IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

APPEAL CASE NO: AR358/2023

CASE NO: 9022/2007

In the matter between:

YUSUF MOHAMMED ESSACK N.O. **APPELLANT**

(Plaintiff a quo)

and

VINO ADAMS THANGAVELU **RESPONDENT**

(Defendant a quo)

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Msiwa AJ sitting as court of first instance):

The appeal is dismissed with costs on scale A.

JUDGMENT

Mathenjwa J (Poyo Dlwati JP and Bramdhew AJ concurring):

[1] This is an appeal against the judgment of Msiwa AJ (the court a quo) in which it dismissed an application by the appellant to declare parking bay 20, being part of the common property of the sectional title scheme known as Willem Court, located near Victoria Embankment, Durban, KwaZulu-Natal, as the property of the appellant.[1] The appellant seeks that the decision of the court a quo handed down on 27 March 2023 be set aside and replaced with an order declaring that he is the owner of the right of exclusive use of parking bay 20.

[2] The facts can be summarised as follows: Initially, Mr Cornelius van Rooyen Botha (Mr Botha) owned units 77 and 78 in Willem Court. On 11 May 1994, Mr Botha entered into an agreement with the Willem Court Body Corporate (the body corporate) for the purchase of the right of exclusive use of parking bays 19 and 20. On 27 October 1994, Mr Botha sold unit 78 to Mr Westbrook, together with the right of exclusive use of parking bay 20. However, according to the deed of transfer dated 17 February 1995, only unit 78 was sold and transferred from Mr Botha to Mr Westbrook, parking bay 20 was not mentioned at all in the deed of transfer nor was there any notarial deed that sought to transfer ownership. At the time the right of exclusive use of the parking bay was sold to Mr Westbrook, the exclusive use areas had not been delineated in Willem Court and the right to the exclusive use of parking bays 19 and 20 had not been registered in Mr Botha's name. On 25 April 1996, the body corporate ceded the right of exclusive use of parking bays 19 and 20 to Mr Botha by means of a notarial deed registered with the Registrar of Deeds.

[3] On 4 July 1997, Mr Westbrook sold unit 78 together with the right of exclusive use of parking bay 20 to the appellant. On 22 August 1997, Mr Westbrook signed a power of attorney for the transfer of unit 78 to the appellant, however, parking bay 20 was not mentioned at all in the power of attorney. Subsequently, when unit 78 was transferred by a notarial deed of transfer to the appellant, the right of exclusive use of parking bay 20 was not ceded to him. Despite this, the appellant paid levies for it to the body corporate.

[4] On 15 June 2002, the respondent signed an offer to purchase unit 77 from Mr Botha, but the right of exclusive use of parking bay 20 was not included in that offer.

[1] See *Essack NO v Thangavelu* [2023] ZAKZDHC 26.

On 25 July 2002, Mr Botha signed a power of attorney authorising the transfer of unit 77 and the cession of the right of exclusive use of parking bays 19 and 20 to the respondent. On 31 July 2002, unit 77 was transferred and the right of exclusive use of parking bays 19 and 20 was ceded to the respondent by means of a notarial deed registered with the Registrar of Deeds.

Issues in the court a quo

[5] The appellant's case in the court a quo, as pleaded in his particulars of claim, was that when effecting the transfer of unit 78 into his name, an error occurred in the offices of the conveyancing attorneys and the deeds office, which resulted in the right of exclusive use of parking bay 20 not being ceded to him. According to the appellant, the right of exclusive use of parking bay 20 was further registered in the name of the respondent due to an error in the conveyancing attorneys' offices and the deeds office. The respondent disputed that an error occurred when the right of exclusive use of parking bay 20 was ceded to him, as the parking bay was sold and ceded to him by its lawful owner.

[6] The court a quo found that the appellant had failed to discharge the onus that rested upon him to prove that an error occurred in the offices of the conveyancing attorneys and the Registrar of Deeds that resulted in the right of exclusive use of parking bay 20 not being ceded to him. The court a quo found that the appellant had failed to prove that he had acquired the right of exclusive use of the parking bay and that the parking bay was erroneously ceded to the respondent.

Issues before this court

[7] It was submitted on behalf of the appellant that the court a quo had incorrectly interpreted the Sectional Titles Act 95 of 1986 (STA), as it pertained to the transfer of the right of exclusive use areas. The appellant contended that an error presented itself when the body corporate purported to cede the right of exclusive use of parking bay 20 to Mr Botha in 1996, as Mr Botha had already passed ownership of the parking bay to Mr Westbrook in 1994. According to the appellant's counsel, *Herald Investments Share Block (Pty) Ltd and others v Meer and others, Meer v Body*

Corporate of Belmont Arcade and another[2] supports her submission that s 27 of the STA does not make it peremptory for every exclusive use area within a sectional title scheme to be formally registered or transferred by way of a notarial deed of cession. The appellant contended that the STA does not abolish existing rights. Therefore, the appellant wished to formally register his ownership of parking bay 20 with the Registrar of Deeds whilst it holds a contractual right of ownership to it. The respondent disputed that the court a quo erred in its finding that the appellant had not discharged the onus resting upon him, as the appellant had not proved that it was an error that occurred in the offices of the conveyancing attorneys and Registrar of Deeds that prevented the cession of the parking bay to him.

[8] The issues for determination in this court are, firstly, whether the court a quo erred in finding that the appellant had failed to discharge the onus resting upon him, and secondly, whether the court a quo erred in its interpretation of the law relating to the acquisition of the right of exclusive use areas in terms of the STA.

The onus

[9] This then brings me to the onus of proof. In order to discharge the onus resting upon him, the appellant had to satisfy the court, firstly, that when Mr Westbrook sold parking bay 20 to him, Mr Westbrook had title to the parking bay. Secondly, the appellant had to satisfy the court that he had acquired the right of exclusive use of the parking bay when it was ceded to the respondent, and thirdly, that an error occurred in the conveyancing attorneys' offices and Registrar of Deeds that resulted in the parking bay not having been registered in his name. It is common cause that Mr Botha originally acquired the right of exclusive use of parking bay 20 from the body corporate. It was alleged that Mr Botha sold unit 77, together with the right of exclusive use of parking bay 20, to Mr Westbrook. However, the sale and cession of the right of exclusive use of the parking bay were not mentioned at all in the contract of sale and the power of attorney signed by Mr Botha for the transfer of unit 77 to Mr Westbrook. Therefore, apart from the say-so of Mr Westbrook, there was no iota of evidence before the court a quo that Mr Botha ever sold the parking bay to Mr Westbrook nor that Mr Westbrook ever acquired the right of exclusive use of the parking bay from Mr Botha.

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[2] *Herald Investments Share Block (Pty) Ltd and others v Meer and others, Meer v Body Corporate of Belmont Arcade and another* 2010 (6) SA 599 (KZD) (*Herald Investments*).

[10] Furthermore, the appellant accepts the court a quo's findings that at the time when unit 77 was transferred from Mr Botha to Mr Westbrook, the body corporate had not yet ceded the right of exclusive use of parking bay 20 to Mr Botha. It is not in dispute that at the time when Mr Westbrook sold the parking bay to the appellant, Mr Westbrook did not have title to it. It is trite law that 'an individual cannot pass a better title than she has and a buyer can acquire no better title than that of the seller'.[3] Thus, the offices of the conveyancing attorneys and the Registrar of Deeds could not have made an error by not ceding the right from Mr Westbrook, which he did not have, to the appellant.

[11] Another challenge to the appellant's case is that he claims cession of the parking bay from a third party, who acquired it directly from Mr Botha. The appellant does not allege that the right of exclusive use of the parking bay was fraudulently acquired or ceded to the respondent consequent upon a misrepresentation. It is trite that ownership does not pass from a fraudulent transferor to a bona fide purchaser, since fraud or misrepresentation will render the agreement to pass ownership defective. That legal principle does not apply in the present case, because the appellant does not plead fraud or misrepresentation, but an error in the offices of the conveyancing attorneys or Registrar of Deeds. The appellant does not allege that the respondent is not a bona fide purchaser nor that he bought the parking bay for no value with notice of any defects in Mr Botha's title. For that reason, the respondent would be protected from any vindicatory action.[4] It is open to the appellant, if he has proof that he acquired the right from Mr Westbrook and is prejudiced by the cession of the right to the respondent, to recover the purchase price paid from the seller and levies paid to the body corporate. However, the appellant's claim against the respondent, a bona fide purchaser, is not sustainable.

The law on acquisition of the rights of exclusive use areas

[12] In his grounds of appeal, the appellant raised an error of law in the court a quo's interpretation of s 27 of the STA. The respondent's counsel argued that the

[3] *Amedee v Fidele and others* [2021] ZAGPJHC 837 para 95.
[4] *Knox NO v Mofokeng and others* 2013 (4) SA 46 (GSJ) para 30.

appeal is solely based on the facts pleaded by the appellant in his pleadings in the court a quo, which state that an error made in the conveyancing attorneys' office or deeds office prevented parking bay 20 from being ceded or transferred to him. It has nothing to do with s 27 of the STA. Given the fact that the alleged error of law was raised in the appellant's notice of appeal, was dealt with in the parties' heads of argument, and by the parties in their oral arguments before us, this court should decide on whether the court a quo erred in its interpretation of the law and whether such error was material in the court's dismissal of the appellant's application.

[13] At the time when Willem Court was established, a sectional title scheme would have been established by a developer by making an application to the local authority.[5] When submitting the application for approval, the developer prepares a draft sectional plan which delineates any exclusive use area.[6] At the relevant time, s 27 of the STA provided that:

'(1)*(a)* …

(b) A developer shall cede the right to the exclusive use of part or parts of the common property to the owner or owners to whom such rights are allocated, by the registration of a unilateral notarial deed in their favour: Provided that when the developer has transferred the last section in a scheme, he shall cede to the body corporate the right to any exclusive use area still registered in his name free of charge and without any compensation.

(2) A body corporate, duly authorized thereto by a unanimous resolution of its members, may, subject to the provisions of section 5 (1), request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan in the manner prescribed of a part or parts of the common property in terms of section 5 (3) *(f)* for the exclusive use by the owner or owners of one or more sections: Provided that no such delineation shall be made on the sectional plan in terms of this subsection if such delineation will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use by one or more of the owners.

(3) The body corporate, duly authorized thereto by a unanimous resolution of its members, shall transfer the right to the exclusive use of a part or parts of the common property delineated on the sectional plan in terms of subsection (2) to the owner or owners on whom such right has been conferred by the body corporate, by the registration of a notarial deed entered into by the parties and in which the body corporate shall represent the owners of all the sections as transferor.

[5] This was in terms of the wording of section 4(1) of the STA prior to the amendment by the Sectional Titles Amendment Act 44 of 1997.
[6] Section 5(3)*(f)* of the STA.

(4) An owner of a section in whose favour the right to the exclusive use of a part of the common property delineated on the sectional plan is registered, may transfer his interest in such right to the owner of another section in the scheme by the registration by the registrar of a notarial deed of cession entered into by the parties.

(5) …'

[14] The STA prescribes two ways in which exclusive use areas may be delineated in a common property. Firstly, they may be delineated by a developer in a draft sectional plan when applying for registration of the sectional title scheme.[7] Secondly, they may be delineated by a unanimous resolution of members of the body corporate, allowing for the exclusive use by the owner or owners of one or more sections.[8] The right of exclusive use is transferred either by a developer or the body corporate to the owners of sections in the scheme by registration of a notarial deed of cession. Furthermore, an owner of a section in whose favour the right of exclusive use is registered may transfer his or her interest in such right to the owner of another section by registration of a notarial deed of cession.

[15] When Mr Westbrook allegedly acquired ownership of parking bay 20 from Mr Botha on 27 October 1994, and subsequently sold the right to the appellant on 4 July 1997, there was only one way in which ownership of an exclusive use area could be transferred to a new owner: that was by means of registration of a notarial deed of cession. It is common cause that the right of exclusive use of parking bay 20 was never transferred to Mr Westbrook nor transferred from him to the appellant by registration of a notarial deed of cession. On 3 October 1997, the STA was amended by the Sectional Titles Amendment Act 44 of 1997, which inserted s 27A. It provided that:

'A developer or a body corporate may make rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate…'

Therefore, after the amendment, ownership of an exclusive use area could be transferred to a new owner either by means of registration of a notarial deed or by the rules of the body corporate.

[7] Ibid.
[8] Section 27(2) of the STA.

[16] In addition to these two ways of acquiring the right of exclusive use areas in a common property, the STA recognises rights that were acquired by other means, other than the registration of a notarial deed prior to the coming into effect of the STA. In this regard, the original wording of s 60(3) of the STA provided that:

'Where an owner has in terms of rules made under the Sectional Titles Act, 1971, been granted the right to the exclusive use of a part or parts of common property, the body corporate concerned shall, if so requested after the commencement date by the owner, and if any mortgagee of the owner's section consents in writing thereto, transfer such right to the owner by the registration of a notarial deed entered into by the parties, in which the body corporate shall represent the owners of all relevant sections as transferor.'

On 22 May 1991, s 60(3) was amended by s 25 of the Sectional Titles Amendment Act 63 of 1991. The first part of the amended section relevant to this matter provides that:

'Where an owner has, prior to the commencement of this Act, acquired in terms of an agreement or been granted in terms of rules made under the Sectional Titles Act, 1971, the right to the exclusive use of a part or parts of common property, the body corporate concerned shall, if so requested after the commencement date by the owner… transfer such right to the owner by the registration of a notarial deed entered into by the parties…'

[17] The different ways in which exclusive use areas can exists under the STA were stated by Wallis J in *Herald Investments* as follows:[9]

'As matters stand at present, therefore, the Act recognises four different ways in which an exclusive use area can exist and an exclusive use right be enforced. Under the Act such rights can now be created only by way of registration under s 27 or a rule under s 27A. However, by virtue of the transitional provisions of s 60(3), the Act continues to recognise such rights when created by an agreement in force when the 1971 Act applied or under rules produced in terms of the 1971 Act.'

[18] Initially, counsel for the appellant contended that the STA does not apply to the present matter. However, during argument, she conceded that the STA applies to the present matter. To my mind, that concession was well made since the STA was in operation when Willem Court was established; when the exclusive use areas were delineated; when parking bay 20 was ceded to Mr Botha and allegedly sold to Mr Westbrook; and when it was eventually sold by Mr Westbrook to the appellant. It follows that the appellant could not have acquired the right of exclusive use by

[9] *Herald Investments* para 22.

agreement or under the rules prescribed in terms of the Sectional Titles Act 66 of 1971 (the 1971 Act), since the 1971 Act predates the establishment of the scheme.

[19] The appellant misconstrued both s 60(3) and *Herald Investments* with regard to the acquisition of the rights of exclusive use areas under s 27 of the STA as amended. The original s 60(3) recognised the right of exclusive use areas granted to owners in terms of the rules made under the 1971 Act. The amended s 60(3) recognises the right of exclusive use granted to the owners of sections by agreement or rules made under the 1971 Act prior to the commencement of the STA. The effect of s 60(3) is to preserve the rights created by an agreement or produced in terms of the rules prior to the coming into effect of the STA. In *Herald Investments,* Wallis J sketched the history of the acquisition of the right of exclusive use areas at the time of the adoption of the STA. He stated that:[10]

'… there were people who had acquired rights to the exclusive use of a part or parts of common property in existing sectional title developments, by way of rules made under the 1971 Act.'

Wallis J further held that the effect of the amendment to s 60(3) is:[11]

'… to recognise, as mentioned earlier, the possibility that, under the 1971 Act, exclusive use rights might have been acquired by way of an agreement, rather than under the rules applicable to a sectional title development'.

[20] I agree with the contention by the appellant's counsel that after the amendment to s 27 and the insertion of s 27A , the right of exclusive use areas could be acquired by an alternative means to the registration of a notarial deed of cession, namely, by the rules of the body corporate. However, the problem with this contention is that the appellant does not allege that he acquired the right of exclusive use of the parking bay by means of the rules of the body corporate. Accordingly, the appellant had never acquired ownership of the exclusive use of parking bay 20 within the legal framework of s 27 of STA as amended. Therefore, the appellant's contention that the court a quo made an error of law in its interpretation of the acquisition of the right of exclusive use areas under s 27 of STA should fail. Consequently, the appeal should be dismissed with costs.

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[10] Ibid para 16.
[11] Ibid para 19.

[21] In the result, the appeal is dismissed with costs on scale A.

MATHENJWA J

POYO DWLATI JP

BRAMDHEW AJ

Appearances

Applicant's counsel:	Ms G J Moodely
Instructed by:	Andrew Peens &.Asociates
	Durban
Respondent's counsel:	Mr. D W Eades
Instructed by:	Dickson & Theunissen Inc.
	Durban
Date of hearing:	15 November 2024
Date of judgment:	26 January 2025