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**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

APPEAL NO: A09 / 2025

CASE NO: 1501 / 2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 22 August 2025

SIGNATURE

In the matter between:

JOHN DANIEL KESTELL SWANEPOEL

APPELLANT

And

TORSTEN EDWIN FJASTAD

FIRST RESPONDENT

CATHERINE FJASTAD

SECOND RESPONDENT

J U D G M E N T

RATSHIBVUMO DJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. Date and time for the hand-down is deemed to be 22 August 2025 at 09H00.

[1] Introduction.

The two respondents were the applicants in a case brought against the Registrar of Deeds, Mpumalanga, along with ten other respondents. Among these respondents was the Appellant, who was cited as the ninth respondent. Only the Appellant opposed the application. On 06 May 2024, Gumede AJ of this Division (the court *a quo*) delivered a judgment in which she issued the following order:

- “1. The first respondent is directed to arrange for and to allow the filing in the relevant sectional titled file replacement plans which were submitted to it in terms of section 25(2A) of the Sectional Titles Act read with Regulation 25 of Sectional Titles Regulations published in terms of this Act, as replacement of the plans initially filed in terms of section 25(2) of the Act when the sectional title register was opened in respect of the sectional title scheme known as Hulala Lakeview SS728/2000 (the Scheme).
2. The first respondent is directed to uplift and expunge any caveat noted against the Certificate of Real Right SK6991/2000S and/or Notarial Deed of Cession of Real Right SK 08222/2003S.
3. The second respondent, the body corporate of Hulala Lakeview Sectional Title Scheme, is ordered to sign all documents and to do all things required by the Registrar of Deeds to give effect to order 1 above.
4. It is declared that the applicants are, by virtue of a notarial deed of session of real rights SK 08222/2003S, the lawful registered holders of the real right to extend the Scheme, originally reserved to the developer of the Scheme in terms of section 25(1)(a) of the Act and initially held by the developer by virtue of Certificate of Real Right SK6991/2000S.
5. It is declared that the real right of extension referenced to in order 4 above, remains extant, valid and enforceable, in accordance with the certificate of reservation.
6. The ninth respondent is ordered to pay the costs of opposition to this application.

[2] The Appellant now appeals against the above order. The appeal is with the leave of the court *a quo*. The Respondents oppose the appeal.

[3] **Background.**

As the court *a quo* observed, the Respondents are the joint registered holders of a real right of extension in respect of the Hulala Lakeview Sectional Title Scheme, no. SS728/2000, which right was acquired by way of cession from the original developer of the Scheme. The developer had reserved the right of extension to construct an additional dwelling under section 25(1) of the Sectional Titles Act, no. 95 of 1986 (the Act), when the scheme was registered in 2000. It is important to note at this stage that the Appellant denies that the developer validly ceded its real right of extension to the Respondents.

[4] The Sectional Plan for Hulala Lakeview Sectional Title Scheme was registered on 19 December 2000. On the same date, a Certificate of Real Right of Extension was issued by the Registrar of Deeds, Pretoria. The said certificate makes reference to plans that should be submitted under section 2(2) of the Act, and kept in the file held by the Registrar of Deeds upon its issuance. These plans could not be located in the Registrar's file. Their absence led the Respondents to launch an application for the replacement of lost or destroyed plans in terms of Regulation 25A.

[5] The Registrar's Office received several objections to this application. The Appellant was among those who raised objections. His reasons for the objection are discussed under the grounds of appeal. In light of the objections raised, the Registrar decided to record a caveat against the Certificate of Real Right SK6991/2000S and/or the Notarial Deed of Cession of Real Right SK 08222/2003S, preventing any action until the issue regarding the missing plans has been resolved. This prompted the Respondents to file an application seeking the relief granted by the court *a quo*.

[6] **Grounds of appeal.**

7.1 The Appellant submitted in the application for leave to appeal that the court *a quo* erred in finding that the Real Right of Extension relied upon by the

Respondents was validly reserved in terms of section 25 of the Act, considering the following points:

- (a) The Certificate of Real Right does not specify the type of building, the specified part of the common property on which it may be constructed, or even the Sectional Scheme to which it refers. Consequently, the Certificate of Real Right of extension lacks any substantive content and has no legal effect.
- (b) There is no evidence that the application for the Reservation of Real Right of extension was accompanied by the plans, schedules, and particulars required under the provisions of section 25(2)(a), (b), (c), or (d).
- (c) The Certificate of Real Right of Extension does not constitute *prima facie* proof that the plans, schedules and particulars required under section 25(2) of the Act were filed.
- (d) If the plans are not in the file, it does not necessarily mean they were misplaced or destroyed as considered in regulation 25A of the Act, thereby entitling the Respondents to submit an application for the replacement of the plans.
- (e) The respondents did not provide secondary evidence to demonstrate that the documents were ever prepared and filed with the Registrar.
- (f) The respondents do not claim that the replacement plans closely reflect the lost or destroyed documentation, as required under regulation 25A(5).

7.2 It was further submitted that the court *a quo* erred when it found that the application for the filing of the replacement documentation under regulation 25A of the Act was authorised by the Body Corporate. In this regard, it was submitted that the court *a quo* erred by failing to consider the following:

- (a) In terms of the provision of Regulation 25A(1), the application for the replacement of documentation referred to in section 25(2) must be submitted by the Body Corporate.
- (b) The application submitted to the Deeds Registrar was not signed by the chairperson or any other person authorised by the Body Corporate.
- (c) The Body Corporate did not pass any resolution to introduce or endorse such a resolution.

7.3 It was further submitted that the court *a quo* erred in failing to find that no real right of extension had been reserved concerning the specific portion of the common property adjacent to the appellant's dwelling, as the certificate of Real Right SK6991/2000S reserved in favour of Hulala Shareblock Company Limited does not specify the part of the common property subject to the Real Right of Extension.

[8] The law.

Section 25(1) & (2) of the Act provides,

“(1) A developer may, subject to the provisions of section 4 (2), in his or her application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11 (2), the right to erect, complete or include from time to time, but within a period stipulated in such condition or such extended period as may be agreed upon (by unanimous resolution of the body corporate and with the consent of the bondholders existing on the date of the taking of the unanimous resolution, which resolution and consent must be obtained by the notary and filed in his or her protocol) prior to the expiry of the stipulated period, by way of a bilateral notarial deed, for his or her personal account... a building or buildings... on a specified part of the common property, and to divide such building or buildings into a section or sections and common property and to confer the right of exclusive use over parts of such common property upon the owner or owners of one or more sections, or to delineate exclusive use areas on or in specified parts of the land and buildings in terms of section 5 (3) (f) and to confer the right of exclusive use over such areas upon the owner or owners of one or more sections.

(2) In the event of a reservation in terms of subsection (1), the application for the registration of the sectional plan shall, in addition to the documents referred to in section 11 (3), be accompanied by

(a) a plan to scale of the building or buildings and on which the part of the common property affected by the reservation; the siting, height and coverage of all buildings; the entrances and exits to the land; the building restriction areas, if any; the parking areas; and the typical elevation treatment of all buildings, are indicated;

- (b) 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 only;
- (c) 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;
- (d) particulars of any substantial difference between the materials to be used in the construction of the building or buildings and those used in the construction of the existing building or buildings;
- (e) ...
- (f) the certificate of real right which is to be issued in terms of section 12 (1) (e); and
- (g) such other documents and particulars as may be prescribed.

[9] Regulation 25A of the Sectional Titles Regulations provides,

“25A Replacement of documentation referred to in section 25(2)

(1) A registrar of deeds must, if any of the documentation referred to in section 25(2)(a), (b), (c), (d) or (g) of the Act have been lost or destroyed, on written application by the body corporate or if a body corporate has not been established, on written application by the developer, accompanied by replacement documentation, arrange for such replacement documentation to be filed in the relevant sectional title file.

...

(5) The replacement documentation shall be as nearly as possible a reflection of the lost or destroyed documentation and shall take the place of the lost or destroyed documentation...”

[10] **Discussion.**

The court *a quo* approached the Respondents’ application on the assumption that an application had been lodged with the Deeds Registrar per Regulation 25A. It also accepted at face value that “the certificate of real right of extension which the Registrar of Deeds signed is a prima facie proof that the plans were indeed filed as

stated in the certificate.”¹ Furthermore, it appears that the court *a quo* accepted the version put forward by the First Respondent that he had submitted the building plans to his conveyancer. This aspect was, however, vehemently disputed by the Appellant.

[11] Upon scrutinising the application form submitted in compliance with Regulation 25A by the Respondents, it becomes evident that no application was lodged with the Deeds Registrar by the Body Corporate.² From the form attached to the application, it is unclear who the applicant was, as the space for the applicant's name was left blank. While the names were omitted, it appears the applicant was meant to sign in “his capacity as Chairperson of Hulala Lakeview Body Corporate (the Chairperson).” The portion for the signature, as well as that for the witnesses, and the place where the document was meant to be signed, remained blank.

[12] In an attempt to declare a dispute over who lodged the application with the Deeds Registrar, the Appellant provided email correspondence between his legal representative and the Chairperson. In the emails, the Chairperson denied having authorised the application for the replacement documents. He also stated that he could not have approved it, as the matter had not yet been presented before the Body Corporate for voting. The court *a quo* held that since the First Respondent had email correspondence from the legal representative of the Body Corporate suggesting that the application would be approved by the client (Body Corporate), this was sufficient authorisation to deem the application to have been approved by the Body Corporate.

[13] Following the Plascon-Evans rule, where disputes of fact arise from affidavits in motion proceedings, a final order may only be granted if the facts stated in the applicant's affidavits, which the respondent has admitted, along with the facts alleged by the respondent, justify such an order. It may differ if the respondent's version involves bald or uncreditworthy denials, raises fictitious disputes of fact, is

¹ See paragraph 13 of the court *a quo*'s judgment.

² See Annexure FA5 attached to the founding affidavit.

implausible, far-fetched, or so clearly untenable that the court is justified in rejecting them based solely on the papers.³

[14]The dispute over whether the Body Corporate submitted the application should have been decided in favour of the Appellant's version. The order sought by the Respondents could only be granted if the facts stated in the applicant's affidavits justify such an order, despite the dispute. The Appellant's version, which should have prevailed, asserts that the Body Corporate did not authorise the application for replacement documents. The court *a quo*'s failure to determine this dispute in favour of the Appellant's version amounts to a misdirection, which entitles this Court to intervene with the outcome.

[15]Moreover, even if it were assumed that the Body Corporate did authorise the application with the Deeds Registrar, Regulation 25A requires more than just authorisation for a valid application. The application to the Deeds Registrar must be made by the Body Corporate, which must have completed its own required process beforehand. The application form attached to the founding affidavit is simply incomplete and unsigned. This falls short of the requirement as per Regulation 25A.

[16]The Appellant further contests the court *a quo*'s judgment on the ground that there was no evidence showing that the documents meant to be replaced were ever submitted previously. Regulation 25A is intended to cover building plans that were submitted but later got lost or destroyed. It was not designed to address the submission of new documents where they had not been previously submitted. Although the First Respondent claimed he had submitted the plans to the conveyancer and that he discovered they were missing from the Registrar of Deeds in 2016 when he attempted to sell the Real Right of Extension to a third party, this version was challenged by the Appellant.

³ See *National Director of Public Prosecutions v Zuma supra*, at para 26.

[17]The Appellant disputed this “discovery” based on the correspondence exchanged between the former owner of Unit [...] and the First Respondent. In the correspondence, dating from 10 April 2014, the previous owner wrote,

“I am a trustee of the Jolad Trust created by my late husband and the trust is in the process of selling unit no 7. We seem to have a problem with the real right of extension for your plot. Apparently, there should be some sort of a plan for a building for the plot, which should have been lodged with the deeds office. We have exhausted all avenues and have been unable to find anything. Do you have any recollection when you purchased the plot from the Berlin’s, if any plans were given or shown to you at the time of purchase? I really appreciate any light or information that you might be able to give me.”

[18]In a response dated 11 April 2014, the First Respondent stated, “[W]e have never known of any plan for a house on our Unit [...]. We only know that it is a plot between Unit [...] and [...].” In two other emails written in March 2014, when the First Respondent was being questioned over the same subject, he had responded as follows,

“There are no plans. Plans have never been made, and therefore nothing has been submitted.” [03 March 2014]. “Good day. To my knowledge, of myself and my actions, no plans have been submitted. No architect has been engaged; perhaps a previous owner may have. We have not.” [17 March 2014].

[19]In light of the response from the First Respondent, the Appellant decided to purchase Unit 7. The email correspondence between the First Respondent and the former owner of Unit 7 is undisputed. The Appellant was, therefore, shocked to learn from the application filed by the Respondents with the Deeds Registrar that there would now be a structure near his unit following the application for replacement of plans.

[20]The court a quo's conclusion that the issuance of a certificate of real right of extension by the Registrar constitutes prima facie proof that the plans were filed as stated therein should be considered in conjunction with the email correspondence

from the First Respondent above. After researching practices in various deeds offices, the author, CG Van der Merwe, noted in her book, *Sectional Titles*, “it frequently happens that the documents as provided for in section 25(2) are not lodged with the opening of the sectional title register, or are subsequently lodged or destroyed.”⁴ [my emphasis]. The learned author’s observation suggests that the absence of the plans in the register, owing to the plans not having been filed when opening the sectional title register, is common in the Deeds Office.

[21] Further considerations on this aspect are that the Respondents did not attach any copy of the original plans that were initially lodged, if there was any lodgement. The First Respondent was aware, before launching the Regulation 25A application with the Deeds Registrar, that the existence of building plans was a contentious issue raised by the Appellant before deciding to purchase Unit 7. He made no effort to seek assistance from Ms. Middleton, the conveyancer through whom he claimed to have submitted the plans, to provide him with the information she still had in her possession. He did not even seek a confirmatory affidavit.

[22] As Van der Merwe noted,⁵ to get approval of the building plans, the developer was expected to appoint architects, engineers and quantity surveyors to prepare them. If these experts were appointed in this case, their details were not provided, and no documentation from them was submitted. For this reason, the Respondents were unable to claim that the replacement plans were as close as possible a reflection of the “lost or destroyed” documentation as required by Regulation 25A(5).

[23] There is, therefore, an alternative explanation for the absence of plans from the register other than that they might have been lost. The email correspondence between the First Respondent and the former owner of Unit 7 supports this assertion. On this ground, I am of the view that the court *a quo* misdirected itself by concluding that the issuing of a certificate was a prima facie proof that the plans could be lost or destroyed. The evidence presented by the litigants does not support that finding. This finding entitles this Court to interfere with the order of the court *a quo*.

⁴ *Sectional Titles*, Vol 1 para 12-23.

⁵ *Supra* at 12-21.

[24] In light of the two grounds mentioned above that support the upholding of the appeal, it remains unnecessary to determine the further grounds of appeal, particularly, whether the reservation of real right extension was valid, in view of the application having not identified the portion of the common property in respect of which the common property was so reserved. The determination of this aspect would have no impact on the outcome of this appeal.

[25] **The Order:**

For the reasons above, the following order is made:

26.1 The appeal is upheld with costs.

26.2 The order of the court *a quo* is hereby set aside and replaced with the following:

26.1.1 The application is dismissed with costs.

TV RATSHIBVUMO
DEPUTY JUDGE PRESIDENT

I agree.

S MSIBI
ACTING JUDGE OF THE HIGH COURT

I agree.

MB MADAVHA
ACTING JUDGE OF THE HIGH COURT

FOR THE APPELLANT:

MR. R SPOOR

INSTRUCTED BY:

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MBOMBELA

DATE OF HEARING:

08 AUGUST 2025

DATE OF JUDGMENT:

22 AUGUST 2025