THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 779/2023

In the matter between:

THE BODY CORPORATE OF SAN SYDNEY	**APPELLANT**

and

SHIVANI SINGH	**FIRST RESPONDENT**
ZAMAPHEMBA NTULI	**SECOND RESPONDENT**
FIRSTRAND BANK LTD	**THIRD RESPONDENT**
NEDBANK LTD	**FOURTH RESPONDENT**
SB GUARANTEE COMPANY (RF) PTY) LTD	**FIFTH RESPONDENT**
ABSA HOME LOANS 101 (RF) LTD	**SIXTH RESPONDENT**
CHANGING TIDES 17 (PTY) LTD N O	**SEVENTH RESPONDENT**

Neutral citation: *The Body Corporate of San Sydney v Shivani Singh and Others* (779/2023) [2024] ZASCA 169 (9 December 2024)

Coram: DAMBUZA and SMITH JJA and MOLOPA-SETHOSA, KOEN and MOLITSOANE AJJA

Heard: 14 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal

website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 9 December 2024.

Summary: Sectional Titles Act 95 of 1986 (the STA) and Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) – right of extension of scheme reserved to developer having lapsed – right of extension of scheme vesting in body corporate – body corporate concluding agreement for sale and cession of its right of extension to a third party – s 25(6) of the STA – obtaining a certificate of real right of the right to extend the scheme – whether sale agreement a sale/alienation of part of the common property of the scheme requiring authority in s 17(1) of the STA and s 5(1)*(a)* of the STSMA – written consent in s 5(1)*(b)* of the STSMA to alienation or cession of real right – whether withholding of approval by owner of unit in the scheme without good cause in law.

ORDER

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

1 The appeal is upheld to the extent set out in paragraph 3 below but is otherwise dismissed.

2 Each party is directed to pay its own costs of the appeal.

3 The order of the high court is set aside and substituted with the following:

'(a) The respondents are directed to sign whatever consent is required for:

(i) the applicant to obtain a Certificate of Real Right in respect of the extension of the San Sydney Sectional Title scheme, by the addition of the buildings that have been erected on the common property of the scheme, depicted on Building Plan Number 14/10/860 approved by the KwaDukuza Municipality as sections 9, 10 and 11, as required by s 25(6) of the Sectional Titles Act 95 of 1986 read with s 5(1)(*b*) of the Sectional Titles Schemes Management Act 8 of 2011; and

(ii) the exercise of that right of extension by the applicant as contemplated by s 5(1)(*b*) of the Sectional Titles Schemes Management Act 8 of 2011.

(b) Should the respondents fail to sign such consent(s) in whatever format required by the Registrar of Deeds within seven days of written request by the conveyancers appointed by the applicant, then the Sheriff of this court is authorised and directed to sign the written consent(s) on behalf of the respondents.

(c) The further relief sought is dismissed.

(d) Each party is directed to pay its own costs of the application.'

JUDGMENT

Koen AJA (Dambuza and Smith JJA and Molopa-Sethosa and Molitsoane AJJA concurring):

Introduction

[1] This judgment considers the requirements of the Sectional Titles Act (the STA)[1] and the Sectional Titles Schemes Management Act (the STSMA)[2] when a body corporate of a sectional title scheme wishes to dispose of the right to extend the scheme, which vests in it, to a third party.

[2] The appellant is the body corporate[3] of a sectional title scheme known as San Sydney (the scheme).[4] The scheme comprises of eight registered units.[5] The appellant wishes to implement an agreement concluded on 11 May 2018 in terms whereof, it 'sells . . . the right to complete buildings 9, 10 and 11 on the common property and to divide such buildings[6] into sections[7] and the common property[8] . . . ("the real right")', to a third party, HF Property Investments (Pty) Ltd (HFP).

[1] The Sectional Titles Act 95 of 1986 (the STA).
[2] The Sectional Titles Schemes Management Act 8 of 2011 (the STSMA).
[3] In terms of the provisions of s 1 of the STA 'body corporate' means the body corporate as defined in the STSMA. Section 1 of the STSMA provides that a 'body corporate', in relation to a building and the land in a sectional title scheme, means 'the body corporate of that building referred to in s 2(1)'. See further footnote 24 below.
[4] In terms of s 1 of the STA 'scheme' means 'a development scheme' and 'development scheme' means a scheme in terms of which a building or buildings situated or to be erected on land within the area of jurisdiction of a local authority is or are, for the purposes of selling, letting or otherwise dealing therewith, to be divided into two or more sections, or as contemplated in the proviso to s 2 (*a*). Section 1 of the STSMA is to similar effect.
[5] In terms of s 1 of the STA a 'unit' means 'a section together with its undivided share in common property apportioned to that section in accordance with the quota of the section'.
[6] 'Building', according to s 1 of the STA and STSMA means 'a structure of a permanent nature erected or to be erected and which is shown on a sectional plan as part of a scheme.'
[7] 'Section', according to s 1 of the STA and STSMA means 'a section shown as such on a sectional plan.'
[8] 'Common property' according to s 1 of the STA means 'in relation to a scheme, means –
(a) the land included in the scheme;
(b) such parts of the building or buildings as are not included in a section; and
(c) land referred to in section 26.'
The definition in s 1 of the STSMA is similar except that subparagraph *(c)* refers to 'land referred to in section 5*(d)*.'

[3] The appellant concluded that such a sale would require the written consent, 'contemplated in s 5(1)*(b)* of the STSMA read with s 25(6) of the STA', of each owner[9] and bondholder in respect of the registered units in the scheme, and that such consents may not be withheld 'without good cause in law'. It accordingly prepared written consents to: it obtaining a certificate of real right, in the prescribed form, in terms of s 25(6)[10] of the STA, of the right to extend the scheme; the transfer of the s 25(6) real right to a third party on terms and conditions as may be determined by the board of trustees of the scheme in its sole discretion; and, the board of trustees taking whatever steps may be necessary or expedient in order to secure the registration of the extension of the scheme by the addition of the existing buildings as sections 9, 10 and 11.

[4] When the required consents were not all forthcoming, the appellant applied to the High Court of South Africa, KwaZulu-Natal Division, Durban (the high court) for an order:

'1. Declaring that there was no good cause in law for the withholding of such written consent by the First Respondent,[11] the Second Respondent,[12] the Third Respondent, the Fourth Respondent, the Fifth Respondent, the Sixth Respondent and the Seventh Respondent[13] to:

(a) the exercise by the [appellant] of the right of the extension of [the scheme] by the addition of the buildings constructed on the common property of the [scheme] as depicted on Building Plan Number 14/10/860 approved by the KwaDukuza Municipality as sections 9, 10 and 11 in accordance with section 25 (6) of the STA ('the right of extension'); and

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[9] 'Owner', according to s 1 of the STSMA means, 'in relation to a unit or a section or an undivided share in the common property forming part of such unit, means, subject to subsection (5), the person in whose name the unit is registered at a deeds registry in terms of the Sectional Titles Act or in whom ownership is vested by statute, including the trustee in an insolvent estate, the liquidator of a company or close corporation which is an owner, the executor of an owner who has died, or the representative of an owner, who is a minor or of unsound mind, recognised by law, and 'owned' and 'ownership' have a corresponding meaning'.
The definition of 'owner' in the STA is to similar effect.

[10] Erroneously referred to as s '24(6)' in the written consents.

[11] Shivani Singh, the registered owner of unit 2. She was registered as the owner of unit 2 on 30 March 2012.

[12] Zamaphemba Ntuli, the registered owner of unit 4.

[13] The third, fourth, fifth, sixth and seventh respondents were Firstrand Bank Ltd, Nedbank Ltd, SB Guarantee Company (RF) Pty Ltd, ABSA Home Loans 101 (RF) Ltd and Changing Tides 17 (Pty) Ltd NO, the mortgagees in respect of units 1, 2, 3, 4 and 7 respectively.

(b) the cession of the right of extension to [HFP].

2 Directing the First Respondent, the Second Respondent, the Third Respondent, the Fourth Respondent, the Fifth Respondent, the Sixth Respondent and the Seventh Respondent to each sign a written consent(s) to the exercise of the right of extension by the [appellant] and to the cession of the right of extension by the [appellant] to [HFP], in the format as required by the Registrar of Deeds, within seven (7) days of written request by the conveyancer(s) appointed by the [appellant] and/or [HFP].'

If the required consents were not provided, then the Sheriff was to be authorised and directed to sign the consent(s) on behalf of such respondents. The appellant also sought specific costs orders in the application.

[5] The first respondent (the respondent) opposed the application[14] successfully. The application was dismissed with costs. The high court concluded that: to implement the agreement entailed the alienation of common property and a right of extension of the scheme; to conclude the agreement, additional powers had to be conferred upon the appellant by the direction of the registered owners; such additional powers had not been obtained; further, a decision to alienate, exercise or cede such right of extension could only be made by the owners if they had all relevant material information before them; the owners had not been provided with all the information; and, the respondent accordingly was not withholding her approval without good cause in law.

[6] The appeal is against the whole judgment of the high court with the leave of that court. The respondent was not represented at the appeal but in a notice indicated that she unconditionally abides by the decision of this Court.

[14] Subsequent to the launch of the application, the second respondent furnished the written consent. The third to seventh respondents did not oppose or otherwise participate in the proceedings before the high court.

The factual and legislative background

[7] The scheme was developed by Big Sky Trading 426 CC (the developer).[15] It was registered[16] on 30 March 2012, comprising units 1 to 5, in accordance with sectional plan 80/2012. At the time of applying for the registration of the sectional plan, the developer, in terms of s 25(1) of the STA, reserved to itself the right to extend the scheme for its own account.

[8] When registering the sectional plan and opening the sectional title register in respect of the scheme, the Registrar of Deeds (the Registrar) issued the developer with a certificate of real right in respect of its right of extension.[17] The certificate recorded that:

'. . . the developer or its successor in title is the registered holder of the right to erect and complete from time to time within a period of one (1) year for his personal account:

(a) a further building or buildings

(b) a horizontal extension on an existing building[18] on the specified portion of the common property as indicated on the plan referred to in Section 25 (2) (*a*) of the Act, filed in this office, and to divide such building or buildings into a section or sections and common property, and to confer the right of exclusive use over a portion of such common property upon the owner or owners of one or more units in the scheme known as SAN SYDNEY in respect of the land and building

[15] 'Developer' is defined in s 1 of the STA and STSMA. Its technical meaning is not material to this appeal.

[16] The registration followed on an application pursuant to s 4 of the STA.

[17] Such a certificate is issued in terms of s 12(1)*(e)* of the STA. Section 12(1)(*e*) of the STA provides that when the requirements of the Act and any other relevant laws have been complied with, the registrar of deeds upon registration of sectional plans and the opening of the sectional title register, 'issue to the developer, in the prescribed form, a certificate or certificates of real right in respect of any reservation made in terms of s 25(1), subject to any mortgage one registered against the title deed of the land'. A certificate of real right in respect of the right to extend is also required by the provisions of s 25(2). S 25(2) requires that in the event of a reservation of a right to extend, the application for the registration of the sectional plan shall be accompanied by inter alia: a plan to scale of the building or buildings and on which the part of the common property affected by the reservation, the building restriction areas, if any, the parking areas and the elevation of all buildings are indicated; a plan to scale showing the manner in which the building or buildings are to be divided into a section or sections and exclusive use areas, or the manner in which the common property is to be made subject to the rights of exclusive use areas; a schedule indicating the estimated participation quotas of all the sections in the scheme after such section or sections have been added to the scheme; and the certificate of real right which is to be issued in terms of section 12(1)(*e*).

[18] Properly construed the part of subparagraph (b) which follows from where this footnote is inserted, should spatially have appeared on a new line, as it plainly qualifies subparagraph (a) and the portion of subparagraph (b) up to this point of the footnote. The certificate of real right could never have meant that a horizontal extension of an existing building had to be shown on a plan, but not a further new building or buildings.

or buildings situate at BALLITOVILLE in the KWADUKUZA MUNICIPALITY as shown on Sectional Plan Number SS 80/2012.'

[9] The developer exercised its right to extend the scheme by building what subsequently became registered as units 6, 7 and 8 on the common property of the scheme. Upon registration of the sectional plan of extension SS 2013 072 on 28 March 2013, the owners in the scheme, the mortgagees of sectional mortgage bonds and the holders of any real rights over such sections were, as provided in s 25(12)(*a*) of the STA, divested of their share or interest in the common property, to the extent that an undivided share in the common property was vested in the developer, 'his successor in title or[19] the body corporate, as the case may be, by the issue of the certificates of registered sectional title'.

[10] Section 25(6) of the STA provides:

'If no reservation was made by a developer in terms of subsection (1), or if such a reservation was made and for any reason has elapsed, the right to extend a scheme including the land contemplated in section 26, shall vest in the body corporate, which shall be entitled, subject to this section, section 5(1) (*b*) of the Sectional Titles Scheme Management Act and after compliance, with the necessary changes, with the requirements of paragraphs (*a*), (*b*), (*c*), (*d*) and (*g*) of subsection (2), to obtain a certificate of real right in the prescribed form in respect thereof.'[20]

[11] Any right of the developer to extend the scheme further lapsed on 30 March 2013.[21] This is not in dispute. Apart from lapsing, the right of extension reserved to the developer in terms of the certificate also had been exercised fully and did not

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[19] Contextually and by comparison with s 25(11)(*c*), the word 'of' in the text of s 25(12)(*a*) should read 'or'.

[20] Subsection (6) was substituted by s 20 of Act 8 of 2011 with effect from 7 October 2016, and has since been amended by s 11*(c)* of Act 13 of 2022 (with effect from 5 January 2023). The latter added the following proviso:
'Provided that the body corporate shall only exercise, alienate or transfer such a right with the written consent of all the members of the body corporate, the mortgagees of the units and real rights over the units, and the holders of registered real rights over the units in the scheme and who shall not withhold such consent without good cause in law.'
The application papers were issued on 31 August 2018, the answering affidavit was dated 18 April 2019, the replying affidavit was dated 12 July 2019, the application was argued on 9 May 2023 and judgment delivered on 23 June 2023. The high court wrongly relied on s 25(6) with the proviso. Nothing significant however turns on this.

[21] *Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd* [2010] ZASCA 78; [2010] 4 All SA 282 (SCA); 2010 JDR 0596 (SCA).

permit any further extensions to the scheme which, after the lapse of the developer's right, could become vested in the appellant. Mr Stewart, who appeared on behalf the appellant, accepted that this was so. The right to extend which became vested in the appellant would be a 'new' right.[22] It has been described as an abstract right to extend the scheme, which means that the body corporate must start the s 25 process again.[23] The process to establish a right of extension is essentially the same whether it is reserved by the developer pursuant to s 25(1), or if not reserved, is created in favour of the developer before the body corporate is established in terms of s 25(6A), or is vested in the body corporate in terms of s 25(6) of the STA.

[12] The appellant was established, in terms of s 36(1) of the STA, when the first unit was transferred to a person other than the developer. This was when ownership of unit 2 was transferred to the respondent on 30 March 2012. When transfer of ownership of units 1, 3, 4, 5, 6, 7 and 8 was registered, these owners also became members of the appellant.[24]

[13] The appellant has powers in terms of ss 3 and 4 of the STSMA to administer and manage the scheme. It may also exercise such additional powers as are entrusted to it in terms of s 5 of the STSMA on compliance with the requirements of that section.

[14] Sections 5(1)(*a*) and (*b*) of the STSMA provide that:

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[22] J G Horn '*The legal effect of rights specific to sectional title property in South Africa, with reference to selected aspects of the Australian and Dutch law*' 2018 para 4.5.5 a at 108. The appellant should similarly to the developer have to comply with the requirements of s 25(2) of the STA. The appellant will then likewise acquire a certificate of real right to extend the scheme. See also *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh* 2006 (3) SA 369 (W) para 58.

[23] Van der Merwe *Sectional Titles* 12-47.

[24] Section 2(1) of the STSMA provides:

'With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner of a unit in that scheme is a member of that body corporate.'

'(1) In addition to the body corporate's main functions and powers under sections 3 and 4, the body corporate –

(a) may, upon unanimous resolution, on direction by the owners and with the written consent of any holder of a right of extension contemplated in section 25 of the [STA], alienate common property, or any part thereof, or let the common property or any part thereof under a lease, and thereupon the body corporate may, subject to sections 17(1) of the [STA] deal with such common property or such part thereof in accordance with the direction and may execute any deed required for this purpose, including any deed required under the [STA] . . .;

(b) may, with the written consent of all the owners as well as the written consent of the mortgagee of each unit in the scheme, alienate, or in terms of the [STA] exercise or cede, a right of extension of the scheme by the addition of sections: Provided that an owner or mortgagee may not withhold such approval without good cause in law;

(c) . . .'

[15] The developer commenced the construction of a further three buildings, 9, 10 and 11, during or about November 2011. He thereafter abandoned the site but moved onto the site again during or around August 2013 and, despite opposition, continued with the construction of the three buildings. On or about 23 October 2013, the three buildings were sold by the developer to Mrs J A Hodgson (Mrs Hodgson), who paid deposits in respect of the purchase prices. She released parts of the deposits to the developer although ownership of the buildings had not been registered in her name.

[16] The three buildings were completed, with certificates of occupancy issued in respect thereof by the KwaDukuza Municipality on 10 December 2014. The buildings have since become occupied. Transfer of ownership of the units has not passed as it is legally impossible to register ownership of unregistered units.

[17] The developer was provisionally liquidated on 9 February 2016. The effective date of the liquidation is 19 November 2012, being the date when the liquidation

application papers were issued. The judgement of the high court records that the appellant's counsel advised that the provisional liquidators of the developer had sought to intervene in the application forming the subject of this appeal, but later withdrew the application. A copy of the application papers before the high court was sent informally to 'the developer's lawful representatives' but the liquidators were not joined as parties. Nor was a notice to abide filed by the liquidators. The application papers are silent as to whether the liquidators have waived any claim the insolvent estate of the developer possibly may have, whether as against the owners, or the appellant, for the improvements the developer had affected by the construction of the three buildings.

[18] The appellant contends that the legal position regarding the three buildings fell to be regularised by extending the scheme to include these buildings. This it could do by invoking the right to extend the scheme vested in it. It is common cause that this process would entail: the preparation of a sectional plan of extension depicting sections 9, 10 and 11; updating the participation quota schedule relating to the scheme as will be required by the addition of the three sections;[25] the approval of the sectional plan of extension by the Surveyor-General;[26] the application to the Deeds Office for the issue to the appellant of a Certificate of Real Right in terms of s 25(6) of the STA to extend the scheme; and finally, the application to the Registrar for the registration of the sectional plan of extension adding sections 9, 10 and 11 as units in the sectional title register.[27]

[19] As a result of the conundrum caused by the developer having erected the three buildings on the common property when it had no right to do so, the appellant contends that it had a choice: either to exercise the right to complete the extension

[25] Section 25(5A) of the STA.
[26] Section 25(8) read with s 4, 5 and 7 of the STA.
[27] Section 25(5A) and s 25(11).

of the scheme vesting in it itself; or to sell, cede and transfer its right to extend to a third party.[28] It chose the latter, selected HFP as the third party and on 11 May 2018 concluded the agreement it seeks to implement.

The agreement

[20] In concluding the agreement, HFP was represented by its sole director, Mr Dean Hodgson, the son of Mrs Hodgson. Mrs Hodgson had passed away in the interim. It does not appear that she, or her estate, had recovered any part of the deposits which she had released to the developer.

[21] The preamble to the agreement between the Body Corporate of San Sydney and HFP records that: the developer had constructed units 9, 10 and 11 to the stage that certificates of occupancy had been issued by the local authority; the units had been sold to the occupiers of those units; this all occurred despite the developer's right to extend the scheme having lapsed; the right to extend the scheme vested in the appellant from 1 April 2013; the intention is to extend the scheme to enable proposed units 9, 10 and 11 to be registered; and HFP intends to purchase the right, which it terms 'the real right', to take the necessary steps to register the proposed units in the scheme and pass title of such units.

[22] In terms of the agreement, HFP: will acquire the right to extend the scheme by the addition of the proposed units; undertakes to remedy certain waterproofing defects in the three units without expense to the appellant; is prepared to sell those sections to the present occupiers in line with the prices they had agreed to pay; undertakes to complete the units and to divide the buildings into sections and the common property for its personal account in accordance with the building plans already approved by the local authority; and, undertakes to procure the registration

[28] Section 25(4*)(b)* of the STA.

of the sectional plan of extension in respect of the proposed units within one year of the date of fulfilment of all suspensive conditions, failing which the right would lapse.[29] The purchase price of the right is R500 000, payable upon registration of cession of the right from the appellant to HFP. If a unit is not purchased by its present occupier, then HFP would be entitled to retain or transfer ownership thereof as it deems fit.

Discussion

[23] Any further right to extend the scheme vesting in the appellant, would require to be established in accordance with the provisions of the STA and be given content separately and afresh. There is no reason why the process, in dealing with a right of extension of a sectional scheme, should be any different, depending on whether it was reserved by a developer, or is sought to be invoked by a body corporate pursuant to s 25(6) of the STA.

[24] It is significant that the same requirements of s 25(2), specifying the prerequisites to the registration of a sectional plan of extension, apply both where the right of extension was reserved by the developer in terms of s 25(1), or, with the necessary changes, where a sectional plan of extension is to be registered when the right to extend is exercised by a body corporate duly authorised thereto. Section 25(2)(*f)* of the STA requires in respect of both, that a Certificate of Registered Real Right must be submitted. The Certificate will embody the real right[30] of extension and set out the terms thereof, including specifying the part of the common property affected by the extension. These prescriptions ensure that the right to extend is clearly described with reference to approved plans.

[29] It was not contended that the agreement had lapsed in the interim.
[30] *Erlax Properties (Pty) Ltd v Registrar of Deeds and Others* 1992 (1) SA 879 (A).

[25] Generally, the exercise of a right to extend provides a right to build in the future on the common property of the body corporate. The exercise thereof affects not only the common property owned by the unit owners in undivided shares according to their participation quotas but also mortgagees, as their security comprises of the section as well as an undivided share in the common property.

[26] The right to extend may be transferred. This is achieved by a notarial deed of cession of the right.[31] A Certificate of Real Right in favour of the appellant, evidencing the right to extend, will be required for the registration by the Registrar of any transfer of the right to extend the scheme, by cession, as provided in s 25(4)(*b*) of the STA.[32] Section 5(1)(*b*) of the STSMA prescribes the consent required for such an alienation or cession.

[27] The appellant correctly acknowledged, as is apparent from the wording of the consolidated standard consent which it produced for the respondent to sign, that consent was required for the two stages in the procedure: first, for the appellant to obtain a certificate of real right, in terms of s 25(6)[33] of the STA read with s 5(1)*(b)* of the STSMA, to extend the scheme; and second, for the transfer of such right to HFP by cession thereof, in terms of s 5(1)*(b)* of the STSMA. The consent presented for signature was, however, a composite consent for both stages and did not provide for separate consents to be given.

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[31] Section 25(4)*(b)* of the STA. The right to extend thus becomes a limited real right.

[32] Section 25(4) of the STA reads:

'A right reserved in terms of subsection (1), vested in terms of subsection (6) or registered in terms of subsection (6A), 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 immovable property which admits of being mortgaged; and

(b) may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right . . ..'

[33] Erroneously referred to as s '24(6)' in the written consents. The appellant is entitled to obtain such a certificate of real right of the right of extension subject to compliance with the requirements of s 25 – see *Body Corporate of* '*The Avenues*' *v Hurwitz No and Another* (217/2011) [2014] ZASCA 80; [2014] 4 All SA 1 (SCA) (29 May 2014 para 23.

[28] The relief claimed in the notice of motion, however, drew such a distinction. It sought a declaratory order that the respondent did not have good cause in law to withhold her consent to: first, the exercise by the appellant of the right of extension of the scheme by the addition of sections 9, 10 and 11 and obtaining a certificate of real right in accordance with s 25 (6) of the STA in respect thereof, which was described as 'the right of extension';[34] and, second, the alienation and cession of the right of extension to HFP.[35]

[29] The respondent did not expressly concede that she was agreeable, as required by s 5(1)(*b*) read with s 25(6), to consent to the appellant obtaining a certificate of real right and exercising the right of extension itself. It is, however, clear from reading her answering affidavit that her objection is not to the appellant applying for and being issued with a certificate of real right, and to the appellant exercising that right. On the contrary, her attitude is that the extension of the scheme by the three buildings constructed on the common property should be realised, to greater financial advantage, by the appellant. Her approval is implicit in the attitude she has adopted. No prejudice will be occasioned by directing the respondent, to the extent that it might be necessary, and the other respondents, to consent to the appellant obtaining a Certificate of Real Right and in exercising the right of extension in respect of the three buildings.[36]

The respondent's objections

[30] The true objection of the respondent relates to the cession and transfer of the right to extend by the appellant to HFP. Her objections are: first, that the sale was,

[34] Paragraph 1.1 of the notice of motion.
[35] Paragraph 1.2 of the notice of motion.
[36] Whether the other requirements for the issue of such certificate, notably those in s 25(2)(*a*), (*b*), (*c*), (*d*) and (*g*) of the STA with the necessary changes have been satisfied, is unclear. But that is immaterial to outcome of this appeal.

in her view, not properly authorised; and second, that she had not been provided with sufficient information to decide whether she should consent to such transfer and cession. In the circumstances, she maintains she had good cause in law to withhold her consent to the transfer.

Did the sale constitute an alienation of common property?

[31] As regards the respondent's first objection, the respondent viewed the transfer of the three buildings by cession of the appellant's right to extend the scheme to HFP to amount to an alienation of a portion of the common property. She referred to s 17[37] of the STA providing that a body corporate may alienate common property only if authorised in terms of s 5(1)(*a*) of the STSMA and after compliance with any other law, and that s 5(1)(*a*) requires a unanimous resolution, as defined,[38] by the members of the scheme. As no unanimous resolution was passed, she maintains that the appellant therefore had no authority to enter into the agreement, that she was accordingly entitled to withhold her approval, and that to do so was not without good cause in law.

[32] The respondent's aforesaid belief that a sale of the common property was implicated, was echoed in the finding made by the high court. It concluded, with, inter alia, reliance on *Torgos*[39] (*Torgos*), that the agreement entailed an alienation of common property as contemplated in s 5(1)(*a*) of the STSMA.

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[37]'(1) The owners and holders of a right of extension contemplated in s 25 may, if authorised in terms of section 5(1)(*a*) of the [STSMA] direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease, and thereupon the body corporate shall . . . subject to compliance with any law . . . have the power to deal with such common property or such part thereof in accordance with the direction, and to execute any deed required for the purpose: Provided that if the whole of the right referred to in section 25 . . . is affected by the alienation of common property, such rights shall be cancelled by the registrar with the consent of the holder thereof on submission of the title to the right.'

[38] In terms of s 1 of the STSMA:

'Unanimous resolution means a resolution –

(a) Passed unanimously by all the members of the body corporate at a meeting at which –

*(*i) at least 80% calculated both in value and in number, of the votes of all the members of a body corporate are present or represented; and *(ii)*all the members who cast their votes do so in favour of the resolution; or

(b) agreed to in writing by all the members of the body corporate.'

[39] *Torgos (Pty Ltd v Body Corporate of Anchors Aweigh and Another* 2006 (3) SA 369 (W) (See footnote 22 above).

[33] I am not persuaded that the alienation and cession of a right of extension would entail the alienation of common property.[40] What is contemplated by s 5(1)*(a)* of the STSMA, is the sale of a defined subdivision of land[41] forming part of the common property of a scheme, capable of subdivision and separate disposal. It is the opposite of what is contemplated in s 5(1)(*d*)[42] of the STSMA which provides for the purchase of specific land to extend the common property of a scheme.

[34] The erection of further buildings and the registration thereof as part of a sectional title plan of extension pursuant to the provisions of s 25(2) of the STA, will, as with the extension of the scheme by the addition of units 6, 7 and 8, entail a diminution of each individual owners' participation quota expressed as a percentage. It will thus amount to a diminution of rights of sectional owners, especially the undivided shares in which ownership of the common property is held.[43] This explains the requirement in s 25(2)(*c*) of the STA, that a revised schedule of the estimated participation quotas must accompany the registration of the sectional plan of extension. But such diminution does not mean that there is an alienation of part of the common property, implied or otherwise.

[35] With the conventional ownership of land, as opposed to sectional title ownership, where buildings are constructed on soil, they accede to the soil and the owner of the land becomes the owner of the buildings. Sectional title ownership differs. In terms of s 2*(b)* and *(c)* of the STA ownership of a sectional title unit

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[40] 'Common property' according to section 1 of the STA means 'in relation to a scheme, means –
(a) the land included in the scheme;
(b) such parts of the building or buildings as are not included in a section; and
(c) land referred to in section 5(1)(*d*).'
[41] 'Land' according to s 1 of the STA means 'the land comprised in a scheme as shown on a sectional plan.'
[42] Section 5(1)(*d*) of the STA reads as follows:
'(1) In addition to the body corporate's main functions and powers under sections 3 and 4, the body corporate –
(d) may, subject to subsection (2), purchase land to extend the common property, if duly authorised thereto in writing by all the owners.'
[43] *Oribel Properties 13 (Pty) Ltd v Blue Dot Properties 271 (Pty) Ltd* 2009 All SA 454 (SCA) para 17.

consists of the individual ownership of a section, the principal thing demarcated in terms of its vertical and horizontal boundaries, together with an undivided bound common ownership share in the common property, determined by the participation quota, which is an incorporeal accessory to the section.[44]

[36] A sectional owner may be confronted by various limitations on her ownership of her unit and her co-ownership of the common property, such as exclusive use rights, rights of extension, and other security rights, rights of use and servitudes. When an individual owner extends a section[45] this might affect the use an enjoyment of the common property as it might diminish the area of use and enjoyment of it in some instances, but it will invariably diminish the participation quotas held by other sectional owners in the scheme.[46]

[37] Similarly, in respect of a right of extension. An owner of a section is only the owner of the specifically delineated part of the building that is shown on the sectional plan. All the other areas on the sectional plan, not forming part of the sections, form part of the common property held in co-ownership by all the sectional owners. If a new section is added, it will affect the participation quotas held by the owners, but not the extent of the common property. This is because of the nature of sectional ownership.

[38] The concept of sectional title ownership was evaluated by Professor Cowen[47] when it was first introduced in South Africa in terms of the first Sectional Titles Act.[48] He pointed out with reference to the definition of 'section', as 'a section shown

[44] G J Pienaar '*Sectional Titles and other fragmented property schemes*' (2010) at 22; Horn *op cit* para 3.2.1 at 62 and 3.3.2 at 72. The common property is made up of all the areas of the property that are not included in an individual owner's section as indicated on the sectional plan.
[45] As provided in s 24 of the STA.
[46] Horn op cit at 99 para 4.4.1.
[47] D V Cowen 'The South African Sectional Titles Act in historical perspective: an analysis and evaluation' VI CILSA 1973 at 1-38.
[48] Sectional Titles Act 66 of 1971.

as such on a sectional plan,' with reference to floors, walls and ceilings, and the horizontal and vertical boundaries being the median lines of the floors and walls, that this was a new form of ownership in our law not previously possible. Sectional title ownership provides a composite form of ownership, which is significantly different from our common law conception of ownership in many respects. It consists of separate ownership in a section of a building, coupled with joint ownership of the common property.

[39] Sectional Title ownership draws boundary lines between sections, and between a section and common property, with reference to the median line of the dividing floor, wall or ceiling, as the case may be. The owner of the section, the three-dimensional part of the building with reference to length, breadth and height, is not the owner of the land on which the building is constructed. The land continues to belong to all the sectional owners of the scheme in bound common property ownership.

[40] The material provisions of the first Sectional Titles Act, which influenced the aforesaid views of Professor Cowen, and other academic commentators, have remained substantially the same and have been carried forward in the STA. Their comments accordingly remain similarly apposite to the STA. The delineation of the boundaries between sections, and between a section and common property, with reference to the median line of the dividing floor, wall or ceiling, as the case may be, is expressly retained in s 5(4)[49] of the STA.

[41] The common law principle of accession,[50] expressed in the maxim *omne quod inaedificatur solo cedit* (what is built on land, forms part of the land and hence is

[49] Section 5(4) of the STA provides:
'The common boundary between any section and another section or the common property shall be the median line of the dividing floor, wall or ceiling, as the case may be.'
[50] *Van Wezel v Van Wezel's Trustee* 1924 AD 409 417.

owned by the landowner), does not apply to sectional ownership. It had to yield to considerations of practicality, practical convenience and the provisions of the STA.

[42] The extension of a scheme, by the erection of further buildings on 'common property', accordingly will affect the participation quotas, diluting the percentage of the floor areas of owners expressed as a percentage, and hence their undivided share of ownership of the common property,[51] but the extension of the scheme on common property does not involve an alienation of the common property.

[43] The respondent and the high court erred in concluding that the agreement involved a sale of common property which required compliance with the provisions of s 5(1)(*a*) of the STSMA. The respondent was not entitled to withhold her consent to the agreement based on the sale of the right of extension contained therein not having been authorised by a unanimous resolution.

Was the respondent's withholding of approval to the alienation or cession of the real right otherwise without good cause in law?

[44] Mr Stewart stressed that there is no express legal obligation imposed on the appellant to consult and negotiate with the respondent to secure her consent. He argued that all that the appellant had to do, was to request the respondent's written consent. She then had the option, either to provide her written consent or to withhold her approval if she had good cause in law to do so. Whilst his contention might be conceptually correct, when it comes to determining whether the respondent had good cause in law to withhold her approval, the extent and nature of what was communicated to inform her decision, does assume importance. There is a relationship between the appellant as the body corporate, and the respondent as unit

[51] Section 32 of the STA requires that the participation quotas be stated to four decimal places.

owner and the other unit owners inter se, to co-operate in relation to their bound sectional ownership.

[45] The phrase 'good cause in law' is not defined in the STSMA. We were not referred to any authority dealing with the meaning thereof. The phrase must be accorded a meaning according to its text, context and purpose. In context, and having regard to its purpose, s 5(1)*(b)* of the STSMA affords to an owner of a sectional title unit a veto to prevent the body corporate of the scheme from alienating, or in terms of the STA exercising or ceding a right of extension of a scheme by the addition of sections, which could result in a diminution of the value of a unit,[52] provided the owner has good cause in law to do so. Good cause would accordingly include anything which objectively would be contrary to the best interest of the owner, the body corporate, or the scheme. There can however never be a closed list of what might constitute good cause in law. The enquiry is fact specific, depending on the unique facts and circumstances of each case.

[46] The appellant submitted that the respondent had simply not bothered to provide any explanation for not having consented to the sale and cession, and that she had therefore not established good cause. There is substance to that criticism. But the conduct of the appellant was also not without criticism, as highlighted by the high court, and summarized below.

[47] Requests by the appellant for the respondent to consent to the sale and cession of the right of extension to HFP, resulted in various requests for information. These included: questions about the liquidation of the developer; details of when units 9, 10 and 11 were sold; requiring copies of the agreements of sale in respect of units 9,

[52] Upon registration of a sectional plan of extension s 25(12) of the STA provides that the owners 'shall be divested of their share or interest in the common property to the extent that an undivided share in the common property is vested in the developer, his successor in title, or the body corporate, as the case may be, by the issue of the certificates of registered sectional title . . ..'

10 and 11, and the like. Some of this information was provided. Copies of the agreements of sale in respect of the buildings were not supplied initially, the appellant maintaining that it was not a party to those agreements. Copies of the agreements were furnished later with the replying affidavit.

[48] The replying affidavit also acknowledged the relationship between the sole director of HFP, Mr Hodgson, and the erstwhile purchaser of units 9, 10 and 11, his mother, Mrs Hodgson. Mrs Hodgson had purchased the three units from the developer, and prior to transfer released part of the deposits paid to the developer.[53] Her estate would possibly have been unable to recover those payments from the developer's insolvent estate. This would give rise to concerns whether the transaction contained in the agreement was entirely at 'arm's length.' It is a consideration that could influence the decision of owners and would warrant a closer examination of the considerations that would determine whether the agreement should have been concluded with HFP and on the terms contained therein.

[49] The owners of units in the scheme will also be prejudiced if the insolvent estate of the developer was to pursue an enrichment claim against the appellant or its members, *qua* owners of undivided shares in the common property, for the improvements effected by the erection of buildings 9, 10 and 11. It is not clear what the possibility of such a claim being brought, or the merits thereof, might be. This should have been canvassed and clarified.

[50] The respondent also presented figures of the increase in the value of the three units, to demonstrate that there was a marked difference between what HFP would pay for the right to extend the scheme, compared to the likely values of units 9, 10 and 11, which HFP would be entitled to realise for its own account. That would be

[53] It appears that she may thereafter have on-sold the units, although this is not clear.

irrespective of whether the present occupiers purchased the properties, or if they declined to do so, HFP being entitled to sell the units to third parties. In each instance the respondent believes that the proceeds which HFP would receive would be considerably more than the sum of R500 000.

[51] The appellant sought to counter some of the aforesaid criticisms by contending that there was no other entity willing to undertake the completion of the extension process, and that the respondent ignores that HFP will assume responsibility for the repair of leaks in the units, and the costs of getting the units to a registrable stage after compliance with the requirements of the STA. These arguments raised the need for even further information and disclosure of, for example, the estimated costs of attending to these obligations. Some sort of feasibility would, or should, have been undertaken by the appellant in deciding not to undertake the extension of the scheme for its own account. Estimates of values, the costs of repairing leaks and obtaining guarantees for repair work done, the costs of completing the registration process to have the amended sectional plan prepared and registered, and the like would presumably have informed the appellant's decision whether to conclude the agreement with HFP. This information should have been volunteered by the appellant to the respondent.

[52] The appellant would have been privy to the negotiations culminating in the agreement. Being sufficiently satisfied to agree to the terms thereof, the appellant would be familiar with what informed the amount of the consideration payable, the opportunity costs of HFP assuming liability for leaks, the possibility of any enrichment action being pursued against it, and the like. This information should have been made available by the appellant to all its members. It should also have advised its members of details of levies not paid by the developer[54] and what had

[54] Section 25(5A)(*b*) of the STA.

happened to rentals allegedly paid to the developer ‘until recently,’ to allow them to decide whether the appellant should itself exercise the right to extend, or on what terms it should cede the right to a third party. Owners of units in the scheme have a direct and substantial interest in these issues.

[53] The impression gained from a perusal of the affidavits in the application is that the respondent’s concerns were sought to be met mainly by broad replies that the members were given information and that questions could have been asked and answered and meetings held if necessary and called for. However, this was not necessary because a majority of the owners had provided their consent. Further, the agreement with HFP was merely for the exercise and cession of its right to extend the scheme. In addition, the respondent had not presented proper valuations for units 9, 10 and 11. Accordingly, the contention was that there was no good cause in law to withhold the consent to the cession of its right to extend the scheme to HFP.

[54] The affidavits from both parties reflect a measure of distrust. The issues raised by the unusual and novel event which faced the appellant and its members because of the conduct of the developer, required a transparent and open process of candid disclosure of information to enable owners to make an informed choice. An informed decision by all the owners in the scheme would only be possible if all the material information was made available.

[55] The appellant contended that the respondent fundamentally misunderstood the agreement with HFP and that it only related to the exercise and cession of the right of extension. The high court correctly found that this was not so. Notwithstanding the wording in the agreement that HFP would acquire the right to complete the buildings, the buildings were already complete to the extent that occupation certificates had been issued. The full price of the units would ultimately be realised

for the account of HFP. The realisable value of the buildings, to the extent that they have been completed, would not vest in or revert to the appellant. And if the current occupiers do not purchase the units at the same price at which they had been bought, then the three units could be sold to third parties at open market prices for the account of HFP. That might be justified, but the respondent was entitled to be provided with information that would persuade her that it was an appropriate way for the appellant to proceed, and one to which she could not in law withhold her approval.

[56] The high court pointed out that there was no suggestion in the founding affidavit that any of the various options were put before the owners with sufficient information to enable them to make informed decisions, to debate the options and ultimately to decide what to do. The owners did not have the full facts before them when they were asked to provide their written consents. It concluded that the respondent was not provided with sufficient particulars and that it was therefore not unreasonable for her to have withheld her approval. Having regard to the purpose of the provisions and the wide meaning of the phrase 'without good cause in law', I am not persuaded that the high court erred in reaching that conclusion.

Conclusion

[57] The predicament faced by the parties is one that called for considerably more transparency and co-operation between the appellant and the respondent. With a full and candid disclosure, a mutually acceptable arrangement, with the consent of all the relevant parties, should be possible. If not, then it would at least identify the considerations which will have to be adjudged to determine whether good cause in law exists to withhold approval. Mediation could be a viable remedy and is an option that should have been explored. The provisions of rule 41A, specifically the mandatory requirements in rule 41A(2) were regrettably not yet applicable at the

time the application was brought.[55] Alternative dispute resolution processes are also available in terms of the Community Schemes Ombud Services Act (CSOS).[56]

[58] In the spirit of communal ownership and the legal obligations it imposes in matters where sectional title ownership is implicated, the parties needed to engage constructively to achieve a mutually acceptable resolution of their dispute. They had not done so. Both the appellant and the respondent are, to a greater or lesser extent to blame for that situation.

[59] As regards costs, it would be inappropriate to say that either party has been more successful than the other. There is no winner. The impasse needs to be resolved and should have been resolved long ago. Each party should pay their own costs of the appeal and the proceedings before the high court.

The order

[60] The following order is granted:

1 The appeal is upheld to the extent set out in paragraph 3 below but is otherwise dismissed.

2 Each party is directed to pay its own costs of the appeal.

3 The order of the high is set aside and substituted with the following:

‘(a) The respondents are directed to sign whatever consent is required for:

(i) the applicant to obtain a Certificate of Real Right in respect of the extension of the San Sydney Sectional Title scheme, by the addition of the buildings that have been erected on the common property of the scheme, depicted on Building Plan Number 14/10/860 approved by the KwaDukuza Municipality as sections 9, 10 and 11, as required by s

[55] Rule 41A came into operation on 9 March 2020 – Government Gazette No. 43000 dated 7 February 2020. It provides for a voluntary, non-binding, non-prescriptive dispute resolution process – *Kalagadi Manganese (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2021] ZAGPJHC 127.

[56] Act 9 of 2011.

25(6) of the Sectional Titles Act 95 of 1986 read with s 5(1)(*b*) of the Sectional Titles Schemes Management Act 8 of 2011; and

(ii) the exercise of that right of extension by the applicant as contemplated by s 5(1)(*b*) of the Sectional Titles Schemes Management Act 8 of 2011.

(b) Should the respondents fail to sign such consent(s) in whatever format required by the Registrar of Deeds within seven days of written request by the conveyancers appointed by the applicant, then the Sheriff of this court is authorised and directed to sign the written consent(s) on behalf of the respondents.

(c) The further relief sought is dismissed.

(d) Each party is directed to pay its own costs of the application.'

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P A KOEN

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	M.E. Stewart
Instructed by:	Northmore Attorneys, Durban Webbers, Bloemfontein.