

WHEN EXCLUSIVE USE AREAS ARE “LOST” UPON SALE BY DEVELOPER OF LAST UNIT

Diaz Hotel and Resort (Proprietary) Limited v Body Corporate of the Vista Bonita Sectional Titles Scheme No SS 357/2008 and Another (15175/2019) [2021] ZAWCHC 180 (31 August 2021)

This judgment deals with the sticky scenario that arises when a developer (or owner) sells his last unit in a sectional title scheme without also transferring the rights he had to exclusive use areas. The Law states that once such owner loses membership of the body corporate, because he no longer is an owner of a unit in the scheme, the rights to the exclusive use areas “vest” with the body corporate. But what does this mean? Do these areas “belong” to the body corporate without more? No, says the Court. The specific circumstances play a role and a Registrar of Deeds must consider the circumstances before allowing a cession of rights to the body corporate.

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

FACTS

The Tower Trust had entered into a sale agreement on 2 February 2015 (and subsequently properly nominated the Diaz Hotel and Resort (Proprietary) Limited (‘the Hotel’) as purchaser) in respect of a business known as the Convenience Centre. The seller was S D Commercial Holdings (Proprietary) Limited (‘S D Commercial’) and was in liquidation at the time.

The business sale included the immovable property where it was situated, being unit 73 in the Vista Bonita sectional title scheme. The sale also included two exclusive use areas which were associated with unit 73, namely, parking bays P73 and P74 (and another parking bay which does not form part of this matter). At the time of sale, S D Commercial was registered as the holder of the rights to the exclusive use areas numbered P73 and P74.

After the conclusion of the sale transaction, the agreement and other related transfer documents were lodged in the Deeds Office to transfer the immovable property into the name of the Hotel. The parties were thereafter advised that the Deeds Office had rejected the transfer of the three exclusive use areas as these were not expressly cited in the sale agreement.*In response to the rejection note, the parties concluded an addendum to amend the agreement so that it expressly included the three exclusive use areas as part of the assets sold under the agreement. (*This part of the judgment is uncertain as the sale agreement is not lodged in the deeds office and it is uncertain what the source was of the deeds office’s enquiry.)

Nonetheless, upon re-lodgment of the documents in the Deeds Office, only transfer of unit 73 was registered, in other words without the simultaneous cession of the rights in respect of the exclusive use areas (apparently due to an error on the side of the conveyancing attorneys). Unit 73 was the last unit held by the seller (who was also the developer) in the scheme. Hence, in terms of the provisions of the Sectional Titles Act 95 of 1986 (‘STA’), the exclusive use areas vested with the body corporate after transfer of the last unit that was still registered in the name of the developer.

Subsequently the Hotel sought transfer into its name of the parking areas, specifically because these were needed for parking for the business’ customers and such parking was also required in terms of the applicable zoning regulations. The body corporate snubbed at this, claiming that the rights now vested in itself. It refused to issue a clearance certificate required for transfer.

The Hotel approached the Court for an order that the Deeds Office’s records should be amended to reflect the correct position, i.e. that it held the rights to the exclusive use areas.

HELD

- The legal question for determination is whether any right to exclusive use areas which were registered in the name of S D Commercial vested in the body corporate, in terms of 27(1)(c) of the STA, when S D Commercial ceased to be a member of the body corporate upon transfer of unit 73 into the name of the Hotel. And, if not, whether the exclusive use areas can still be transferred to the Hotel; and assuming that they can still be transferred to it, whether section 33(1) of the Deeds Registries Act can be utilised for this purpose.

Did the rights to the exclusive use area vest in the body corporate?

- Section 27(1)(c), (d) and (e) of the Act are illustrative in this regard and must be read together. These provide as follows:

“27 Rights of exclusive use of parts of common property

- (c) *If a developer ceases to be a member of the body corporate as contemplated in section 2 (2) of the Sectional Titles Schemes Management Act, any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond.*
- (d) *If a right to the exclusive use of a part or parts of the common property vests in a body corporate in terms of paragraph (c), the body corporate shall, in the prescribed form-*
 - (i) *apply to the registrar for the issuing of a certificate or certificates of real right of exclusive use in its favour; and*
 - (ii) *submit a certificate of compliance with any law dealing with vesting.*
- (e) *The registrar shall, **after consideration of the application** in paragraph (d), issue such certificate or certificates in the prescribed form.” (Our emphasis)*

- Thus, a body corporate would acquire rights in terms of **section 27(1)(c)** if the developer ceases to be a member of the body corporate, i.e. when he or she ceases to have a share in the common property which in turn occurs when the ownership in every section is held by any person or persons other than the developer.
- The circumstances that led to the enactment of section 27(1)(c) of the STA are relevant in this context. Before that section was legislated, *“the creation and exploitation of exclusive use areas were not regulated and gave rise to malpractices on the part of developers. These were, inter alia, that exclusive use areas were sold to outsiders who had no personal interest in the scheme; that exclusive use areas were let rather than sold and that rents escalated according to demand; that developers collected the cost of maintaining these areas from levies paid by sectional owners for the upkeep of the property; and that developers retained these areas as a lucrative nest egg after they have left the scheme. On account of these malpractices, the new Sectional Titles Act recognised the need for placing all matters pertaining to exclusive use areas on a secure footing by abolishing the mechanism of establishing exclusive use areas by amendment of the rules of a scheme.”*
- It was with the intention of eradicating these malpractices by developers that section 27(1)(c) was promulgated.
- It is evident that it is only when the developer has ceased to be a member of the body corporate that any rights to exclusive use areas registered in his/her name would vest in the body corporate in terms of section

27(1)(c) of STA. The body corporate *must* thereafter apply to the Registrar in terms of section 27(1)(d), in the prescribed form for the issuing of a certificate(s) of real rights in its favour. In such an application it must submit a certificate of compliance with any law dealing with vesting. The certificate in the prescribed form would be issued by the registration after “*consideration of the application*”.

- Reference to “*shall after consideration of the application*” in section 27(1)(e) of STA implies that obtaining a certificate to a real right in respect of a right of exclusive use area which has vested in a body corporate by operation of section 27(1)(c) is not a matter of mere formality. The Registrar may, after consideration of the application, grant or refuse to issue such a certificate. The Registrar would therefore have to enquire into the circumstances under which the body corporate alleged the rights vested in it in terms of section 27(1)(c) of the STA. These circumstances would include, in the present scenario, that:
 - Before transfer of ownership in section 73 passed, and before the rights vested in the body corporate, S D Commercial sold its rights to these exclusive use areas to the Hotel; to this effect the necessary documents were purportedly executed and lodged with the Deeds Registry in order to effect transfer of these immovable property rights to the Hotel.
 - When the Deeds Office initially rejected the transaction, it was particularly because the exclusive use areas which were part of the *merx* were not expressly cited. S D Commercial took the necessary steps to rectify the situation by concluding the addendum to ensure that transfer of these rights was effected. The steps taken by S D Commercial resulted in the Hotel acquiring personal rights which preceded the entitlement of the body corporate to have the rights to the exclusive use areas vest in it in terms of section 27(1)(c) of STA.
 - That transfer of these exclusive use areas rights did not happen, was an error which ought to be rectified to reflect the correct legal position.
 - Acquisition by a body corporate of the exclusive use rights in terms of section 27(1)(c) does not cover instances where a developer expressly, and in a binding agreement intended its rights to be transferred to a purchaser but where through a mistake, negligent or otherwise, these were not so transferred at the time when the last unit owned by the developer in the scheme was transferred.
- These considerations militate against registering the cession in favour of the body corporate.

Section 33 where a belated transfer of rights to exclusive use areas is sought

- Can section 33(1) of the Deeds Registries Act be used to transfer the rights to the Hotel? This section provides as follows:

“33 Registration of title by other than the ordinary procedure

(1) Any person who has acquired in any manner, other than by expropriation, 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..., may apply to the court by petition for an order authorizing the registration in his name of such property.”

- It is imperative to distinguish between ownership rights and exclusive use rights in a sectional title scheme, for this distinction is crucial to a determination of the matter and the relief which is sought. In terms of the STA, ownership rights in sectional title schemes are transferred in the same way as ownership rights in land are transferred, i.e. by way of a deed of transfer which is endorsed as against the title deed of the property (the sectional unit) concerned, by the Registrar of Deeds. An exclusive use right, on

the other hand, is a right which is given to an owner of a section in a scheme to use (a) part(s) of the common property, i.e. property of the scheme which is owned jointly by all the registered owners of sections in the scheme.

- In terms of section 27(1)(c) of the STA, if a developer ceases to be a member of the body corporate by no longer owning any sectional units in the scheme, any right to an exclusive use area which is still registered in its name 'vests' in the body corporate, 'free' of any mortgage bond which may have pertained to such rights.
- The parking bays have been allocated in terms of the sectional plan, for use by the owner of the section which operates a supermarket, and they never 'belonged' to the developer in the sense that they were never *owned* by it. They belonged to and have always been collectively owned by all the owners in the sectional title scheme in undivided shares (*pro rata* their participation quota in the scheme), as part of the scheme's common property. The developer only held the exclusive *use rights* to the parking bays and was entitled, and indeed compelled to transfer these rights to the owner of the section in respect of which such rights attached as per the delineation on the sectional title plan, i.e. the owner of the supermarket for which the use of such parking bays was designated.
- As stated above, sections 27(1)(c) and 27(4)(a) were introduced into the Act in 2003 in order to prevent developers and former owners of units in a sectional title scheme, who had divested themselves of ownership of units in the scheme, from thereafter hanging onto exclusive use rights over parts of the common property in order to exploit these commercially for their own benefit, or for the benefit of other parties who had no interest in the scheme.
- Rights which vested in the body corporate once the last unit which the developer owned was transferred, i.e. the unit in respect of which the supermarket is being operated from which was bought by the Hotel, were rights of *exclusive use*, and not rights of *ownership*. In the circumstances the body corporate could not and did not obtain better rights over the parking bays than those which the developer had, as these bays collectively belong to all the owners of units in the scheme, as part of its common property.
- One must bear in mind the mischief which Section 27(1)(c) seeks to address, viz. to prevent the abuse of parts of the common property of a sectional title scheme by allowing them to be used exclusively by persons or entities who are not supposed to be using them in terms of the sectional title plan.
- When exclusive use rights in respect of common property vest in a body corporate in terms of sections 27(1)(c) or 27(4)(a) it does not have the right to do with them as it pleases, and it holds them and must administer and deal with them, in the interests of and for the benefit of all owners in the scheme and not to serve its own interests. To allow the body corporate to deal with such rights otherwise would be to allow exactly the kind of mischief which the introduction of these provisions sought to do away with, in that it would allow the body corporate to exploit or deal with exclusive use rights when it is not entitled to do so in terms of the delineation and allocation of such rights as provided for in the sectional plan.
- It is common cause that in this matter the Hotel is the registered owner of unit 73, the section to which the exclusive use rights in respect of the parking bays attach. It is common cause that certificates of real right in respect of such use rights over the parking bays were issued by the Registrar of Deeds to S D Commercial and the title deed(s) were endorsed accordingly. S D Commercial had not been deregistered and the liquidator had indicated that it was still desirous of honouring and giving effect to its contractual obligations in terms of the deed of sale, in which the exclusive use rights were listed as part of the *merx* sold and that were required to be transferred to the Hotel. As long as such rights remain registered in the name of the company its affairs could not be finally wound up. The fact that these rights were vested in the body corporate does not mean that they were owned by it. It has merely been vested with these rights in order to prevent the developer from holding onto and exploiting them, and it merely held them in a custodial capacity and was required to

deal with them in the interests of the scheme and the members of the body corporate, i.e. the owners of units in the scheme, in accordance with the intended allocation of these rights as per their designation and delineation in terms of the sectional plan, and not to advance its own interests.

- The language of section 33(1) of the Deeds Registries Act is directed at the transfer of ownership of rights and there is no provision to justify an expansive interpretation of section 33 such as to equate the holder of an exclusive use right in a sectional title scheme with the holder of ownership rights in immovable property.
- Rather, there are specific provisions in the STA which deal with the establishment, registration, cancellation and transfer of exclusive use rights, and section 2(e) of the STA expressly empowers and authorizes the Registrar of Deeds to register in the deeds registry a title deed whereby ownership and/or any lease of, or any other real right in or over a section or an undivided share or common property of the scheme is acquired. This section is therefore the operative one which allows for the transfer of exclusive use rights in sectional title schemes generally and in circumstances such as those which prevail in this matter, and not section 33(1) of the Deeds Registries Act.