IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D10058/2018

In the matter between:

THE BODY CORPORATE OF SAN SYDNEY	Applicant
and	
SHIVANI SINGH	First Respondent
ZAMAPHEMBA NTULI	Second Respondent
FIRSTRAND BANK LTD	Third Respondent
NEDBANK LTD	Fourth Respondent
SB GUARANTEE COMPANY (RF) PTY LTD	Fifth Respondent
ABSA HOME LOANS 101 (RF) LTD	Sixth Respondent
CHANGING TIDES 17 (PTY) LTD N.O.	Seventh Respondent

JUDGMENT

Summary

1. This case concerns the interpretation and application of sections 25(6) and 17 of the Section Titles Act 95 of 1986 (“STA”), read with sections 5(1)(a) and (b) of the Sectional Titles Schemes Management Act 8 of 2011(“STSMA”).

2. The applicant instituted this application during August 2018. When the matter

was argued before me, as an opposed motion, only the first respondent opposed the application and the applicant limited the relief that it sought to the first respondent. I will refer to the first respondent simply as "the respondent."

3. After hearing argument, I requested counsel to provide further submissions to me on the applicability of the decision of Satchwell J in *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another* 2006 (3) SA 369 (W), which I had come upon in my research. They did so and I am grateful to counsel and to their instructing attorneys for those further arguments.

4. The applicant has approached this Court to declare that the respondent has no "good cause in law" to refuse to consent to it exercising and ceding certain rights to extend the sectional scheme, in which the respondent is a property owner. If the applicant is correct in its arguments, then it seeks orders declaring so and it seeks certain consequential orders directing or securing the respondent's consent. Although the affidavits in the application are voluminous, with layers of factual detail, the basic facts are common cause between the parties (save for their respective interpretation of the legal effect of those facts).

Sectional Ownership

5. The applicant is a body corporate and was established in terms of section 36(1) of the STA. It administers the development scheme known and registered as the San Sydney scheme in terms of the STA and the STSMA. The respondent is the registered owner of Unit 2 in the San Sydney scheme and is therefore a member of the applicant.

6. The STA provides a legal framework for sectional ownership. The Supreme Court of Appeal has described this as follows:

> "Sectional title ownership consists of three elements, namely individual ownership of a section, joint ownership of the common parts of the sectional title scheme and membership of a body corporate. The registered title-holder of a unit is the owner of the section, joint owner of the common parts of the scheme and a member of the body corporate. Thus, a person, buying into a sectional title scheme, enters into a series of interlocking relationships. The [STA] introduced several new

concepts into our law. By providing for the division of land and buildings comprising a development scheme into sections and common property, it created an entirely new composite *res*, called a unit, which consists of a section and an undivided share in the common property. The section is considered the principal component, with the undivided share in the land and other common property inextricably linked thereto as an accessory. The Act [STA] also created an entirely new form of composite ownership, namely separate ownership of a section coupled with joint ownership of the common property. Sectional owners own the common property collectively in undivided shares in accordance with the provisions of the Act."[1]

7. In that context bodies corporate such as the applicant are given functions in section 3 and powers in section 4. The general import of these powers and functions is that a body corporate such as the applicant, is required to administer and manage the scheme and manage the common property in the interests of its members.[2] Bodies corporate act through their trustees and their roles and responsibilities are regulated by sections 6 and 7 of the STSMA.[3]

8. Bodies corporate also have "additional powers" and these are regulated through section 5 of the STSMA.

9. These matters are also regulated by:

   (a) Part II of the STA which deals with "development schemes, sectional plans and sectional title registers" in sections 4 to 14;

   (b) Part III of the STA which deals with "registration and common property," in sections 15 to 19; and

   (c) Part IV of the STA which deals with "subdivision, consolidation and extension of sections," in sections 20-24.

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[1] *Mobile Telephone Networks (Pty) Ltd and Another v Spilhaus Property Holdings (Pty) Ltd and Others* 2018 (3) SA 396 (SCA), at paragraph 1, which is quoted in *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and Another* 2020 (2) SA 61 (SCA), at paragraph 15, read with paragraph 16.
[2] *Body Corporate of Marine* Sands, *supra*, at paragraph 16.
[3] *Zikalala v Body Corporate, Selma Court and Another* 2022 (2) SA 305, at paragraphs 19-23 and 25. This case deals with the role of trustees, who are required to act within the legislative powers granted to bodies corporate as creatures of statute, as well as in accordance with any restrictions or directions given at a general meeting of owners.

10. Part V of the STA deals with the "extension of schemes." In summary, it enables a developer, when applying to register a sectional plan, to reserve in a condition, the right to extend the scheme over common property (section 25(1)). That right must be exercised within the period stipulated or it lapses and vests in the body corporate.

11. Section 25(6) provides:

> "If no reservation was made by a developer in terms of subsection (1), or if such a reservation was made and for any reason has lapsed, the right to extend a scheme including land contemplated in section 26, shall vest in the body corporate which shall be entitled, subject to this section, section 5(1)(b) of the Sectional Titles Scheme Management Act and after compliance, with the necessary changes, with the requirements of paragraphs (a), (b), (c), (d) and (g) of subsection (2), to obtain a certificate of real right in the prescribed form in respect thereof: Provided that the body corporate shall only exercise, alienate or transfer such right with the written consent of all the members of the body corporate, the mortgagees of the units and real rights over the units, and the holders of registered real rights over the units in the scheme and who shall not withhold such consent without good cause in law."

12. Section 25(6) was considered and applied in *SP and Catering Investments (Pty) Ltd v Body Corporate of Waterfront Mews and Others* 2010 (4) SA 104 (SCA), where the content of the right in section 25(1), reserved by a developer to extend the scheme, was explained as follows, at paragraph 9:

> "… The right is one which the developer has reserved for the period expressly stipulated in his application. It is a right to construct the additional buildings, or extend the existing ones, on the common property, to divide them into sections and to confer rights of exclusive use in respect of them. That is the content of the right. It is to be distinguished from the obligation to perform the work which is defined in

s 25(13)."[4]

13. The import of section 25(6) is:

> "…[I]f no right is reserved in terms of ss (1) at inception of the scheme or if a right has been reserved but has lapsed, the right to extend the scheme will vest in the body corporate."[5]

14. Within this context, the applicant asserts a right to "exercise" and "cede" the right to extend the scheme, in terms of section 25(6) of the STA.

The Facts and Arguments

15. It is common cause in this application that the developer's right to extend the scheme lapsed on or about 31 March 2013 and that the right to extend the scheme vested thereafter in the applicant.

16. The applicant contends that it is entitled to "exercise" and "cede" the right to extend the scheme to a third party, HF Property Investments (Pty) Ltd ("HF Property"). It did so by concluding an agreement with HF Property on 11 May 2018 ("the agreement").[6]

17. The preamble to the agreement records that the developer[7] had constructed units 9, 10 and 11, for which certificates of occupancy had been issued by the local authority, and that the developer had purportedly sold these units to the present occupiers of those units. The preamble records that all of this occurred despite the fact that the developer's right to extend the scheme had lapsed, with that right vesting in the applicant from about 1 April 2013.

18. The preamble describes the intentions of the applicant and HF Property as follows:

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[4] *See also, Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another* 2006 (3) SA 369 (W), at paragraphs 66 to 107. The decision in *Croxford Trading 7 v the Body Corporate of the Inyoni Rocks Cabanas Scheme no 111/1978* (174/2010) [2011] ZASCA 27 (18 March 2011), provides a legislative history of the developer's right of extension, at paragraphs 2-5.

[5] *SP and Catering, supra, a*t paragraph 3. At paragraph 5, the Supreme Court of Appeal held that the Court has no inherent power to extend the period beyond which the developer's right of extension would lapse.

[6] "Annexure J" to the founding affidavit, entitled "Memorandum of Agreement."

[7] Big Sky Trading 426 CC, which was placed into provisional liquidation by Order dated 9 February 2016.

(a) the applicant intends to extend the scheme to enable units 9, 10 and 11 to be registered at the Deeds Registry as sectional title units in the San Sydney scheme; and

(b) HF Property intends to purchase the right "to take the necessary steps to register buildings 9, 10 and 11 as sectional title units in the San Sydney scheme and to pass title of such units."

19. Clause 2 of the agreement deals with the applicant's "sale of [the] real right to extend the scheme." It provides:

> "2.1 The BC sells to HF Prop the right to complete buildings 9, 10 and 11 on the common property and to divide such buildings into sections and the common property, for its personal account, subject to the fulfilment of the suspensive conditions below [in clause 3] and on the terms and conditions contained in this agreement ("the real right").
>
> 2.2 HF Prop agrees and undertakes to complete the buildings 9, 10 and 11 strictly in accordance with the building plans already approved by the local authority. HF Prop acknowledges that any deviation from such approved plans shall require the written consent of the Trustees of the BC.
>
> 2.3 HF Prop shall procure the registration of the sectional plans of extension in respect of buildings 9, 10 and 11 within one (1) year of the date of fulfilment of all suspensive conditions, failing with the right shall lapse and all rights to extend the scheme in terms of section 25 of the Act shall again vest in the BC."

20. In terms of clause 3 the parties acknowledged that "the exercising, alienation and/or cession by the BC of a right of extension of the scheme requires the written consent of all owners in the scheme as well as the written consent of the mortgagee of each unit … provided that an owner or mortgage may not withhold such approval without good cause in law."

21. The remainder of clause 3 deals with the mechanics of how the applicant would secure the consent of the owners, including by launching this application, if necessary, within 90 days of the conclusion of the agreement, for an order that owners did not have good cause in law for withholding consent. In addition, clause 3.5 records that "if the application is initiated but the order is not granted, this agreement will lapse and have no further force and effect."

22. Clause 4 records that the purchase price of the real right is R500,000.00, payable upon registration of the cession of the real right from the applicant to HF Property.

23. Clause 6 of the agreement obliges HF Property to offer 'a right of first refusal' to the persons who had previously concluded sale agreements with the developer for the purchase of units 9, 10 and 11. Maximum purchase prices are set for each of units 9, 10 and 11 in amounts ranging between R1.5 and R2 million. Clause 6 records that if such units are not purchased by those persons on those terms, then "HF Prop shall be entitled to retain or transfer ownership of each unit to be registered on terms and conditions as it deems fit."

24. By the time this matter was heard, all the owners of units in the San Sydney scheme had granted their consent to the applicant to 'sell' the right of extension on the terms contained in the agreement, except the respondent. Those consents were obtained after the conclusion of the agreement.

25. In addition, Mr M E Stewart who appeared as counsel for the applicant, advised the court that the provisional liquidators of the developer had sought to intervene in this application but had since withdrawn that application. The liquidators played no further role in the application.

26. The founding affidavit sets out the factual bases upon which the applicant claims relief. The applicant contends that the developer's conduct in completing the buildings on proposed units 9, 10 and 11, in obtaining certificates of occupancy for those buildings and in selling such 'units,' took place after the developer's right of extension had lapsed.[8]

[8] I shall refer to these buildings on proposed units 9,10 and 11 as "units" for convenience, noting that they are not registered sections nor units as defined in the STA, within the San Sydney scheme.

27. The applicant contends that the trustees of the body corporate had monitored the proceedings for the winding up of the developer, since the provisional liquidation order granted on 9 February 2016, but that it appeared that those proceedings had not been finalised.

28. Approximately two years later, the applicant sought legal advice about the legal status of units 9, 10 and 11. The upshot of that advice was that the applicant was the only party "able to take steps to procure the registration of sections 9, 10 and 11 at the Deeds office" because the right to extend the scheme vested in it pursuant to section 25(6) of the STA.

29. Based on this and related advice, the applicant's trustees considered that they had the following options: to accept the three buildings as part of the common property and to rent them out, or to exercise its vested right to extend the scheme or to cede that right to a third party to register units 9, 10 and 11.

30. The founding affidavit records that "a critical factor in the decision to be made was that the Board had a prospective purchaser of the right to extend the scheme, being Mr Dean Hodgson, the sole director of HF Property. In addition, HF Property "was prepared to acquire the real right to extend the scheme by the addition of sections 9, 10 and 11," would remedy certain waterproofing defects on those units without expense to the applicant and it was prepared to sell to the present occupiers of those units, in line with the prices that they had agreed to pay the developer, which meant that those occupiers would be able to obtain title to those units.

31. The applicant's trustees considered these options and decided against renting out the three units which had been built on common property. It decided against being a landlord and being responsible for the repair and maintenance of those three buildings.

32. The trustees decided to exercise and cede the applicant's right to extend the scheme, which would mean that:

    (a) the applicant would be able to fulfil the 'moral obligation' that each Trustee believed it owed to those purchasers (of units 9, 10 and 11), to enable them to acquire ownership of their sections;

(b) the cash injection from HF Property would benefit the applicant's reserve fund which would assist reduce the financial obligations of its members;

(c) the applicant would not have to remedy and pay for the waterproofing defects in those three units; and

(d) the applicant would be able to achieve all of this with "little to no financial cost to it."

33. Paragraph 32 of the founding affidavit records:

> "The Applicant's Board of Trustees was unanimous in its decision to procure the exercise and cession of its vested right to extend the scheme to HF Prop. An agreement was consequently negotiated and concluded between the Applicant and HF Prop…".

34. The founding affidavit describes the attempts made by the applicant's attorneys to secure consents from the members of the applicant, as is required in terms of section 5(1)(b) of the STSMA.

35. The remainder of the founding affidavit details efforts made by the applicant, through its attorneys, to persuade the respondent to provide her written consent,

as contemplated in section 5(1)(b) of the STSMA, without any success.

36. One such written communication was sent to the respondent on 30 May 2018 explaining the applicant's decision and motivating for her consent. That letter recorded that the Trustees were of the view that extending the scheme to include units 9,10 and 11 would impose onerous obligations on the applicant, requiring it to step into the shoes of the developer, when this could be avoided by transferring that right to a new developer. That letter also recorded:

> "Fortunately, the Board of Trustees has already secured a new developer who is prepared to pay the Body Corporate R500, 000.00 for that right [the right to extend the scheme] and to carry all the costs involved. That new developer will only be able to register the existing

three buildings - it will not be able to extend the scheme any further or make any other changes to the scheme. The effective outcome of this action will be that the three homes are registered as sectional title units, the Body Corporate will receive R500 000.00 and will also soon start receiving levies in respect of those three homes."

37. The letter also gave the respondent notice that owners could not refuse to consent without good cause and stated that an application would be made to court, if required, for a Judge to determine "whether the reason for refusing consent was lawful or not."[9]

38. That letter was eventually responded to by the applicant, through her attorneys, who asked for information about the liquidation of the developer, details about when units 9,10 and 11 had been constructed, when they became occupied, copies of the agreements of sale concluded in respect of those properties and whether payments had been made to any party in respect of those units.

39. The applicant's attorneys responded with some of the information but could not provide any information about the sale of units 9, 10 and 11 and payments in respect of those units, stating that this was because the applicant was not party to those agreements. The respondent was advised to seek that information from the parties to those (sale) agreements.

40. In the end, the applicant brought this application when the respondent did not provide her consent.

41. The applicant's founding affidavit alleges that the respondent has not "bothered to provide any explanation for not having consented" and it concludes that this can only be because she does not have good cause in law for withholding the approval required in terms of section 5(1)(b) of the STSMA.

[9] Draft written consent forms were sent to all members of the applicant, all of whom have consented save for the respondent. There could be an error in the consents signed by the applicant's members because these refer to section 24(6) of the STA and not to section 25(6) of the STA. Section 24(6) deals with "extension of sections" whereas section 25 deals with "extension of schemes by addition of sections and exclusive use areas or by addition of exclusive use areas only." Regrettably, I could not find an answer to this because the building plans attached to the founding affidavit are so reduced in scale as to be illegible and the developer's certificate of real right of extension refers to sectional plans which were not included in the papers.

42. The respondent contends that she has good cause in law to withhold her consent. The primary contention raised on the papers and in argument by the respondent's counsel Mr B Skinner SC, is that the agreement with HF Property is "anything but" just the cession of the applicant's right to extend the scheme because it also permits the sale of common property.

43. The respondent argues that the buildings on units 9, 10 and 11 have been erected on common property and that these are being sold to HF Property, for less than they are worth.

44. The respondent contends that these matters ought to have been determined by members through a "unanimous resolution" required in terms of section 5(1)(a) of the STSMA.

45. On the papers, the respondent effectively contends that the agreement is not an arms-length transaction because units 9,10 and 11 were purchased by the mother of the sole director of HF Property. The properties were 'on-sold' thereafter.

46. The respondent asserts that she cannot remember any of these issues being brought to the attention of or debated by members at a meeting. She argues that these matters ought to have been put before the owners, with all material information, for them to consider and decide how best to deal with matters, which ought to have occurred before the conclusion of the agreement. The respondent therefore argues that the agreement ought to have been sanctioned by unanimous resolution of the owners, as is required in terms of section 17(1) of the STA read with section 5(1)(a) of the STSMA, before the agreement had been concluded.

47. In its replying affidavit, the applicant presented the sale agreements which had been concluded for the purchase of units 9, 10 and 11 and it generally disputed the contentions and arguments of the respondent, save that it acknowledged the relationship between the sole director of HF Property and the erstwhile purchaser of units 9, 10 and 11.

48. Further arguments raised by the respondent were that:

(a) she has tracked the sale of units in the scheme and she presented figures to demonstrate increases in the value of such units;

(b) there was a marked difference between what HF Property will pay for the right to extend the scheme (R500,000.00) compared to the values placed on units 9,10 and 11 in the agreement, which units exist on common property; and

(c) if the occupiers do not purchase the properties (as recorded in the right of first refusal clause) then HF Property will be able to sell those properties and keep the proceeds.

49. The respondent contends that these issues ought properly to have been dealt with in terms of section 17(1) of the STA because it concerns the sale of common property which may only lawfully occur upon “unanimous resolution” and after permission has been granted by the members to the applicant to sell that common property.

50. The broad counter by the applicant to the concerns raised by the respondent was to the effect that:

(a) members were given information, their questions could have been answered and, if necessary, a meeting of members could have been called, but that this was not necessary because the majority had provided their consent;

(b) its agreement with HF Property is merely for the “exercise” and “cession” of its right to extend the scheme, as contemplated in section 5(1)(b) of the STSMA;

(c) the agreement with HF Property is subject to a suspensive condition and is therefore “inchoate” until members have consented thereto;

(d) the respondent has presented no counter valuation for units 9, 10 and 11; and

(e) accordingly, the applicant contends that the respondent has “no good

cause in law" to withhold her consent for it to exercise and cede its right to extend the scheme to HF Property.

51. Apart from these broad arguments, the affidavits from the parties reflect an obvious measure of distrust and suspicion of each other. Nevertheless, the issues presented are of a legal rather than a factual nature.

The Law

52. What I am required to determine is whether the respondent has demonstrated good cause in law for her refusal to consent to what it is that the applicant proposes to do. To answer that question, I must determine what it is that the applicant proposes to do, as it is recorded in the agreement that it has concluded with HF Property. This in turn will assist to determine how the legislature has dealt with these matters in the STA and the STSMA.

53. I have quoted the provisions of section 25(6) of the STA earlier.

54. Section 17 of the STA is to the effect that owners (and holders of a right of extension in section 25) may authorise a body corporate to alienate or lease common property:

> "**17 Alienation and letting of common property**
>
> (1) The owners and holders of a right of extension contemplated in section 25 may, if authorised in terms of section 5(1)(a) of the [STSMA] direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease, and thereupon the body corporate shall … subject to compliance with any law … have the power to deal with such common property or such part thereof in accordance with the direction, and to execute any deed required for the purpose: Provided that if the whole of the right referred to in section 25 … is affected by the alienation of common property, such right shall be cancelled by the registrar with the consent of the holder thereof on submission of the title to the right."

55. Sections 5(1)(a) and (b) of the STSMA provide as follows:

> "**5 Additional powers of bodies corporate**
>
> (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, or let the common property or any part thereof under a lease, and thereupon the body corporate may, subject to section 17(1) of the [STA] deal with such common property or such part thereof in accordance with the direction and may execute any deed required for this purpose, including any deed required under the [STA]…";
>
> (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) -(i) …
>
> (2) …".

56. Clearly, when the developer's reserved right to extend the San Sydney scheme lapsed, the applicant acquired the legislatively vested right to extend the scheme, through section 25(6) of the STA.

57. To secure such entitlement, the applicant would, as a first step, have to obtain a certificate of real right of extension from the registrar of deeds. Section 25(6) entitles the applicant to obtain a certificate of real right to extend the scheme. It may do so "subject to this section, section 5(1)(b) of the Sectional Titles

Schemes Management Act and after compliance, with the necessary changes, with the requirements of paragraphs (a), (b), (c), (d) and (g) of subsection (2)."

58. Then section 25(6) contains a proviso to the effect that a body corporate may "only exercise, alienate or transfer such right with the written consent of all the members of the body corporate, the mortgagees of the units and real rights over the units, and the holders of registered real rights over the units in the scheme and who shall not withhold such consent without good cause in law."

59. The owners in the San Sydney scheme may decide that they do not want to extend the scheme. They may decide that they want to sell or lease all or part of that common property.

60. These are outcomes contemplated in section 17 of the STA which regulates the "alienation and letting of common property." The owners may decide and direct the applicant on their behalf to sell or lease such common property. That authority from the owners must be given by unanimous resolution in accordance with section 5(1)(a) of the STSMA.

61. What seems clear from this legislative framework is that such additional powers that the applicant may exercise must be preceded in the first instance upon the authority and by the direction of the owners.

62. If the applicant exercises its right to extend the scheme, the effect of this extension will be that new units are registered and included in the San Sydney scheme, with corresponding changes to what is presently reflected as common property therein. The members of the applicant are owners of units with an indivisible share in that common property. It follows that any change to the common property will invariably affect the members' indivisible share in the common property.

63. The applicant is also empowered to "alienate common property" or "let common property" as provided for in section 17(1) of the STA. Either of these options requires authority from the members and a direction to the body corporate to do so on their behalf. Those are the statutory standards through which the applicant obtains its power to alienate or let common property.

64. The SMTA categorises the power to alienate or let common property as "additional powers of bodies corporate" in section 5. This includes the powers in section 5(1)(a) to alienate or let common property, which must be done "upon unanimous resolution, on direction by the owners…"

65. The definitions in section 1 of the STSMA deal with special and unanimous resolutions. Both types of resolutions require the holding of a "meeting" with members. In the case of a special resolution this must be taken by a majority of 75% of the votes, in number and value of the members present at a general meeting; and in the case of a unanimous resolution, 80% of the votes are required at a meeting representing both number and value of votes of the members present at such meeting.

66. However, both types of resolutions may also be "agreed to in writing by all the members of the body corporate."

67. The powers in section 5(1)(b) relate to the alienation, exercise or cession of "a right of extension of the scheme by the addition of sections." In this instance, the legislative standard for the trustees so to act is "the written consent of all the owners" and mortgagees.

68. Ultimately, decisions of this nature can only be made by owners if they have all relevant information before them, or all "material information" as the respondent put it.

Application of the Law to the Facts

69. The applicant contends that the respondent has fundamentally misunderstood the agreement it has concluded with HF Property. It contends that such agreement reflects the trustees' choice to "exercise" and "cede" the right of extension to HF Property. On this basis, it contends that all that is required, in terms of section 5(1)(b) of the STSMA is the written consent of owners.

70. I disagree with this characterisation by the applicant of the agreement as one through which it simply exercises or cedes its right of extension.

71. In my view, a consideration of the agreement in its totality reveals that the

applicant has not simply exercised or ceded its right to extend the scheme. It has done more.

72. The agreement provides for the sale of buildings constructed on common property, it sets minimum prices for such sale in so far as the present occupiers are concerned and it requires changes to the scheme consequent upon the sale and extension of the scheme to incorporate these as units in the sectional title register.

73. The applicant is not itself exercising its right to extend the scheme. It is ceding its right to do so to HF Property. It has authorised HF Property to extend the scheme by the inclusion of the presently unregistered units 9, 10 and 11.

74. The *de facto* position is that these buildings have been erected on common property and that such buildings are capable of being valued and sold. HF Property is authorised to sell these units to the present occupiers, or to other purchasers. If the respondent's figures are anything to go by, then comparable sales demonstrate that units within the San Sydney scheme have increased in value over time. That value will not revert to the body corporate and its members, but will be retained by HF Property, in exchange for the payment of R500,000.00.

75. An important, related question is whether the members of the body corporate have properly sanctioned such "additional" powers, as is required in section 5(1)(a) of the STSMA.

76. There is no suggestion from the applicant that it called a meeting with its members at which it presented any of the options for discussion or decision by such owners. There is no resolution arising from any such meeting. Nor are any minutes presented of a meeting in which such matters were discussed, options were presented, debated upon and in which resolutions were taken.

77. It is evident from the founding affidavit that the applicant presented its decision to members as a *fait accompli.* It did explain its reasoning, it offered to make further information available to members, yet it also threatened litigation.

78. As I interpret the scheme of the STA and the STSMA, these "additional powers"

of the applicant ought properly to have been preceded by resolution and a direction by owners to sell or lease common property. That resolution and direction ought also to have preceded the applicant's decision about whether to exercise or cede the right to extend the scheme.

79. If all these decisions were to be done simultaneously, as is apparent from the agreement with HF Property, then all of these matters ought to have been presented to members for discussion, debate and for a resolution to be taken. That would then have yielded the "authority" by members of the applicant to "deal with such common property or such part thereof in accordance with such direction" as required in section 5(1)(a) of the STSMA, in addition to ceding the right of extension to HF Property in accordance with section 25(6) of the STA read with section 5(1)(b) of the STSMA.

80. What also emerges from the papers is that the developer may not have paid amounts lawfully due to the applicant, in the form of levies, for failure to extend the scheme within the stipulated time. This is an obligation recorded in section 25(5A)(b) which makes the developer liable for the payment of levies "as if the unit has been included in the relevant sectional title register on the date of completion."

81. Unfortunately, that is the very conundrum which confronted applicant's trustees. The developer did not act as it was required to, it continued after the lapse of its authority to extend the scheme to erect buildings on portions of the common property and it appeared to have derived revenue therefrom either through advances on purchase prices or through rentals paid by occupiers.

82. In my view, what all of this demonstrates is that such matters ought properly to have been presented to the applicant's members, with sufficient information such as the present value of the buildings erected on common property and what the applicant has been deprived off in the form of levies in the interim. This in turn would have enabled the members to make an informed decision as to whether to sell or lease the portions of the common property upon which units 9, 10 and 11 have been erected, whether the applicant ought itself to exercise the right to extend the scheme to regularise matters, or whether it ought to cede such right either to HF Property or to any other third party.

83. Given the interlocking nature of sectional ownership described earlier,[10] there can be no debate that members of the applicant have a direct and substantial interest such matters. No doubt this is why the legislature made specific provision for these additional powers to be exercised by a body corporate upon the authority, direction or written consent of the members in accordance with the processes set out in sections 5(1)(a) and (b) of the STSMA.

84. Mr Stewart for the applicant referred me during argument to the decision of the SCA in *Body Corporate of Savannah Park v Brainwave Projects 1147 CC and Others* 2012 (2) SA 276 (SCA). The argument advanced by Mr Stewart was that the respondent had failed to appreciate the nature of the agreement that the applicant had concluded with HF Property. Mr Stewart relied upon the characterisation of the developer's right to extend the scheme as described by the SCA in *Savannah Parks*, to the effect that this is only a limited real right given to the developer which is akin to a praedial servitude. He argued that this is all that the agreement in this case deals with.

85. In *Savannah Parks*, the SCA had to deal with the erection of a cell phone mast on common property. That mast had been erected pursuant to a lease concluded with the developer, at a time when the relevant unit had not yet been registered in the sectional title register. The developer believed that it was entitled to retain revenue that it derived from that lease while it had reserved the right to extend the scheme to accommodate that unit, and after it had exercised that right and it became the registered owner of that unit.

86. The issue in that case was whether the rental income accrued to the developer or to the body corporate. It was in that context that the SCA was called upon to determine "the narrow question … whether the [developer's] right of extension includes a usufruct in its ambit" (at paragraph 9).

87. The SCA held that the right of extension which a developer may reserve in terms of section 25(4)(a) of the STA, is a limited real right, which does not give the developer a right to exploit a unit commercially before completion. This emerges from the following passages in that decision:

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[10] In *Body Corporate of Marine Sands*, *supra* at paragraph 15 and 16. *See also*, *Body Corporate Selma Court*, *supra*, at paragraphs 23-26 and paragraph 31 for an application of these principles in the context of the duty to collect levies.

> "[12] … I do not think that the characterisation of that right as a personal servitude is sustainable. And, considered against its purpose, the right also cannot encompass a usufruct … The reserved right only gives a developer the right to develop further phases of a scheme. In doing so, the developer must comply with strictly with the documentation and plans accompanying the application for registration of the sectional plan. Having exercised the right, the developer must … immediately after completing the relevant unit, apply to register the relevant plan and the inclusion of the completed unit in the sectional title register. It is, therefore, a limited real right."
>
> [13] Properly construed, the description of the right as 'á right to immovable property' 'for all purposes' does not change this. The Act clearly does not contemplate the leasing of a unit (or part thereof) - as would be the case with a usufruct - or give the developer any right to exploit the unit commercially before completion…". (Footnotes omitted.)

88. It was in that context that the SCA described the right of extension reserved by a developer as a limited real right, which did not give the developer without more, the right to lease that section of the common property or to derive revenue from that lease. In that factual context, the SCA concluded that such rental income ought properly to accrue to the body corporate and it made orders to facilitate that outcome.

89. I do not think that the description of the right of extension reserved by a developer, in *Savannah Parks*, assists the applicant in this case. The agreement in this case deals with the applicant's right to extend the scheme, its sale and cession thereof and it permits the sale of common property.

90. In this regard, the respondent contends that prior to concluding the agreement with HF Property, the applicant ought to have:

    (a) called a meeting of the owners;

    (b) undertaken a valuation of the buildings on units 9, 10 and 11;

    (c) apprised the owners of all material facts; and

(d) secured a unanimous resolution from the owners to grant HF Property the right to become “the owner of three units in San Sydney”.

91. In its replying affidavit the applicant denies these allegations and contends that there was no obligation on it to call a meeting of the owners, that the owners could have requested such meeting and that further information could have been provided on request. The applicant states that it had authority to conclude the agreement with HF Property, that the agreement is suspensive on it obtaining the consent of the owners and that it is merely exercising its vested right to extend the scheme, without it claiming “ownership” of units 9, 10 and 11. It contends that the respondent has been obstructive by failing to provide reasons for not consenting and it contends that she has no good cause in law to refuse her consent for the purposes of section 5)(1)(b) of the STSMA.

92. According to the applicant, rentals have been paid in respect of units 9, 10 and 11, to the developer “until recently”. There is no indication about what has happened with respect to the payment of rentals since that undefined date.

93. In my view, what has happened in this case, is the reverse of the legislative processes through which decisions such as these ought properly to have been made.

94. On the facts before me, it seems clear that the applicant’s trustees were confronted with a difficult situation. The developer overstepped his lawful authority and, for whatever reason, he constructed the additional units on common property. The developer may also have succeeded in deriving revenue from those unregistered units, which ought properly to have accrued to the applicant.[11]

95. The applicant’s trustees considered their options, took a decision and then presented their decision to the owners as a *fait accompli*. When they did so they thought that they had the power to do so, subject to the consent of the owners. The owners were then told that if they refused to consent, that would be challenged in court as a refusal without good cause in law. Although the applicant explained the reasons for its decision, these were presented with little

[11] *Body Corporate of Savannah Park*, *supra*, at paragraph 13.

factual information, upon the assertions that these decisions were correct and that any deviation from this would be without good cause in law.

96. There is no suggestion in the founding affidavit that any of the various options were put before the owners, with sufficient information to enable them to make informed decisions, to debate the options and ultimately to decide about what to do as those who would be directly affected. Certainly, none of this appears to have been done before the conclusion of the agreement with HF Property.

97. If the letters sent to the respondent are anything to go by, including the limited replies to the information that was sought by her, then, *prima facie*, the owners did not have the full facts before them when they were asked to provide their written consent.

98. Despite claiming that the applicant did not have access to the 'sale' agreements concluded between the developer and purchasers of units 9,10 and 11, some of those documents emerged in the replying affidavit delivered by the applicant.

99. Further documents have been presented in the respondent's answering affidavit to suggest that the sole director of HF Property has an interest in units 9,10 and 11 because these were sold to his mother (who is now deceased), who advanced and lost some of the purchase prices and who subsequently sold them to the present purchasers. The replying affidavit records that the trustees were concerned about these losses caused to Mr Hodgson's mother and they regarded Mr Dean Hodgson's "personal and direct involvement" and that of his mother as amongst the important factors the considered when they concluded the agreement with HF Property. In my view, these matters ought to have been disclosed to the owners.

100. What has emerged in the affidavits in this matter, is substantially less information than that conveyed to the respondent in the letter of 30 May 2018, albeit that it stated that "questions or concerns" would be addressed. That letter effectively advised the respondent that the applicant had already taken a decision over such matters and that it had acquired a new developer to register these sections, who would absorb the costs of that extension to the scheme and who would pay R500.000.00 for that purpose.

101. I am not required to decide whether the option selected by the applicant was correct or not, or whether it was the best decision in the circumstances. The legislature leaves those decisions to be made by owners and others with a direct interest in such matters. Once they consider and decide such issues, they authorise and direct the applicant, through its trustees, to act in accordance with such directions.

102. Accordingly, my view is that the legislative process through which such "such additional powers" could have been exercised by the applicant, were not followed. This means that when the trustees concluded the agreement, they acted outside their powers.

103. There is a marked difference between saying to sectional owners "here are the facts, please make a decision and authorise me to execute your decision" as compared to saying "here is the decision we have made on your behalf, and if you disagree you must prove that you have good cause in law not to accept our decision or we will ask a Judge to rule on the matter." In my view, that is to subvert the decision-making process set out in the STA and STSMA.

104. The factual situation presented at the San Sydney scheme presented problems but also options for the applicant and its members. The benefits and risks of each option ought to have been considered by the members of the applicant, who hold the common property in undivided shares and through which "a section and its undivided share in the common property shall together be deemed to be one unit."[12]

105. These members would inevitably be affected by the option chosen. When a sectional plan of extension is registered, the sectional title register is extended to include the sections and exclusive use areas and a certificate of registered sectional title is issued in respect of each unit, which reflects its respective exclusive use areas and undivided share in common property.[13]

106. Upon registration of a sectional plan of extension, the owners "shall be divested of their share or interest to the common property to the extent that an undivided share in the common property is vested in" the developer or the body corporate

[12] Section 16(3) of the STA.
[13] Section 25(11) of the STA.

(depending on who has exercised that right of extension).[14]

107. Section 17 of the STA provides for the members to "direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease...". In turn, these are categorised in the STSMA as "additional powers" which can be exercised by the body corporate, after being so authorised and directed by its members.

108. The applicant in this case purported to exercise those additional powers, and made decisions about common property, as if it were exercising its ordinary powers to manage and administer the scheme and generally to "control, manage and administer the common property for the benefit of all the owners."[15]

109. Does it make a difference that that the agreement with HF Property is subject to a suspensive condition that the written consent of owners must be obtained? The argument advanced by Mr Stewart for the applicant, on this issue, is that the suspensive condition renders the agreement inchoate and therefore that the applicant did not need the prior consent of its owners to have made those decisions.

110. Mr Skinner SC for the respondent contended however, that the suspensive condition does not alter the legislative consequences, given the provisions at issue and because the Alienation of Land Act includes within the term "alienate" a sale "subject to a suspensive" condition.[16] I agree.

111. The plain meaning of the term "alienate" as it is used in section 17(1) of the STA, must include the divesting of that common property from the scheme, which is wholly different to alienating a right of extension, as the applicant contends it has done in the agreement. The first requires the "unanimous resolution" in section 5(1)(a) of the STSMA while the second requires the written consent of all the owners for the alienation, cession or exercise of a right of extension by the body corporate, as specified in section 5(1)(b) of the STSMA.

112. In *Torgos (Pty) Ltd v Body Corporate of Anchors Aweigh and Another* 2006 (3) SA 369 (W), Satchwell J was called upon to consider the right to alienate and

[14] Section 25(12) of the STA.
[15] Sections 3 and 4 of the STA, in particular the general function specified in section 3(1)(t).
[16] Section 1 of the Alienation of Land Act 68 of 1981, the definition of "alienate."

transfer the right to extend a scheme. This was in the context of the STA prior to the amendments bought about to it by the enactment of the STSMA, which took effect on 8 October 2011, although nothing of substance turns on this.

113. In *Torgos* the court had to consider the provisions of section 25(6) of the STA. The issue was whether the body corporate could be forced to implement an agreement it had concluded with a third party, through which it had sold and ceded the right to extend the scheme. The body corporate claimed that the agreement it had concluded with the third party was void *ab initio* as it had not secured the prior written consent of the owners as required by the first proviso to section 25(6) (as it then read). The third party sought to enforce the agreement upon the basis that the second proviso to section 25(6) only required the written consent prior to transfer and not prior to the conclusion of the agreement of cession of the right of extension. The third party argued that the agreement was therefore valid and enforceable.

114. Importantly, for present purposes, the court in *Torgos* undertook an examination of the "purpose of the proviso to s 25(6), and in whose interests" it had been enacted. The court considered these matters from the perspective of owners and mortgagees and concluded as follows:

> "I have no doubt that the clear purpose of the proviso is to protect owners of units from discovering that the value of their undivided share in the common property of the sectional title scheme has been diminished or has disappeared by cession of the right vested in the body corporate to extend that scheme. Further, it is to protect such owners from discovering that a scheme which has had a known and limited number of units and an extended expanse of common property and amenities has unexpectedly had that the number of units increased and the common property diminished by reason of a developer's exercising the right to extend the scheme which formerly vested in the body corporate. In short, insofar as the members of the body corporate or the owners of the units are concerned, they are entitled to be protected against a diminution in the value of their units - both section and share in common property - whether this value is in monetary terms or by way of enjoyment of their units. The protection afforded is to ensure that they know of the alienation or transfer of the right to extend the scheme, are

aware of the implications thereof to them, are aware of the loss to them in some terms and the gains to them in other terms.

…

[77] The purpose of the proviso is then clear: to protect persons and institutions who have invested money and living or work arrangements in a sectional title scheme - who are members or mortgagees. The proviso is therefore solely for the benefit of these two groups and none other."

115. The court then addressed the issue at which stage the written consent of the owners was required, that is, prior to concluding the agreement of cession as the body corporate argued, or prior to registration of transfer as the third party argued.

116. Satchwell J considered the use of the term "alienate" in section 17 of the STA, which deals with "alienation or letting of common property" and resolved this issue as follows:

"[89] I conclude that to 'alienate' includes the dispossession of the right to extend through a sale and cession while 'transfer' refers to the formal act required by statute and which publicly enacts and completes such dispossession. Once can do neither without the 'written consent' of owners and mortgagees."

117. On the issue of when the written consents had to be obtained, the court concluded:

"[95] Subsection 26(6) permits the body corporate to alienate its right *only* with the necessary consents. Absent such consents, the body corporate is not permitted so to do."

118. After considering various textual indicators in the STA, the court concluded that the agreement by the body corporate in that case, to sell and cede its right to extend the scheme, had to have been preceded by the written consent of owners, without which the body corporate could not validly have concluded the

agreement with the third party.[17] Accordingly, the court upheld the arguments of the body corporate and concluded that:

> "[107] …[T]he written consents required by the proviso to section 25(6) must be furnished prior to the conclusion of the agreement which is the act of alienation."

119. Satchwell J therefore dismissed the argument advanced by the third party that the written consent of owners could be obtained "later" because the peremptory terms of the proviso were clear, that is, that the body corporate "shall only" alienate that right with the written consent of the owners.

120. In his further submissions for the applicant, Mr Stewart sought to distinguish the agreement that was at issue in *Torgos* upon the basis that there was no indication in that matter that the agreement made provision for the written consent of owners to be obtained later, through a suspensive condition, such as is the position in the agreement before me.

121. On this aspect, Satchwell J remarked that even if the agreement in that case had contained a suspensive condition to this effect, "such [suspensive] condition would probably not have assisted the applicant in claiming an agreement to alienate validated by the subsequent provision of the written consents" but the court expressed no final view on that issue (at paragraph 110).

122. I accept that the comments at paragraph 110 in *Torgos* were expressed as *obiter* statements. Nevertheless, I have considered these issues and can see no reason to depart from the clear legislative standards and processes set in sections 25(6) and 17(1) of the STA, which must be read with section 5(1) of the STSMA.

123. I have already concluded that the agreement with HF Property did more than merely exercise or cede the right to extend the scheme. On its terms it authorised the sale of sections of the common property in the form of units 9, 10 and 11, with the proceeds thereof ostensibly to be retained by HF Property.

124. If the members of a body corporate are required by unanimous resolution to

[17] At paragraphs 90-107.

direct the body corporate to alienate or let common property in the scheme, then logically that process must unfold first, so as to enable such members to decide upon the options available to them with respect to that common property.

125. In my view, the unusual factual situation presented in this case demonstrates forcefully why this prior consent is important. The members of the applicant, could decide to sell or lease that common property, which are the options available to them in section 17(1) of the STA.

126. They could also decide that the body corporate must "exercise" or undertake the extension of the scheme itself, given that it has the vested right to do so. They could also decide that the body corporate must "alienate" or "cede" that right to extend the scheme.

127. All of these decisions are of a genus categorised by the legislature as "additional powers" of the applicant (in section 5 of the STSMA).

128. The agreement presented in this application does more than merely cede the right of extension to HF Property, it also includes the sale of portions of the common property. It follows that I agree with the submissions advanced by Mr Skinner SC for the respondent, that such decision and agreement ought to have been preceded by unanimous resolution as defined in the STA and as is replicated in the STSMA through the provisions of section 5(1)(a).

129. Ordinary human experience suggests that the applicant's members have a direct and substantial interest in what is to happen with units 9, 10 and 11, which have been built on common property, and which they hold jointly in undivided shares.[18] They ought therefore to have been consulted about these matters, prior to the body corporate making a determination about the best option for the owners and prior to the conclusion of the agreement with HF Property.

130. The applicant's trustees did not do so. They therefore acted outside their powers when they concluded the agreement with HF Property, without the prior authorisation and direction from the owners.

[18] In proportion to the quotas of their respective sections as specified on the relevant sectional plan, as provided in section 16(1) of the STA.

Conclusion

131. I therefore conclude that the first respondent has good cause in law to withhold her consent.

132. It follows that the application must be dismissed with costs.

133. On the issue of costs, the respondent's attorney in further written submissions argued that an adverse costs order against the applicant would ultimately have to be borne by the owners, including the first respondent. Formulations of orders were submitted to insulate the first respondent in this regard.

134. I have not had the views of the applicant on this issue and therefore see no reason to depart from the usual order that costs follow the result.

135. I therefore make the following **Order**:

A. The application is dismissed.

B. The applicant is directed to pay the first respondent's costs.

(Delivered electronically.)

Gabriel AJ

CASE INFORMATION

Date of hearing	:	9 May 2023
Date delivered	:	23 June 2023 (As agreed by electronic circulation to the parties on this date.)

APPEARANCES:

Counsel for Applicant	:	Advocate Malcolm Stewart

Instructed by	:	Northmore Montague Attorneys Spaces, 2 Ncondo Place Umhlanga Ridge DURBAN (Ref: K Northmore/MAT12466) Tel: 031 830 5157 E-mail: kelly@northmont.co.za
Counsel for Respondents	:	Advocate Barry Skinner SC
Instructed by	:	Asmal & Asmal Attorneys (Ref: Mr Asmal/55/S838/Gen) Tel: 032 552 1245 E-mail: asmalx2@telkomsa.net c/o Messenger King Suite 1001, Durban Club Chambers 5 Durban Club Place DURBAN