) to their reply to Ms Bolliger's rule 35(12) notice. The management and conduct rules forming part of the pack are at record 382-406, the printed rules bearing page numbers 1-25. The parking bay allocation table at 407 (corresponding to the allocation table in the original rule 73) may have been regarded as page 26 of this version of the rules, and the PB plan as page 27. This version of the rules was not dealt with in subsequent affidavits or in argument. I note that, in this version of the rules, the original rule 73 now appears (without textual alteration) as rule 71, and that rules 1-70 and 72 are based on the default rules prescribed under the 1986 Act. The property managers seem thus to have been under the impression that the default rules in the 1986 Act superseded Florentia's 1983 rules except for the original rule 73. There is no evidence that the body corporate actually adopted new rules after the 1986 Act came into force, but nothing turns on this, because the only rule of relevance in this case is the original rule 73 (renumbered rule 71 in Ms Pinto's version).

In an email sent by Ms Kim Dicks, a portfolio manager at the property management company, Coastal Property Group (CPG), to Florentia owners in November 2019, setting out the results of CPG's investigations (record 180-2), reference is made (in para 1) to a fax dated 3 October 2003 in the possession of Mr Louis Simon, the owner of Unit 9. This fax detailed the parking layout. On this layout, Unit 11 was crossed out and replaced with Unit 7 in the parking bay allocation table. The fax of 3 October 2003 was attached to an application which the body corporate lodged with the Community Schemes Ombud Service in February 2021 and which the applicants produced as "GR25" (record 455-532) in response to Ms Bolliger's rule 35(12) notice. The fax is at record 471. There is, however, no affidavit from Ms Kim Dicks or Mr Simon.

[24] *Vermeulen's Executrix v Moolman* 1911 AD 384. Innes J's judgment was a minority judgment, the other two Judges differing from him on the facts.

he intended to abandon it". The learned Judge continued: "The reason why a servitude is destroyed by the toleration of matters inconsistent with its user is that the owner is held to have given it up. The ground of destruction is a tacit *remissio* …"[25] In *Margate Estates*,[26] Fannin J summarised his survey of the authorities thus:

> "[A] servitude is lost by implied or tacit agreement if the dominant owner grants to the servient owner a right which conflicts with the right conferred by the servitude – which, to use *Voet's* phrase, is 'necessarily and naturally' obstructive of the servitude. In such a situation the dominant owner clearly abandons the obstructed right … In this kind of situation the permission will usually be express, though, of course, it may be implied, in the same way as any other right can be waived by 'conduct by a person with full knowledge of his rights plainly inconsistent with an intention to enforce the right' (*Laws v Rutherford* 1924 AD 261 at p 263)."[27]

[28] It might be said that an arrangement in terms of which the right to the exclusive use of PB19 was transferred by Mrs Back to Mrs Lipsitz required an amendment to the rules, since the PB plan and the table at the end of rule 73 allocated PB19 to Unit 11. However, rule 73 itself, by permitting an owner to dispose of the right to the exclusive use of a parking bay, created a situation in which the allocation recorded in the PB plan and table might cease to be applicable. Rule 73 did not require a disposal to be accompanied by an amendment of the rules. If Ms Bolliger had, on the strength of the 1983 rules, bought Unit 11 in the genuine belief that she would thereby acquire the right to the exclusive use of PB19, the issue of estoppel might perhaps have arisen. But those are not the facts. When the applicants and Ms Bolliger bought their units in 2016, nobody (and this includes Ms Bolliger herself) believed that PB19 was attached to Unit 11.

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[25] Id at 409.

[26] *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 (1) SA 279 (N).

[27] Id at 290B-D. See also the survey of authorities in *Pickard v Stein* [2014] 3 All SA 631 (GJ) at paras 47-57. In *M v M* [2020] ZAGPPHC 155 at paras 33-44 the same principles were applied in finding that a co-owner had abandoned his co-ownership.

*Conclusion and order*

[29] In view of this conclusion, I need not consider the two alternative contentions advanced on the applicants' behalf, namely (a) that even if the applicants' predecessors did not acquire the right to the exclusive use of PB19 from Mrs Back, the latter's said right was extinguished by prescription in terms of section 7(1) of the Prescription Act,[28] because Mrs Back had not exercised the right for more than 30 years; and (b) that the applicants' predecessors acquired the said right by acquisitive prescription in terms of section 6 of the Prescription Act. A resolution of these contentions would have required a consideration of the question whether a right of exclusive use, created by rules adopted in terms of the 1971 Act, is a "servitude" for purposes of sections 6 and 7 of the Prescription Act and, if so, whether it is a personal or praedial servitude. Contention (a) would also have required me to address Ms Bolliger's contention that only the body corporate has standing to seek a declaration based on extinctive prescription.

[30] The following order is made:

1. It is declared

   (a) that the owner of Unit 11 of the sectional title scheme known as Florentia, Bantry Bay, Cape Town (Florentia), does not hold the right to the exclusive use of parking bay 19;

   (b) that the second respondent did not acquire and does not have the right to the exclusive use of parking bay 19;

   (c) that the owner of Unit 7 at Florentia is the holder of the right to the exclusive use of parking bay 19, and that the applicants, as the current owners of Unit 7, are entitled to exercise that right.

2. The second respondent is ordered to remove, within one week from the date of this order, any vehicle which she or any tenant of hers has parked in parking bay 19.

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[28] 68 of 1969.

3. Subject to 4 below, the second respondent must pay the applicants' costs of suit.

4. The applicant must pay the second respondent's costs of opposing the applicants' application for a postponement dated 13 April 2022.

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O L ROGERS

Judge of the High Court

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| For the Applicants: | L C Kelly instructed by MacGregor Stanford Kruger Inc |
| For the Third Respondent: | R B Engela instructed by Hayes Inc |