

IN THE KWAZULU NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

Case No.: 12257/2009

In the matter between:

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THE BODY CORPORATE OF SAVANNAH PARK

Applicant

and

BRAINWAVE PROJECTS 1147 CC

1st Respondent

VODACOM (PTY) LTD

2nd Respondent

REGISTRAR OF DEEDS, PIETERMARITZBURG

3rd Respondent

SURVEYOR GENERAL, PIETERMARITZBURG

4th Respondent

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JUDGMENT

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GRIFFITHS, AJ

1. This application involves a question as to who is entitled to the fruits flowing from a lease agreement with the second respondent which has erected a cell phone mast, or tower, within the precincts of a Sectional Title Scheme known as "Savannah Park". The applicant is

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the duly established body corporate of Savannah Park, as defined in section 1 of the Sectional Titles Act¹ ("the Act").

2. The applicant seeks an order directing the first respondent to provide it, *inter alia*, with a copy of the contract which the first respondent admittedly holds with the second respondent,² to account for fruits received therefrom and ordering the first respondent to pay over to it all income received from such agreement together with interest thereon. The first respondent is the only one of four respondents to oppose the relief sought by the applicant. 10
3. Briefly stated, the facts giving rise to the aforementioned issue are as follows: At all material times the first respondent was the developer of Savannah Park as defined in section 1 of the Act. In its application for registration of the sectional plan, the first respondent reserved, in terms of section 25 of the Act, the right to erect and complete further buildings or extensions to existing buildings as more fully described in section 25(1). 15 20
4. In terms of section 25(2), in the event of such a reservation the developer is obliged, when making application for registration of the sectional plan, to deliver, in addition to the documents referred to in section 11(3), *inter alia*, a plan to scale of the building or buildings to be erected together with particulars thereof.³ Pursuant thereto, and when it reserved such right, the first respondent duly ensured that the 25

¹ No. 95 of 1986

² Vodacom (Pty.) Ltd.

³ Section 25 (2) (a)

application for registration of the sectional plan was accompanied by, *inter alia*, scale plans indicating the proposed future development. In amongst the documents so filed, which were duly accepted and registered by the third respondent,⁴ was a plan which clearly relates to the erection of a cell phone tower as it indicates a small building or a control room housing the electrical and other components which are required for the functioning of such a tower, together with the concrete base therefor. In addition, the plan reflects the Vodacom logo. It does not, however, reflect the actual mast itself.

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5. According to the first respondent, well before the sectional plan was registered, it had concluded an agreement of lease with the second respondent in respect of this specified portion of the property. This agreement was concluded during September 2005 and the tower had been *in situ* since the early part of 2006. Thus it was that the tower, together with all its allied components, was in existence well before the opening of the sectional title register which was done on 17 November 2007.

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6. In terms of section 25(5A) of the Act, when the right reserved in terms of subsection (1) of section 25 is exercised and the relevant unit is complete, the developer shall immediately apply for the registration of the relevant plan of extension and the inclusion of such unit in the relevant sectional title register. Although it is complete, the first respondent has not as yet caused the unit to be so included or the

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⁴ The Registrar of Deeds, Pietermaritzburg

relevant plan of extension to be so registered in terms of this subsection.

7. It is the contention of the applicant, as represented in these proceedings by Mr. Stewart, that the relevant portion of the property falls within the "common property" of the development and is thus subject to the control and under the aegis of the applicant, as the relevant body corporate. He has submitted that until the relevant plan of extension has been registered and the unit included in the relevant sectional title register, this situation prevails and, accordingly, it is the applicant that is entitled to lease this portion of the property and not the first respondent. The argument is that it follows from this that the first respondent was not lawfully entitled to lease the property to the second respondent as it has done, and that all the fruits flowing from such lease were, at all material times, due to the applicant and not the first respondent.

8. In response to this argument Mr. Rowan, who appeared for the first respondent, pointed to the provisions of section 25(4)(a) of the Act which states as follows:

"A right reserved in terms of subsection (1) or vested in terms of subsection (6), and in respect of which a certificate of real right has been issued –

(a) *shall for all purposes be deemed to be a right to urban immovable property which admits of being mortgaged; and*

(b) *.....*"

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9. Mr. Rowan has argued that the words as contained in section 25(4) (a) "shall for purposes" are indicative of the fact that the Legislature intended that the developer was to have rights of alienation which are wider than the right to mortgage the property concerned and include the right to lease the property to a third party. He has contended that this subsection recognizes two categories of rights, those for all purposes which are not registrable on the one hand, and those that are, such as a mortgage. In this regard he has contended further that as one of the purposes of the inclusion of section 25 in the Act was to give the developer more flexibility to raise capital for the further extension of the scheme, there is no reason as to why the developer should not have the right to rent or lease the property in order to raise such capital.

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10. In order to decide the issue so raised, it is necessary to have some understanding as to the nature of the right created in terms of section 25. In the case of *Erlax Properties (Pty) Ltd. v Registrar of Deeds and Others*⁵ the Appeal Court had occasion to deal with a registered right in favor of the appellant in terms of which the owners of the units in the relevant scheme and their successors were obliged to

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⁵ 1992 (1) SA 879 AD

consent to a further extension of the scheme by the addition of new units and to allow the appellant, as developer "to exercise his positive rights to proceed with the development in the manner envisaged herein".⁶ This right was registered in terms of the earlier Sectional Titles Act⁷. Joubert JA had, firstly, to consider whether or not this right was a real right and, thereafter, the nature of such right. He concluded that it was in fact a limited real right and, furthermore, that it was a personal servitude which was inalienable.⁸

11. Van der Merwe⁹ has set forth various compelling reasons as to why the right created under section 25 cannot be regarded as a personal servitude. He has stated, *inter alia*, that "*the background, nature, purpose and field of application of personal servitudes differ so much from the developer's rights of extension that the latter can hardly be classified as a personal servitude*". He has concluded that the rights created in terms of the provisions of section 25 should rather be construed as a statutory real right *sui generis* which has its own peculiar characteristics. With respect to the learned author, I agree that this is the correct approach to the classification of the right created by this section.¹⁰

12. It seems therefore that it is necessary to determine the intention of the Legislature in enacting section 25, with particular reference to the

⁶ At 883 A

⁷ No. 66 of 1971

⁸ At 887 E

⁹ Sectional Titles, Share Blocks and Time-sharing, at page 12 - 30 - 32

¹⁰ See also The Law of Property, Badenhorst, Pienaar and Mostert, (fifth edition) at page 458

developer's rights to that portion of the property so reserved for future development. In this regard, the Legislature's intended meaning should be derived from the ordinary meaning of the words used in the section, with proper regard to their context and the background and history of the Act.¹¹ It seems that the purpose of section 25 was to introduce the flexibility of developing a sectional scheme in stages. In this regard, the flexibility thus given to a developer necessarily involves a reduction in the protection previously given to the purchasers of units in various respects. Furthermore, there is neither justification for a restrictive interpretation, nor for an extensive interpretation.¹²

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13. Section 25 of the new Sectional Titles Act was introduced in order to mitigate the harsh situation in which developers found themselves under the old Act, which contained no similar provision. By providing for the extension of schemes by the addition of sections, the developer was given far more flexibility to develop in phases and thereby to reduce his initial capital outlay and overall expenses. By developing and marketing in stages, the developer is now able to ensure a steady cash flow from the proceeds of sales and transfer of units in the early stages with which to finance the construction of later stages.¹³

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¹¹ *Knoetze v Saddlewood CC* 2001 (1) All SA 42 (SE) at 46 - 47

¹² *Knoetze v Saddlewood* (supra) at 47

¹³ *Van der Merwe* at paragraph 12 1. See also *Oribel Properties 13 (PTY) LTD and Others v Blue Dot Properties 271 (PTY) LTD and Others* (454/2009) [2010] ZASCA 78 (28 May 2010) at para 17.

14. As against this background, it seems to me that the scheme of section 25, as read with the other relevant provisions of the Act, is such that it allows the developer to register the real right referred to in subsection 25(1) as long as there has been compliance with the relevant formalities as set out in subsection 25(2). Section 25(1) specifically provides that such right is not unlimited in time and that the right to erect and complete the further buildings and extensions is to be limited to a time period which is stipulated in such condition. In *casu*, the time period stipulated is 10 years. Once the real right has been duly registered, the developer has two real options. He may, depending on the market conditions or for whatever reason, sit back and do nothing until the right expires by the effluxion of time. In this instance, the right to extend the scheme will become vested in the body corporate.¹⁴ Alternatively, should circumstances permit, the developer may proceed to exercise the right so reserved in terms of section 25(1) and proceed with the development in phases subject to the further provisions of section 25 and the further relevant provisions of the Act.

15. It appears from the scheme of the Act that should the developer remain supine with regard to his aforesaid right and not develop the property further, such of the property which is subject to the reserved right must fall within the common property and be administered by the body corporate in terms of its various powers and responsibilities relating thereto.

¹⁴ Section 25(6)

16. In this regard Mr. Stewart has submitted that whilst the portion of the property subject to the section 25(1) right remains undeveloped and part of the common property, the body corporate is vested with all the normal rights which flow therefrom. He has submitted furthermore that until the developer exercises his aforesaid reserved right, this situation prevails. He contends that it is only once the planned extension is registered, and the unit included in the relevant sectional title register, that the body corporate's rights with regard to that portion of the common property subject to the right will be varied.

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17. In view of these submissions it seems to me that the pivotal question in this matter is as to when it may be said that the developer exercises the right afforded to him in terms of the reservation thereof and pursuant to section 25(1). Before he exercises such right the relevant portion of the property must surely remain part of the common property but, thereafter, the developer must, surely, be vested with the right, *inter alia*, to lease the developed section. Is this right only exercised as at the time when registration of the plan of extension takes place and the unit is included in the sectional title register, as submitted by Mr. Stewart? Or does the developer exercise the right at an earlier stage?

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18. It seems to me, taking into account the history of the section, its purpose and its scheme, that the only answer to the aforesaid question can be that the developer exercises his aforesaid right as at the time when he commences the development of the particular unit concerned and not when it is included in the sectional title register. This

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approach would appear to fit far more comfortably with the general scheme of the Act and, in particular, section 25. It surely cannot have been the intention of the Legislature that once the developer has commenced the development of the new phase, from that time until registration the body corporate will retain full rights over that particular portion of the property as if it were still common property. At best for the applicant, the right must have been exercised when the unit is complete, and before registration.

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19. This view is fortified by the provisions of section 25(5A), the relevant portions of which state as follows:

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"(a) If the right reserved in terms of subsection (1) is exercised, the developer or his or her successor in title shall immediately after completion of the relevant unit apply for the registration of the relevant plan of extension and the inclusion of such unit in the relevant sectional title register.

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(b) If the developer or his or her successor in title fails to take such steps and fails to register the relevant plan of extension within 90 days of completion for occupation of the unit, the developer or his or her successor in title shall be liable to the body corporate for the amounts payable in terms of section 37(1) as if the unit has been included in the relevant sectional title register on the date of completion."

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20. Section 25(5A) was introduced into the Act by virtue of section 3 of the Sectional Titles Amendment Act.¹⁵ According to the memorandum which accompanied the Amendment Bill, the purpose of introducing this subsection was to prevent unscrupulous developers from letting out the developed sections before registration thereof without making any contribution to the levy fund of the particular scheme. 10
21. It appears to be clear that this subsection envisages that the right is, in effect, exercised as at the time when the developer commences the development of the next phase pursuant to his rights so reserved in terms of section 25. It is also clear from this subsection that once the developer has completed the unit, but before registration takes place, he may utilize the unit *qua* owner thereof, one of the consequences of which is that it may be leased to another. This is so because the section clearly envisages that the developer is obliged to pay the levies due by owners of the units pursuant to the provisions of section 37(1), even though the unit has not yet been included in the sectional title register. 15 20
22. It remains then to apply the foregoing to the present matter. As indicated above, the mast was *in situ* as at the time when the sectional title register was opened and when the section 25(1) right was registered in favour of the first respondent. The section was reflected on the relevant plan which was filed pursuant to the provisions of 25

¹⁵ No. 7 of 2005

section 25(2) and which depicted a concrete base for the mast and the separate control room. It is with reference to this plan that content must be given to the right reserved.¹⁶ It seems to me that, in the circumstances, the first respondent's right to develop this particular section had been duly exercised irrespective as to whether or not the developed section was in existence prior to the opening of the sectional title register and the registration of the right of reservation. As indicated above, the fact that the section had not as yet been included in the sectional title register and the fact that the relevant plan of extension had not been registered, matters not for the purposes of determining whether the applicant or the first respondent had, and has, the rights to the lease with the second respondent.

23. In this regard, Mr. Stewart has made much of the fact that the mast itself was not reflected on the relevant plan. I do not believe that this can make any difference to the conclusion to which I have reached above. This is not an application in terms of section 25(13) to force the developer to comply strictly with the documents referred to in subsection (2) of section 25 and, indeed, the applicant appears to have accepted the existence of the mast and its allied equipment but seeks the fruits therefrom.

24. In all these circumstances, it is my view that it is the first respondent who has held, and who continues to hold, the right to lease the relevant section to the second respondent and not the applicant. In

¹⁶ Oribel Properties (*supra*) at para 17.

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these circumstances, the applicant is not entitled to the order which it seeks and the application accordingly falls to be dismissed with costs.

25. Mr. Rowan has submitted, albeit with not much force, that should I take this view I should order punitive costs as against the applicant. I am not persuaded that there is any reason whatsoever for taking such a view.

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26. In the circumstances, the order I make is that the application is dismissed with costs.

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Griffiths AJ

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