

PURCHASER'S REMEDY WHERE PARKING BAY NOT CEDED ON TRANSFER OF UNIT

Le Roux v Dunrobin Body Corporate and Others (10268/2019) [2020] ZAWCHC 53 (9 June 2020)

It happens from time to time that, due to oversight, a formal cession of an exclusive use area does not accompany the registration of transfer of ownership of the unit to the new purchaser. The Sectional Titles Act states that in such an instance the exclusive use area "vests" in the body corporate. Is the purchaser who paid the purchase price and transfer duty on the acquisition of both without a simple remedy? No, the Court held here, because there are provisions in the Deeds Registries Act that should be invoked to obtain cession (without a requirement to obtain a unanimous resolution from the body corporate).

The Judgment can be viewed [here](#).

FACTS

Le Roux owned a unit in the Dunrobin Sectional Title Scheme in Three Anchor Bay, Cape Town, which he bought in 2001.

In 1993 the body corporate of this scheme resolved unanimously to cede specific exclusive use areas to its owners. P12 was allocated to Le Roux's predecessor-in-title and P13 allocated to Scheer's predecessor-in-title. During 1994, all of the parking bays in the scheme, except for P13, were formally ceded to the allocated owners in terms of section 27(3) of the Sectional Titles Act (STA). (This meant that no exclusive use rights attached to parking area P13 and it was ordinary common property, unencumbered by any exclusive use rights.)

In the agreement of sale that Le Roux concluded, it was noted that he purchased his apartment together with parking bay P12, by way of one indivisible transaction. He paid transfer duty on the value of both in order to obtain the transfer duty clearance and registration of transfer into his name. His title deed in respect of the unit refers to the exclusive use area P12 as forming part of the transaction. P12 was however not subsequently formally ceded to Le Roux when he took transfer of his apartment (as is required in terms of Section 27(4)(a) of the STA).

On registration of transfer, the (then) seller ceased to be a member of the body corporate. According to the provisions of the STA, P12 accordingly vested in the body corporate (in terms of section 27(4)(b) of the STA, which records (in its present form) that "if an owner ceases to be a member of the body corporate ... any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond.")

Le Roux had enjoyed the undisturbed use of P12 and had paid the levies, as raised thereon, by the body corporate. The body corporate had treated this area as an exclusive use area to which Le Roux was entitled, to the exclusion of all others. However, the user of Parking Bay 13 (Scheer) applied to the body corporate for the issue to her of exclusive use rights to that parking area. Scheer was the owner of an apartment in the same complex. There was no mention of a parking bay in her deed of transfer, or in that of her predecessor-in-title. P13 had never been dealt with by the rules and had not been ceded to either of Scheer's predecessors-in-title (after the 1993 unanimous resolution). Since the acquisition of the property by Scheer, she held the view that parking bay P13 had been allocated to her and that she was entitled to the exclusive use thereof, to the exclusion of all others. This parking area was controversial in the present application because it was not possible, due to the layout and positioning of the two bays and the configuration of P13, to park two vehicles next to each other simultaneously.

Le Roux applied to court to interdict the granting of an exclusive use area to Scheer by the body corporate, arguing that:

1. By way of default, P12 vested in the body corporate. This 'vesting' does not alter the nature of the exclusive use right that exists in respect of P12. P12 remained, in essence, part of the common property, save for the fact that it was encumbered by an exclusive use right in terms of a registered notarial cession to Le Roux's predecessor-in-title. This exclusive use right vested in the body corporate only for custodial purposes and falls to be relinquished when ownership of the exclusive use right is properly established.
2. In accordance with the provisions of section 27(6) of the STA, the registered right to the exclusive use of a part of the common property is deemed to be a right to immovable property. This is fortified by the fact that, when he purchased his apartment, the title deed referred to his section and included an exclusive use area.
3. Further, regard must be had to the provisions of section 33 of the Deeds Registries Act which provide that *"any person who has acquired in any manner ... the right to the ownership of immovable property registered in the name of any other person and who is unable to procure registration thereof in his name in the usual manner and according to the sequence of successive transactions in pursuance of which the right to the ownership of such property has devolved upon him, may apply to the court ... for an order authorising the registration in his name of such property."* The concept "acquire" in this section falls to be widely interpreted, as meaning the "right to acquire ownership of property", including the personal right to obtain *dominium* in immovable property. Thus, upon a proper interpretation of section 33(1), it must include the right to claim ownership of the exclusive use rights in and to P12. This must be so because the right to ownership which may be registered in terms of section 33, of necessity, encompasses the same right that was acquired in the transaction to which effect cannot be given in the usual manner although recorded in the title deed to the unit. The problem that Le Roux faced was that the previous owner was now deceased, and it was accordingly not possible to obtain a formal cession of these rights from her "according to the sequence of successive transactions".

The body corporate argued that Le Roux's reliance on a wide interpretation of section 33 of the DRA is misplaced as it simply does not contemplate cessions or transfers of rights from one party to another. It is contended that section 33 cannot be used to bypass a transaction capable of registration in the usual manner (which in this instance would be a cession from the body corporate upon the strength of a unanimous resolution, as required by the STA.)

Scheer argued that P12 belonged to the body corporate and that Le Roux could not procure transfer, not even in terms of section 33, because ownership no longer vested in Le Roux's predecessor-in-title, due to her passing. Section 33 of the DRA could not be invoked, Scheer added, by an applicant who was unable to procure registration of immovable property in his name "according to the sequence of the successive transactions" in pursuance of which the right to the ownership of such property had devolved upon Le Roux.

HELD

- The regulations to the Sectional Title Schemes Management Act (STSMA) provide, inter alia, that *'the body corporate must take reasonable steps to ensure that a member or other occupier of a section or exclusive use area does not do anything to a section or exclusive use area that has a material negative affect on the value or the utility of another section or exclusive use area'*. The body corporate is therefore not entitled to grant exclusive use rights over P13 that would impede upon those attaching to P12 (which now vests in the body corporate). The body corporate may only alienate or let part of the common property in terms of a unanimous resolution. Clearly, such a resolution may not be implemented where it would have an unfairly adverse effect on any member. And, although the STSMA does not pertinently deal with whether the allocation of exclusive use areas in terms of Section 10(8) would constitute an alienation thereof, such allocation by amending the

management or conduct rules would, however, be tantamount to an *alienation* thereof.

- Further, the body corporate criticised the observation made in the [Mckersie judgment](#) that an obligation on a body corporate to transfer arises from a contractual obligation delegated to it by operation of law. (In *McKersie* the *developer* sold a unit together with an exclusive use parking bay to X, who in turn sold them to McKersie. No notarial cession followed and the exclusive use parking bay vested in the body corporate when the developer ceased to be a member. *McKersie* is however distinguishable because it related to a developer who had not ceded the exclusive use area, as opposed to the present matter where it was a seller. Specifically, in *McKersie*, there was no mention of the wording in the relevant title deed issued to the claimant.)
- The body corporate advanced a clinical argument that it was not a party to the sale agreement and accordingly no contractual obligations could be transmitted to it. This approach required closer scrutiny. It is significant that in the case of parking bay P12, when carefully examining the actual wording of the title deed in terms of which Le Roux holds his property, there is specific reference to the fact that the seller sold the property to Le Roux for a certain sum, which included the exclusive use area. (By contrast, these words do not appear in any of the title deeds in connection with the transfer of the property to Scheer as no reference whatsoever is made to any exclusive use areas.)
- One of the further arguments raised against the relief sought was that initially the STA provided that when an owner ceases to be such, any exclusive use area registered in that owner's name will vest in the body corporate "free from any mortgage bond or registered real right". The proviso has been dropped in subsequent amendments to the STA and section 27(4)(b) now reads that the right to an exclusive use area still registered in the owner's name where the unit has been transferred to a new owner, "vests in the body corporate free from any mortgage bond." It is trite that there is a presumption against the operation of retrospectivity. But, even if the interpretation against retrospectivity- and the amendments are regarded as having had some sort of retrospective effect, then once the vesting had occurred it could never have been the intention for a re-vesting to take place upon any successive amendments. It could never be argued that the previous amendments apply retrospectively to P12 and in the same breath, ignore the most recent amendment which deleted the reference to any registered real right. Accordingly, the rights that vested in Le Roux in 2003, are still so vested, and for that reason, the necessity to re-create the exclusive use rights in relation to P12, finds no application by operation of law.
- Further, it could not have been the intention of the legislature to enrich the body corporate at the expense of someone in the position of Le Roux given that he paid for his exclusive use rights both in relation to purchase price and transfer duty. It is not Le Roux's case that the body corporate should grant him exclusive use rights over P12 as a new allocation – rather, it was contended that because of the failure to formally register the cession to Le Roux, he had no other mechanism available to him, other than section 33, to obtain cession of those rights from the body corporate.
- Thus, taking into account the provisions of Section 33 of the DRA, Le Roux had demonstrated a clear right to the unhindered access to P12, which he had exercised, to the exclusion of all others, without interference, over many years.
- Upon the ordinary meaning of the language used and on a proper logical interpretation of section 33, in these particular circumstances, it must include the obligation to effect a cession of rights from the body corporate, with the right of Le Roux to receive a cession of such rights. This was not a *new allocation* of rights to grant to Le Roux the exclusive use rights over P12 and it is of no consequence that there is no contract between Le Roux and the body corporate. The facts rather show that Le Roux purchased an exclusive use area; this exclusive use area is noted in his title deed; he had a *clear right* to unhindered access to P12, which he had

exercised, to the exclusion of all others, without interference, over many years and the body corporate must have issued a *levy clearance certificate* being well aware of these facts, prior to transfer having been effected to Le Roux.

- The provisions of Section 33(1) are clear in that they provide that *any person who acquired in any manner, other than by expropriation, the right to ownership of immovable property* may proceed to obtain the appropriate relief under this section.

CONCLUSION

Le Roux's application for a prohibitory interdict was accordingly successful.