

WHAT CONSTITUTES 'GOOD CAUSE' TO WITHHOLD CONSENT TO A BODY CORPORATE DISPOSING OF A RIGHT TO EXTEND?

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

In this judgment, the Supreme Court of Appeal considered the consent requirements and application processes that must accompany the disposal by a body corporate of the right to extend the scheme, which vests in it, to a third party. It deals specifically with the question of whether such disposal constitutes alienation of common property and, otherwise, how a court will determine whether an owner had good cause to refuse to consent to such disposal.

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

FACTS

The San Sydney sectional title scheme was developed by Big Sky Trading 426 CC ('the developer'). At the time of applying for the registration of the sectional plan and opening of the sectional title register in March 2012, the developer had, in terms of section 25(1) of the Sectional Titles Act 86 of 1995 ('the STA'), reserved to itself the right to extend the scheme for its own account. The Certificate of Real Right to extend ('CRR') was valid for a period of one year. At this stage, the scheme comprised of 5 units only.

Subsequently, the developer exercised its right to extend the scheme by adding units 6, 7 and 8. The CRR lapsed thereafter. That meant, as provided for in section 25(6) of the STA, that the right to extend the scheme now vested in the body corporate.

However, in November 2011, without obtaining a new CRR (following the procedure prescribed in section 25 of the STA), the developer commenced the construction of three additional buildings (which were envisaged to become units 9, 10 and 11). Despite opposition, building work was finalised in August 2013. In October 2013, the developer sold the three buildings to Mrs Hodgson. She paid deposits, parts of which she released to the developer although ownership of the buildings had not been registered in her name (and could not be, as an amended sectional plan was not submitted to the deeds office).

The developer was provisionally liquidated in February 2016.

In May 2018, also without procuring the issuance to it of a CRR, the body corporate entered into an agreement of sale with HF Property Investments (Pty) Ltd ('HFP') in terms whereof it sold the '...the right to complete buildings 9, 10 and 11 on the common property and to divide such buildings into sections and the common property...'. HFP was represented by the son of Mrs Hodgson, who has since passed away. (It appeared that neither Mrs Hodgson nor her estate, had recovered any part of the deposits which she had released to the developer.)

The body corporate was of the opinion that, for this sale to be compliant with sectional title laws, it was necessary to obtain written consent, contemplated in section 5(1)(b) of the Sectional Titles Schemes Management Act 8 of 2011 (the 'STSMA') of each owner (and bondholder, if any) and that such consents may not be withheld 'without good cause in law'. It accordingly prepared draft written consents in terms whereof the owner, upon signature, would consent to the body corporate obtaining a CRR (by making application to the deeds office); to it transferring this right to a third party on terms and conditions as may be determined by the

trustees of the scheme; and, to the trustees taking the necessary steps to secure the registration of the extension of the scheme by the addition of the existing buildings as sections 9, 10 and 11.

The owners made various enquiries regarding the proposed consent. They noted 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. They opined that their rights would be prejudiced if the insolvent estate of the developer was to pursue an enrichment claim against the body corporate or its members, as owners of undivided shares in the common property, for the improvements effected by the erection of buildings 9, 10 and 11. This and other queries were not clarified by the trustees, who provided only limited information to the members.

The owners further contended that a unanimous resolution was required, as provided for in section 5(1)(a), STSMA because the disposal of the right constitutes an alienation of common property.

The aftermath was that a majority of owners refused to give consent (the 'dissenting owners'). The body corporate thereupon applied to Durban High Court for relief, arguing that there was no good cause in law for the withholding of consent. The dissenting owners' opposition was successful, which prompted the body corporate to appeal to the Supreme Court of Appeal.

The law

Section 5(1)(a) and (b) of the STSMA provide that:

- '(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...;
 - (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) ...'

HELD

- From the papers submitted on behalf of the dissenting owners, it appeared that their objection was not to the body corporate applying for and being issued with a CRR, nor to it exercising that right. Rather, their attitude was that the extension of the scheme by the three buildings constructed on the common property should be realised by the body corporate itself, for its own financial advantage.
- The true objection relates to the cession and transfer of the right to extend to HFP. In this regard, the objections were that, first, the sale was not properly authorised and required a unanimous resolution; and second, that they had not been provided with sufficient information to decide whether they should consent to such transfer and cession. In the circumstances, they argued there was good cause in law to withhold consent to the cession of the rights to HFP.

General

- The right to extend the scheme, vesting in the body corporate, must be established in accordance with the provisions of s 25 of the STA and be given content separately, and afresh. In other words, it must obtain the issuance of a CRR in its favour, in order to be able to exercise this right.

- Generally, the exercise of a right to extend provides a right to build on the common property of the body corporate on a future date. 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. The right to extend may be transferred by virtue of a notarial deed of cession of the right. Section 5(1)(b) of the STSMA prescribes the consent required for such an alienation or cession.

What consent was required? Did the sale constitute an alienation of common property?

- As regards the dissenting owners' first objection, they viewed the disposal of the three buildings by cession of the body corporate's right to extend the scheme to HFP, to amount to an alienation of a portion of the common property, which requires a unanimous resolution by the members of the scheme.
- The alienation and cession of a right of extension would entail the alienation of common property. However, what is contemplated by section 5(1)(a) of the STSMA, is the sale of a defined subdivision of land forming part of the common property of a scheme, capable of subdivision and separate disposal. The latter is, in other words, the opposite of what is contemplated in section 5(1)(d) of the STSMA which provides for the purchase of specific land to extend the common property of a scheme.
- The erection of further buildings and the registration thereof as part of a sectional title plan of extension pursuant to the provisions of section 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. 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.
- 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 section 2(b) and (c) of the STA, ownership of a sectional title unit 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. 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.
- 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, but the extension of the scheme on common property does not involve an alienation of the common property.
- Accordingly 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 dissenting owners were not entitled to withhold consent to the agreement for the sale of the right of extension for not having been authorised by a unanimous resolution.

Were the dissenting owners' withholding of approval to the alienation or cession of the real right otherwise without good cause in law?

- There is no express legal obligation imposed on a body corporate to consult and negotiate with owners to secure their consent to the issuance to it of a CRR. But, when it comes to determining whether the dissenting owners had good cause in law to withhold approval, the extent and nature of what was

communicated to inform their decision, does assume importance. There is a relationship between a body corporate, the dissenting owners and other owners inter se, to co-operate in relation to their bound sectional ownership.

- The phrase 'good cause in law' is not defined in the STSMA. In context, and having regard to its purpose, section 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, 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.
- In the present matter it appears that there was little transparency. Owners' concerns were met mainly by broad replies, not acknowledging the fact that the issues raised by the unusual and novel circumstances (because of the conduct of the developer) required a transparent and open process of candid disclosure. Accordingly, the owners did not have the full facts before them when they were asked to provide their written consents – and they therefore had good cause in law to withhold their consent.

CONCLUSION

The dissenting owners' withholding of consent was within the parameters of a 'good cause in law'.