IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE NUMBER: 05/22688

In the matter between:

RASMUSSEN, BENT FREDE **First Applicant**

RASMUSSEN, PIA Second Applicant
and

CLEAR MANDATE PROPERTIES CC **First Respondent**

EUGENE PEYPER ATTORNEYS Second Respondent
FALCON ESTATES (PTY) LTD Third Respondent

JUDGMENT

SCHWARTZMAN J:

11 On 15 September 2002 the First Applicant bought Unit 23B in a Sectional Title Development Scheme to be built on a property known as 35 Genmare, 177 Blandford Road, North Riding. The agreement gave the Applicant the right to nominate a person in his place. The Second Applicant, the First Applicant's daughter, is his nominee. As such nomination is not an issue in this application, I will refer to the Applicants in the singular. The seller was the First Respondent, then a Close Corporation that has since converted itself into a company.

The relief sought against the First Respondent is a declarator that the agreement is binding, an interdict restraining the First Respondent from selling or transferring the property to any person and an order directing the First Respondent to transfer the unit to the Applicant. The Second Respondent is the attorney appointed by the First Respondent to transfer units in the Scheme to purchasers. The Third Respondent is the estate agent appointed by the First Respondent to sell units in the Scheme. Apart from being cited as parties to this application, no relief is sought against either of them. In what follows I will accordingly refer to the First Respondent as the Respondent.

12 The Respondent's answers to the relief sought are that the agreement of sale is invalid and that, in any event, the unit or the units for which it could be substituted has been sold to a third party. During argument, the Applicant handed in an affidavit proving that the unit and its possible substitute were transferred to third parties on 29 September 2005. This was some two weeks after this application was served on the Respondent. This fact is not referred to in the answering affidavit served on 26 October 2005. It is mentioned in a supplementary answering affidavit served on 6 February 2006. By reason of these facts, the Applicant concedes that the only relief to which it may be entitled is a declarator that the agreement between the parties is valid and binding and that the Respondent pay the costs of this application.

If a declarator is granted, any claim for damages would have to be determined in other proceedings

BACKGROUND FACTS

21 When the Applicant purchased the unit construction of the proposed development, comprising 54 units, had not commenced. What was bought was accordingly bought off a site plan, drawn to scale, prepared in July 2002 that shows a development comprising 54 units or sections. The type of unit to be constructed is further identified by a letter or a letter and a number. For example B and C units are two types of two bedroom units, E and F units are similarly two types of three bedroom units. The Respondent had also prepared plans drawn to scale of each type of unit.

22 In terms of the agreement between the Applicant and Respondent, the Applicant purchased "*Unit 23B, Plan C, Genmare, 177 Blandford Road, Northriding, measuring approximately 124m²"* (the property) for R369 000. Attached to the agreement is a copy of the July 2002 site plan that identifies the location of the unit and that it is a Type B unit. Also attached to the agreement is a first floor plan, drawn to scale, of a "*Unit B*". Unit 23 would be built above a ground floor unit.

23 The agreement provides that the purchaser is the Applicant or his nominee. The Applicant duly nominated his daughter, Pia, as the purchaser. She is cited as the Second Applicant. As already stated, nothing turns on this appointment. The agreement requires the Applicant to pay a deposit, which he did. The agreement was also conditional on the Applicant obtaining a bond for R365 500. If a bond was not granted within the time frame stipulated in the agreement, the Respondent had the right to give the Applicant seven days notice "*to the effect that unless the loan is granted within such 7 days, the agreement would lapse and become of no further force nor effect*". The only other material term of the agreement is handwritten clause 19 which provides that the Applicant had the right to cancel the agreement "*should he not be happy with the look of the units*. *This cancellation to take place prior to 28 February 2003*".

24 In December 2002 the July plan was amended to provide for a development comprising 69 units. According to the Respondent the extent of the common area of the Scheme was also changed. Another change effected was that Unit 23B, as sold to the Applicant, no longer existed on the site plan. The closest equivalent on the new site plan was Unit 35.

25 At the time, none of these facts were known or disclosed to the

Applicant. What he was told by the estate agent in a letter date 16 February 2003 was that he had until 31 March 2003 to view a show unit, that if he did not advise an intention to cancel the agreement by 7 April 2003, the agreement would continue. The Applicant was also told "*that the site development had been revised and completed and that your unit number has changed. Please be so kind as to sign the amendment and let us have same at your earliest convenience*." As indicated, this was a false and misleading statement. Attached to the letter was an amended offer identifying the unit purchased as "*Unit 35*" and the amended sketch plan that depict a Unit 35. Marcello Machelli, the sole member of the Respondent, gave the instruction for this letter to be written. The Applicant did not sign the amending agreement.

26 Clause 19 of the agreement contemplated the construction of the unit. It gives the Applicant the right to cancel should he not like the look of the unit. The date by which the Applicant could exercise this right was extended to 31 March 2003. The Applicant inspected the show unit and, as appears from paragraph 21 of the Respondent's initial answering affidavit, he approved what had been built and elected to continue with the contract.

27 In May 2003 the local authority approved the December 2002 site

plan. In August 2003 building work started.

28 On 21 January 2004, the Second Respondent wrote to the Applicant advising that bond approval was required by 15 March 2004. Having nominated his daughter as purchaser of the unit, she applied for a bond that was granted on 18 March 2004 in a lesser amount than that referred to in the agreement. This is because the Second Applicant would pay the balance in cash. The Second Applicant signed the transfer documents at the conveyancer's office in about May 2004.

29 On 18 August 2005 Machelli, acting on behalf of the Respondent, wrote to the Applicant advising that the sale of Unit 35 had lapsed because a bond in the amount of R365 500 had not been timeously obtained. A refund of all deposits was tendered. In the concluding paragraph Machelli told the Applicant that should he still be interested in purchasing the unit he should speak to the agent. The applicant telephoned Machelli to discuss the matter. According to the Applicant Machelli admitted that "*what he had done was not morally correct but said he needed the extra money which he could raise by reselling the property at prevailing prices and said that his attorney had found the loophole. He indicated that he could now sell the property for R200 000 more than in terms of the agreement because of the dramatic increase in value of the property since the agreement was entered*

into." Machelli's version of the discussion is that he told the Applicant "*that both parties to a contract are expected to comply with their obligations*". He went on to say that:

"99.2 The reality is that the value of immovable property in the area has increased dramatically over the past few years. The selling price of a typical unit in the development has probable doubled since 2002. Had the market for such developments collapsed, I am convinced that the First Applicant would have relied on the non-fulfilment of the suspensive condition in order to avoid taking transfer of a property which was worth less that (sic than) what he had paid for it.

993 As the value of the units in the development have increased, the Applicants now seek (sic to) enforce the sale agreement in order to profit from the resale of the unit."

210 It was on this note and on these issues that the Applicant brought his application in September 2005. The cause of action was based on the fact that the bond condition was inserted for the benefit of the Applicant, that a bond had been timeously obtained but that, in any event, the Respondent had not given the *mora* notice referred to in the bond clause. The Respondent's answer, filed at the end of October 2005, was to rely on the agreement having failed because of

the non-fulfilment of the bond condition.

3. At the hearing of this application, the Respondent did not – quite correctly I believe – rely on the defence that a bond had not been obtained. What was relied on was what is set out in a supplementary answering affidavit. It is a legal argument said to be based on "*further and better evidence that has come to light, which should serve to clarify certain issue*". This further and better evidence must at all times have been known to Machelli. In reality, the supplementary answering affidavit appears to be the product of the Respondent obtaining a second opinion. Be this as it may, what it now asserts is that the agreement relied on by the Applicant is void. The following facts and submissions are advanced by the Respondent:

3.1. The unit did not exist and could not be identified.

3.2. The "*Applicant* (correctly so) *does not allege that*":

1. The Sectional Title Scheme to be known as Genmare had been registered in terms of the Sectional Title s Act (STA).
2. Genmare came into existence as a Development Scheme in terms of STA.
3. A Sectional Title plan as defined in STA existed.

3.3. The agreement does not meet the requirements of Section 2 (1) of the Alienation of Land Act (ALA).

3.4. The December 2002 plan was approved in May 2003. This plan is not attached to the original answering affidavit. It is attached to the supplementary answering affidavit. It was signed by a surveyor on 4 November 2004. Phases 1 and 2 were approved by the Surveyor General on 15 December 2004. Building plans were approved on 18 August 2005. On 20 September 2005 the Sectional Title s Register was opened.

3.5. When the agreement between the Applicant and Respondent was signed in September 2002 the building plans and Sectional Title plans had not been prepared, submitted or approved by any authority.

3.6. In the agreement, read with the plan, Unit 23 is said to be a downstairs "*B*" type unit. This unit was sold and transferred on 29 September 2005 to a Mr Hammer. (This statement is factually incorrect because according to the July 2002 plan unit 23 is a G-H type unit)

3.7. Unit 35 on the December 2002 plan has not been completed. (This statement is factually incorrect. The unit was sold and transferred on

29 September 2005 for R780 000.)

3.8. On the July 2002 plan unit 23 – a two bedroom B type unit – had an area of 124m². Unit 35 on the December 2002 plan has an area of 153m².

3.9. Unit 23 was to be a B type unit, unit 35 a C type unit. These units are said to be substantially different. (This statement is factually incorrect in that unit 35 is, according to the December 2002 plan, either a G or H type unit, whatever this may mean.)

3.10. The change in area of the common property and the increase in the number of units resulted in the exclusive use and participation areas of the two units differing.

3.11. It is a misnomer to describe the unit bought as Unit 23B. What was in fact bought was unit 23, a B type unit, meaning a two bedroom unit.

3.12. In December 2002 Machelli had instructed the agent "*to change the contracts for the sale of units in Genmare to incorporate the changes reflected in the December 2002 plan, to sign the changed documents and present them to me for consideration.*" As appears from paragraph 2.5 hereof, the estate agent did not tell the Applicant the

truth. The Applicant did not sign the documents reflecting the change in number of his unit.

4. I would here point out that when this application was brought what was sought was relief in relation to "*Unit 35*". This unit was referred to in the mistaken belief that Unit 35 had been substituted for Unit 23. In the replying affidavit this error was acknowledged and what was sought was relief in relation to Unit 23.

DID THE APPLICANT AND RESPONDENT CONCLUDE A VALID AGREEMENT ON 15 SEPTEMBER 2002?

5. The STA regulates the creation and registration of a Sectional Title Scheme. It makes provision for the ownership of a section (unit) within a Scheme, the joint ownership of the common parts of the Scheme and membership of the body corporate consisting of all persons in whose names units are registered. STA does not deal with the validity of an agreement for the purchase or sale of a unit in an existing or proposed Sectional Title Scheme. This is dealt with in the Alienation of Land Act (ALA) that defines "*land*" as including a unit as defined in STA. STA in turn defines a unit as "*a section together with*

its undivided share in common property apportioned to that section in accordance with the quota of the4 section". A section is then defined as a section or sectional plan, which is a plan approved by the Surveyor General.

6. In testing the validity of the agreement, meticulous accuracy in the description of the unit sold is not required. To do so would mostly serve to encourage dishonest purchasers or sellers to escape their bargain (see **Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (Appellate Division)** at page 989). Accordingly, the test for compliance with STA is whether the unit sold can be identified by reference to the agreement between the parties and without reference to their negotiations. For it to be so identified its area and shape would have to be known (see **Botes & Another v Toti Developments Co (Pty) Ltd 1978 (1) SA 205 (W)** at page 209C.

7. In argument, Mr JP Coetzee SC, who appeared with Mr GA Fourie for the Respondent, relied principally on three authorities for his submission that the agreement between the parties is unenforceable.

7.1. In **Botes v Toti Development Co (Pty) Ltd 1978 (1) SA 205 (T) (W?)** the unit sold was in a building to be constructed. The agreement described the building as "*La Martinique Apartments situated in the*

Borough of Amanzimtoti to be erected in respect of a block of flats, 22 storeys in height". A further description of the land followed (at 207B to C). The court approached the matter on the basis that the agreement provided for the sale of a section described as "*Flat 9 on the 29th Floor, in area 26.25 metres*" (at 211A to B). The court went on to find that "*It is clear that this description (giving only the area of the section) does not conform to the requirements referred to. Neither the external shape nor the height of the section is specified. Nor are any plans of any avail in this regard. It was common cause that no sectional plan had or has been prepared.*" (the '*requirements*' referred to were that the description of the section should include a reference to its length, breadth and height, the latter being a requirement of a sectional plan – at page 210D to E). The court rejected an argument that on a proper construction of the agreement, it did not confer on the seller the right to unilaterally determine the shape, height or location of the unit (at page 211H to 212E). It then went on to find that the section sold was insufficiently described and therefore invalid for want of compliance with the predecessor to STA.

7.2. **Richtown Development (Pty) Ltd v Dusterwald 1981 (3) SA 691 (W)** also had to do with the sale of a section in a building to be constructed. At page 698 to 699 Le Roux J, after quoting page 210B to H of the Botes decision, said "*It appears clear from this passage*

that, although future units can be sold (as also stands in a township which has not yet been proclaimed), the description of that unit can only be properly done after a sectional plan has come into existence, or at least after the particulars on which the sectional plan would have to be drawn are fully known and have been set down in writing in a description of the unit. The difficulty which arises primarily in this case is that no indication is given of the common property which forms part of the units. It may be said, by some stretch of the imagination, that the section has been properly described, but if one bears in mind that the developer or seller intends to retain a large number of rooms in the building for his own purposes, either for night-clubs or restaurants, and that these will be withdrawn from the common property in which the purchaser will normally have a share, it becomes important to find out what exactly he is purchasing. It is obvious that on these plans a participation quota which relates to his eventual interest in the common property as well as to his payment of a levy, once the body corporate is in operation, cannot be calculated with any accuracy at this stage. In my view there is at least a requirement that the unit must be properly defined, capable of recognition, before there is an adequate description, or before it can be said that the merx sold has been sufficiently defined to form the subject-matter of a sale" At page 701C to E the learned Judge says "*I find that there is an insufficient description of the unit in terms of the*

Sectional Titles Act, in that no reference is made to the common property, that there is no reference to the exact situation of the unit in which the purchaser is acquiring an interest in relation to the rest of the building, or even in relation to the rest of the floor on which it is situated. One is left to make a rough guess by reason of the schematic plan attached to the contract as to the exact height or depth of the section. In my view, the description does not conform to the requirements laid down for descriptions under the Formalities in Respect of Contracts of Sale of Land Act".

7.3. What was sold in **Naude v Schutte 1983 (4) SA 1974 (T)** was "*Woonstel Nr 3 blok duplex Schutte gelee aan nr 920 Pretoria-Noord in Jack Hindstraat (net oorkant Rachel de Beerstraat*)". AT the time of the sale no Sectional Title plan had been registered and no Sectional Title register had been opened. No plan was attached to the agreement. On exception the Court found that a unit in terms of STA consisted of a section and the section's undivided share in the common property as determined in accordance with the participation quota. On the facts it was found that the description of the section did not comply with the statutory definition in the absence of a plan of any kind or a reference to a sectional plan. Furthermore, the undivided share in the common property could not be determined on the description contained in the agreement.

8. Based on *dicta* from these judgments, Mr Coetzee submitted that absent a sectional plan as defined in STA, any sale of a section in a Scheme to be or in the process of development is invalid. He went on to say that a consequence of upholding this submission is that all "*off plan*" sales by developers of sectional units to be built are, if there is no sectional plan, invalid. I turn to deal with this submission in the context of decisions not debated in argument.

8.1. **Forsyth & Others v Josi 1982(2) SA 164 (N)** (referred to in Applicant's Counsel's heads of argument) was an application in which six purchasers of units in a Sectional Title Scheme to be known as La Felice sought a declarator that their agreements with the Respondent seller were valid and binding. Two grounds on which the validity of the agreements were attacked are relevant to this judgment. The first is that because the six agreements did not define the units three-dimensionally they were invalid. The second was that the space in which the participation quota was to be inserted was left blank and accordingly a material term of the agreement had not been agreed. Dealing with the first of these issues – the three-dimensional issue – Thirion J, at page 170H to 171H said that the submission failed "*… to have due regard to the various ways in which the parties may set about describing the subject matter of the sale. If the subject matter*

of a sale is a piece of land with a house on it and if at the time of the conclusion of the sale the house is as yet not in existence but it is contemplated by the parties that the seller would, as part of his obligations under the sale, erect the house and deliver it with the land, then, generally speaking, it would be quite insufficient for the parties to record, in their written agreement, merely the external dimensions of the house which the seller is to erect. Such an agreement would be void on account of uncertainty. And if the parties were to leave it to the will or discretion of the seller to decide what type of house he will erect to fit those external dimensions then still the agreement would be void on account of uncertainty of the subject-matter of the sale. D 45.1.108 (1); D 18.1.35.1; Voet 45.1.23. On the principle that the subject-matter has to be determined or determinable, the agreement, in order to be valid, would have to define the house in a way, such as by description or by reference to existing plans, which would make it possible to ascertain objectively the seller's obligations. Where, however, at the time of the conclusion of an agreement of sale the seller is in the course of erecting a house and the intention of the parties is that that house in its completed state is the subject-matter of the sale together with the land on which it stands, then I think it would be sufficient for the parties to describe the subject-matter of the sale as the land (giving its description) together with the house which the seller is in the

course of erecting on the land; the house to be completed by the seller. Such a description would, I think, be sufficient compliance with the requirements of Act 71 of 1969 although at the time of conclusion of the sale the house might be far from being complete – provided that at the time of the conclusion of the sale it is possible to ascertain without reference to the parties what the house is which the seller is then in the course of erecting. Evidence that at the time of the sale there were in existence building plans in respect of the house in accordance with which it would have been possible to complete the construction of the house without recourse to the seller would be admissible to identify the house which is the subject of the sale; namely that house which the seller was erecting at the time of the conclusion of the sale. The evidence of such building plans would be admissible, not as evidence supplementing or varying the description of the subject-matter of the sale, but in order 'to identify the thing which corresponds to the idea expressed in the words of the written contract'; the thing being the house which the seller had planned to erect and was, at the time of the conclusion of the sale, erecting in accordance with those plans. See Van Wyk v Rottcher's Saw Mills (Pty) Ltd 1948 (1) SA 983 (A) at 989, 990. If there are building plans for the erection of the house in existence at the time of the sale and if they are sufficiently accurate and detailed to enable a builder to proceed with the construction of the house to its completion it seems

to me that the subject-matter of the sale is 'objectively ascertainable' and the requirements of Act 71 of 1969 are therefore satisfied. (Conroy NO v Coetzee 1944 OPD 207 at 212.) This would be so, irrespective of whether the building plans have been incorporated by reference into the written agreement. To my mind the same considerations would apply to the case of a sale of a unit under (STA)". (My emphasis)

In answer to a submission that after the conclusion of the agreement the seller would have been able to obtain an alteration to the plans, which would have altered the unit bought and that therefore there was no certainty that the building would be completed according to the plans, Thirion J said, at page 174B to C that if the Respondent had done that he would have been in breach of the agreement.

On the second issue – the participation quota – Thirion J found, at page 175E to H, that having agreed the area of a unit and knowing the size of the building site and the other units, the participation quota could be calculated by reference to the provisions of STA.

On these two issues he found that the agreements complied with the corresponding provisions of STA.

8.2. In **Orkin & Another v Phone-A-Copy Worldwide 1983 (3) SA 881 (T)** Le Roux J had occasion to revisit the validity of the sale of units in a Sectional Title Scheme. The facts were that the Defendant owned a block of flats comprising 88 flats, each of which was identifiable by a number on its front door. It was the Defendant's intention to transform

these flats into units in terms of STA. On 10 July 1975 the Plaintiff bought 12 flats in the block. This was recorded in clause 3.1 (a) of the written agreement. In terms of clause 3.1 (b) she also bought undivided shares in the common property to be appointed to each unit. She was required to pay monthly instalments. In February 1980, the Defendant demanded payment of the full balance that was then due. The Plaintiff failed to pay. The agreement was cancelled on 15 April 1980. The Sectional Title Register was opened in October 1980 – more than five years after the agreement was signed. Le Roux J was called on to decide two issues – the validity of the agreement and the cancellation of the agreement relied on by the Defendant. On the cancellation of the agreement he found against the Defendant. On the issue of the validity of the agreement, the complication that arose was that the *res vendita* did not exist because it was a unit that still had to be brought into existence after the submission, approval and due registration of the Sectional Title plans and the opening of the Sectional Title Register. Le Roux held that:

1. It appeared clearly from the contract that the parties had not planned to buy and sell 'flats', although the description referred to flats: the parties actually wanted to buy and sell 'units' on a sectional title plan.
2. These units were clearly not determined as yet and that the

use of the numbers of the flats was only to establish the basis of the determination of the unit itself, ie the part which would then form part of the unit.

3. It meant that it was an indication of a genus and not of the actual res vendita or the merx itself.

4. It had not infringed the requirement in s 1 (1) of Act 71 of 1969 that the res vendita had to be properly described; it had actually fallen in that category where the determination of the subject was left to a third person – the third person in this instance was clearly the seller or the owner of the block of flats.

5. There had indeed been a proper description of the property as required by the Act and that the first issue also had to be decided in favour of the plaintiffs.

8.3. The Defendant took the decision on appeal (**Phone-A-Copy Worldwide (Pty) Ltd v Orkins & Another 1986 (1) 729 (Appellate Division)**. The Appeal Court upheld the appeal on the issue of the validity of the cancellation (page 745E to 751E). It confirmed the correctness of Le Roux's judgment on the validity of the agreement. On this issue, Nicholas AJA held that from the agreement there was no difficulty in identifying the 12 units sold. In this regard he referred to Van Wyk v Rottcher's Saw Mills and Forsyth v Josi (*supra*). With

reference to the undivided share in the common property, he found that it could not be ascertained at the date of the agreement but that it would become ascertainable on registration of the Sectional Title plan. This fact did not render the description insufficient. He went on to find that the share in the common property would, in terms of STA, become ascertainable without reference to the parties.

AN APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

91 Unit 23 is identified in the September 2002 agreement as a unit to be built on an identified piece of land. The land and location of the unit on the land is identified by reference to a site map, drawn to scale, that forms part of the agreement. What this plan also identifies is that there are two types of two bedroom units and four types of three bedroom units, each of which is identified by a letter. Referring back to the agreement, the Applicant purchased unit 23B. It is common cause that Unit 23 is a B type two bedroom unit. Attached to the plan is the plan of what is described as a "*First Floor Plan*" of a "*B*" unit. This is a plan of a two bedroom "*B*" type unit to be built on the first floor. It is drawn to scale. The agreement says it measures "*approximately 124m²*".

92 The agreement does not record either the floor to ceiling dimension of

the unit or the participation quota attaching to the unit.

10.1 In argument, Mr Coetzee placed great reliance on the finding in the Botes decision (supra 1978 (1) at 210) that the application of the ALA to the sale of a unit in terms of STA "*requires as a minimum description of what is being sold that in addition to the horizontal area of the section, its height and external shape be adequately specified*." In the Botes decision (at page 221B to D) what the Court did not know was the external shape or height of the unit. There were no plans to assist the Court and building had not been erected. All that was before the Court was the location of Flat 9 to be built on the 29th floor of a building having an area of 26.25 metres. It was a combination of all these facts and not the absence of the third dimension that led the Court to deciding that the unit sold was not properly described.

10.2 The fact that Section 5 (3) (d) read with Section 5 (4) (a) of STA requires that a draft sectional plan of a unit is to be defined three dimensionally does not mean that the sale of a unit that does not contain a reference to the three dimensions is invalid. In my view, such a requirement is, in any event, directory and not peremptory (see **Maharaj & Others v Rampersad 1964 (4) SA 638 (A)** at page 643F to G). My reasons for upholding the validity of the agreement appear from what follows.

10.3 In Forsyth v Josi (*supra* – 1982 (2) at page 170H to 171H) Thirion J (who does not refer to the Botes judgment) rejected the submission that the sale of a unit would be of no force and effect unless it was described three-dimensionally. On the authority of Van Wyk v Rottcher's Saw Mill, he found that if there are building plans for the erection of the unit in existence at the time of the sale and if they are sufficiently accurate and detailed to enable a builder to proceed with the construction of the unit to its completion, the subject matter of the sale is objectively ascertainable and that the requirements of STA are therefore satisfied. This was so irrespective of whether the building plans had been incorporated by reference into the agreement. In this application, there is a scale plan of the upstairs unit. A show unit built in accordance with his plan was constructed. On the Respondent's version it was approved by the Applicant in terms of their agreement.

10.4 In the Phone-A-Copy decision (*supra* – 1986 (1) at page 743J to 744J) the Appellate Division applied the Clements v Simpson test and found that in the case of the sale of units in a Scheme still to be registered, if the units sold could be identified without recourse to evidence from the parties as to their negotiations and consensus, the sale was valid. (In the Appellant's four pages of heads of argument on this issue – page 731F to 725A – reference is made to the Botes,

Richtown, Naude and Forsyth judgments. Only the last of these is referred to by the Appellate Division.) The ratio of this decision can be applied to the facts of this application.

10.5 I accordingly find that the omission from the agreement of a reference to the third dimension does not affect the validity of the agreement relied on by the applicant.

111 I turn to deal with the absence from the agreement of any reference to the participation quota. The participation quota in relation to a section or unit is a decimal fraction determined in accordance with the provisions of Section 32 of STA. The quota is determined by dividing the floor area of the section by the floor area of all sections in the complex. The quota is then determined as a matter of law by the operation of Section 32. The common property of a Sectional Title Development is then owned by the owners of the sections jointly in undivided shares, proportionate to the participation quota (see Forsyth v Josi (*supra*) 1982 (2) at 175E to H).

112 In Phone-A-Copy (*supra* – 1986 (1) at page 744G to H) Nicholas AJA, writing on behalf of the Court, said "*It is true that the 'undivided share in the common property' could not be ascertained at the date of the agreement, but would become ascertainable only when a sectional*

plan was registered. That fact does not, however, in itself render the description insufficient."

113 Phone-A-Copy was decided before the amendment to STA. What is perhaps decisive on this issue is that in its amended form Section 32 (2) read with Section 32 (2) (c) of STA provides that the failure to disclose or mention the quota in an agreement of sale of a unit renders the agreement voidable at the instance of the purchaser. The Applicant has not sought to assert this right.

12. I accordingly find that I cannot uphold the grounds on which the Respondent has sought to assert that the agreement of 15 September 2002 is invalid.

13. That the Respondent, without reference to the Applicant, amended the site plan in December 2002 to increase the number of units to 69 and the dimensions of certain of the units did not affect the validity of the Applicant's agreement. Here I respectfully repeat Thirion J's response when this issue was debated in Forsyth v Josi (*supra* – 1982 (2) at page 174B to C). He said that in such circumstances the Respondent would have been in breach of its agreement with the Applicants in the same way that a seller would be who, having sold a property with a house on it were to demolish the house before

transferring the property.

14. The First Applicant did not sign the agreement to change the unit purchased by him. The First Respondent cannot deliver the unit it sold to the Applicant in terms of what I have found to be a valid agreement of sale. Its inability is the product of its greed. In the result, I make the following order:

1. The agreement between the First Applicant and the First Respondent that was signed on 15 September 2002 is declared to be valid and binding on the parties.
2. The First Respondent is ordered to pay the cost of this application.

_____

I W SCHWARTZMAN

JUDGE OF THE HIGH COURT

Counsel for Applicant:	**K Lavine**
Instructed by:	**Orelowitz Inc Attorneys**
Mr S Orelowitz	
Counsel for First Respondent:	**JP Coetzee SC**
	GA Fourie
Instructed by:	**Aucamp & Cronjé**
	Mr DW Swanepoel

Date of hearing: **16 March 2006**
Date of judgment: **24 April 2006**

REPORTABLE & OF INTEREST TO OTHER JUDGES

RASMUSSEN & ANOTHER v CLEAR MANDATE PROPERTIES & 2 OTHERS: CASE NUMBER: 05/22688

Sectional Titles Act 95 of 1986 – The circumstances under which the sale of a section in a Sectional Title Scheme to be built may be valid notwithstanding the absence of an approved sectional plan.

_____

I W Schwartzman

Date of judgment: 24 April 2006