THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 454/2009

In the matter between:

ORIBEL PROPERTIES 13 (PTY) LTD	**First Appellant**
INTERACTIVE AFRICA (PTY) LIMITED	**Second Appellant**
and	
BLUE DOT PROPERTIES 271 (PTY) LTD	**First Respondent**
GOSSOW HARDING CONSTRUCTION (PTY) LTD	**Second Respondent**
RANK SHARP (PTY) LTD	**Third Respondent**
THE BODY CORPORATE OF THE THEBE HOSKEN HOUSE SECTIONAL TITLE SCHEME	**Fourth Respondent**
THE REGISTRAR OF DEEDS	**Fifth Respondent**
THE SURVEYOR GENERAL	**Sixth Respondent**
XANTHA PROPERTIES 16 (PTY) LTD	**Seventh Respondent**

Neutral citation:	***Oribel v Blue Dot* (454/2009) [2010] ZASCA 78 (28 May 2010)**
Coram:	CLOETE, PONNAN, MALAN, BOSIELO and LEACH JJA
Heard:	**11 May 2010**
Delivered:	**28 May 2010**
Summary:	**Section 25(13) Sectional Titles Act 95 of 1986 – changed**

circumstances – content of real right of extension reserved – standing of owner of section to apply for demolition of wall on common property

---

ORDER

On appeal from: Western Cape High Court (Cape Town) (Jamie AJ sitting as court of first instance):

(1) The appeal is upheld with costs including the costs of two counsel where so employed.

(2) The order of the court a quo is set aside and substituted with the following:

'(a) The first respondent is interdicted from exercising the right reserved to extend the Theba Hoskens Sectional Title Scheme and contained in the certificate issued to the first respondent on 28 November 2007 in terms of s 12(1)(e) of the Sectional Titles Act 95 of 1986 in any way other than by transferring or ceding the right to the exclusive use of the plant area to the owner of section 401 in the said Scheme.

(b) The first respondent is interdicted from transferring or ceding the said right reserved to any person other than to the owner of section 401 in the said Scheme.

(c) The first respondent is ordered to pay the costs of the applicants.'

JUDGMENT

MALAN JA (CLOETE, PONNAN, BOSIELO AND LEACH JJA concurring)

[1] This is an appeal, with leave of Jamie AJ, against his dismissal of the appellants' application to declare void the reservation of a right to extend the sectional title scheme by the developer, the first respondent; to restrain the purported alienation and transfer of that right to the third, alternatively, the seventh respondent; and to order the

demolition of a wall constructed by the developer pursuant to the reservation of the right and in contravention of the rules of the body corporate, the fourth respondent.

[2] The Theba Hoskens Sectional Title Scheme was registered on 28 November 2007. It concerns a sectional title scheme in respect of an existing three story building on a stand in Cape Town. On the date of registration of the scheme, sections 401 and 501 were transferred into the names of the first appellant and another person respectively. By virtue of these transfers the fourth respondent, the body corporate, was also established. As part of the application for the opening of the register and registration of the scheme, an eight page sectional title plan, approved by the Surveyor General, was lodged with the registrar of deeds. The scheme comprises five levels of which the third to fifth levels correspond with the first to third floors of the building. Section 401 is situated on the second floor of the building and consists of the whole of that floor less certain common areas like staircases and landings. The section on the first floor, section 301, was later subdivided into three sections, viz sections 302, 303 and 304. The developer of the scheme, the first respondent, sought the reservation of various additional real rights of extension in relation to the third to fifth levels. On the extension plans relating to the second floor of the building it is indicated that a right is reserved to extend the plant area adjacent to section 401 into the scheme.

[3] The plant area is the matter in dispute. It is the area extending from the eastern edge of section 401 and faces Devil's Peak. It used to house the air-conditioning plant of the floor below it. Opaque glass windows separated it from section 401 and a second row of opaque glass windows formed the outer edge of the plant area concealing it from the exterior of the building. The floor of the plant area is the roof of the section below, now section 302, and it extends upwards past section 401. The plant area was separated from the floor below it by a 'false ceiling' made up of thin ceiling boards forming the roof of the section below. After removal of the air-conditioning unit and the exterior opaque windows the plant area consisted essentially of a void from the roof of section 302 upwards. During June 2007 the first appellant and the developer reached an agreement that the opaque glass windows separating the plant area from section 401 would be replaced by clear windows. Glass doors were also installed but it is a

matter of dispute whether this took place with the developer's consent. A brick wall was constructed by the developer on common property immediately adjacent to the row of opaque windows separating the plant area from section 410 during the weekend of 10 May 2008.

[4] The first appellant is the registered owner and the second appellant, an associated company, the occupier of section 401 of the scheme. The first respondent, the developer of the scheme, sold section 401 to the second appellant on 16 February 2007 but, in terms of a subsequent agreement (the 'Addendum'), the second appellant was replaced as the purchaser by the first appellant. I will refer to the purchaser as the 'appellants'. The seventh respondent purchased section 302 from the developer and also 'the Real Right to Extend re: the plant room (situated directly above the office space)'. The third respondent (through the seventh respondent) is entitled to occupy section 302. In the court a quo the appellants disputed the validity of the creation of the right of extension and, consequently, also the third and seventh respondents' entitlement to receive transfer of it.

[5] The agreement of sale between the developer and the appellants made provision for the purchase and sale of section 401, 14 parking bays and an undivided share in the common property. The developer warranted to the purchaser that the boundaries of the unit would be substantially in accordance with those pointed out and as set out in Annexure 'B' to the agreement and that it would consist of the entire second floor of Theba Hoskens House (excluding staircases and landings). In terms of the Addendum it was recorded that the appellants waived their rights to annul the agreement of sale and that a real right of extension was reserved pertaining to the retail section and minor extensions thereto. The plans for the right to extend were to be lodged in the Deeds Office and furnished to the purchaser. The rights so reserved have no bearing on the present dispute between the parties.

[6] As part of the application for the opening of a sectional title register the developer lodged an application with the registrar of deeds, the fifth respondent, for the reservation of a real right to extend the scheme in terms of s 25 of the Act. On 28 November 2007

the registrar issued a certificate of real right in favour of the developer pursuant to s 12(1)(e) of the Act. The certificate of real right records that the registrar certified

'that the developer is the registered holder of the right to erect and complete from time to time within a period of 10 years for his personal account a vertical and horizontal extension of an existing building in terms of Section 25(1)(c) of the said Act on the specified portion of the common property as indicated on the plan referred to in Section 25(2)(a) of the Act filed in this office, and to divide such building or buildings into a section or sections and common property, and to confer the right of exclusive use over portion of such common property upon the owner or owners of one or more units in the scheme . . . as shown on Sectional Plan . . . .'

[7] At all material times it was the intention of the developer to reserve the plant area for the use of the applicants, ie the owners of section 401. The appellants produced plans depicting the casting of a concrete slab and the utilization of the plant area as a deck extending from the section into the plant area. The plans lodged with the registrar indicate that in respect of section 401 the plant area was reserved for 'extension' into section 401.

[8] The developer changed, as it was stated in the answering affidavit, his mind regarding the right of extending section 401 into the plant area and decided to offer it to the purchaser of the section below section 401 to be used as an office with a double volume. As a result an agreement of sale with the seventh respondent was concluded on 30 January 2008 in terms of which a portion of section 301, ie the new section 302, and the 'real right to extend re: the plant room' was sold to the seventh respondent.

[9] The court a quo dismissed the application holding that the registration of a real right of extension and the issue of a certificate pursuant thereto amounted to administrative action as defined by the Promotion of Administrative Justice Act 3 of 2000. The relief sought was in effect treated as an application to review and set aside the decisions of the fifth and sixth respondents to issue the certificate of real right of extension of the scheme. It was further found that non-compliance by the developer with the provisions of s 25 had few practical consequences. Exercising the discretion conferred by s 8(1) of PAJA the court a quo declined to review and set aside the decisions of the fifth and sixth respondents reserving the real right of extension. Finally,

the court a quo found that a safety and fire hazard had arisen as a result of the installation of the clear glass windows and sliding doors between section 401 and the plant area and that this constituted 'changed circumstances' as envisaged by s 25(13)

that made strict compliance with the registered plans impractical. The prayer to demolish the wall was therefore also dismissed.

[10] In this court the appellants limited the relief sought to the prayers for an interdict prohibiting the developer from transferring to the seventh respondent or other party any real right to extend the scheme so as to 'incorporate' the plant area into an existing section or to create a new section comprising the plant area or to create an exclusive use area pertaining to the plant area for the benefit of any section other than section 401 as well as to an order directed at the demolition of the brick wall constructed by the developer adjacent to section 401. It follows that I need not express any view on the appellants' submission that no 'decision' as envisaged by PAJA was made when the registrar issued a certificate of real right in terms of s 12(1)(e).[1] Nor do I have to determine whether the reservation of the real right of extension was void by reason of non-compliance with the provisions of s 25(2) of the Sectional Titles Act. The application for the interdict was premised on the provisions of s 25(13) but the prayer for the demolition of the wall was based on a variety of grounds which will be referred to below.

[11] A developer may in terms of s 25 in his application for the registration of a sectional title plan reserve for himself the right to extend the scheme by means of a condition imposed pursuant to s 11(2).[2] The right to extend the scheme includes the right to extend an existing building horizontally or vertically or to erect an additional building or buildings on a specified part of the common property and to divide the extended part of the additional building or buildings into a section or sections, common property and exclusive use areas for the account of the developer.[3] The reservation of

---

[1] Cf *Dolphin Whisper Trading 10 (Pty) Ltd v The Registrar of Deeds & another* (20645/08) [2009] ZAWCHC 31 (23 March 2009) para 26.

[2] See CG van der Merwe *Sectional Titles, Share Blocks and Time-sharing* para 12.1 ff at p 12.3 ff and cf *SP&C Catering Investments (Pty) Ltd v Body Corporate of Waterfront Mews & others* (84/09) [2009] ZASCA 162 (30 November 2009): [2010] 2 All SA 261 (SCA) paras 8 and 9.

[3] Section 25: 'Extension of schemes by addition of sections and exclusive use areas. (1) A developer may, subject to the provisions of section 4(2), in his application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11(2), the right to erect and complete from time to

the right to extend is effected by means of a condition imposed by the developer in terms of s 11(2). This section allows the developer to impose a condition in the schedule filed with the sectional plan which sets out the servitudes and registrable conditions burdening the scheme.[4] The period within which the extension or extensions are to be completed must be set out in the condition and the area of the common property where the extension or extensions will be erected specified.[5] If a right of extension has been reserved, the application for the sectional plan must, in addition to the usual documentation,[6] be accompanied by the documents specified in s 25(2).[7] On the registration of the sectional plan and the opening of a sectional title register in respect of the land and the buildings, the Registrar must issue to the developer a certificate of real right to extend the scheme in the manner indicated on the sectional plan and subject to any mortgage bond registered against the title deed of the land.[8]

---

time, but within a period stipulated in such condition, for his personal account-
(a) a further building or buildings;
(b) a horizontal extension of an existing building;
(c) a vertical extension of an existing building,
on a specified part of the common property, and to divide such building or buildings into a section or sections and common property and to confer the right of exclusive use over parts of such common property upon the owner or owners of one or more sections.'

[4] Sections 11(2) and 11(3)(b).

[5] Section 25(1).

[6] Section 11(3).

[7] Section 25(2): 'In the event of a reservation in terms of subsection (1), the application for the registration of the sectional plan shall, in addition to the documents referred to in section 11(3), be accompanied by-
(a) a plan to scale of the building or buildings to be erected and on which-
  (i) the part of the common property affected by the reservation;
  (ii) the siting, height and coverage of all buildings;
  (iii) the entrances and exits to the land;
  (iv) the building restriction areas, if any;
  (v) the parking areas; and
  (vi) the typical elevation treatment of all buildings, are indicated;
(b) a plan to scale showing the manner in which the building or buildings to be erected are to be divided into a section or sections and any exclusive use areas;
(c) a schedule indicating the estimated participation quotas of all the sections in the scheme after such section or sections have been added to the scheme;
(d) particulars of any substantial difference between the materials to be used in the construction of the building or buildings to be erected and those used in the construction of the existing building or buildings;
(e) particulars of such applicable expenses as are specified in section 37(1)(a), which will be borne by the developer from the date of establishment of the body corporate until the sectional plan of extension is registered;
(f) the certificate of real right which is to be issued in terms of section 12(1)(e); and
(g) such other documents and particulars as may be prescribed.'

[8] Section 12(1) provides: 'When the requirements of this Act and any other relevant law have been complied with, the registrar shall- ...

According to s 25(4) a right reserved in terms of s 25(1) or (6) and in respect of which a certificate of real right has been issued -

'(a) shall for all purposes be deemed to be a right to urban immovable property which admits of being mortgaged; and

(b) may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right: Provided that in the case of a cession affecting only a portion of the land comprising the scheme only such portion shall be identified to the satisfaction of the Surveyor-General.'

A right reserved in terms of s 25 (1) may be exercised by the developer or his successor in title, even where the developer or his successor in title has no other interest in the common property.[9] When the right reserved is exercised the developer or his successor in title must immediately after completion of the relevant unit apply for the registration of the relevant plan of extension and the inclusion of such unit in the relevant sectional title register.[10]

[12] A developer or his successor in title to a right reserved in terms of s 25(1) may, after approval of a sectional plan of extension by the Surveyor-General, apply to the Registrar for the registration of the plan of extension and the inclusion of the additional section or sections in the relevant sectional title register.[11] The application for registration must be accompanied by certain documents.[12] Section 25(11) provides that when 'the requirements of this section and of any other law have been complied with, the registrar shall - (a) register the sectional plan of extension' and perform the other duties set out in the subsection. Upon the registration of a sectional plan of extension the owners of sections in the building or buildings in the scheme that is being extended, the mortgagees of sectional mortgage bonds and the holders of any real rights registered over such sections, are divested of their share or interest in the common property to the extent that an undivided share in the common property is vested in the

---

(e) issue to the developer, in the prescribed form, a certificate of real right in respect of any reservation made by him in terms of section 25(1), subject to any mortgage bond registered against the title deed of the land . . .'.

[9] Section 25(5).

[10] Section 25(5A)(a).

[11] Section 25(9).

[12] Section 25(10).

developer, his successor in title or the body corporate, as the case may be, by the issue of the certificates of registered sectional title referred to in s 25(11)(c).[13]

[13] It is common cause that it was envisaged by the parties that the plant area would be 'incorporated' into section 401. However, as a result of the first appellant's refusal to pay for the area, as more fully discussed below, the developer resolved to 'incorporate' it into the section below and sell it as well as the right to extend in respect of the plant room to the seventh respondent. The sale was concluded on 30 January 2008. This refusal to pay for the plant area, it was submitted, constituted 'changed circumstances' as envisaged by s 25(13) justifying 'incorporation' of the plant area into the unit below as an exclusive use area.[14] Section 25(13) provides:

'A developer or his successor in title who exercises a reserved right referred to in subsection (1), or a body corporate exercising the right referred to in subsection (6), shall be obliged to erect and divide the building or buildings into sections strictly in accordance with the documents referred to in subsection (2), due regard being had to changed circumstances which would make strict compliance impracticable, and an owner of a unit in the scheme who is prejudiced by his failure to comply in this manner, may apply to the Court, whereupon the Court may order proper compliance with the terms of the reservation, or grant such other relief, including damages, as the Court may deem fit.'

[14] The case for the appellants as made out in the founding papers is premised on their contention that they purchased the whole of the second floor of the building, ie the built area (less certain common areas) including the plant area. This is, however, not borne out by the agreement which described the *merx* as the 'unit . . . and parking bays which are more fully described in Annexure 'A', which unit and parking bays include an undivided share in the common property in the land and building/s'. Later in the agreement (clause 16.10) it was stated that the property sold 'includes the premises as otherwise described herein, which are currently situated on the 2nd floor of the building in question, being the floor . . . directly above Indwe Insurance, together with the parking bays (TBA) (as attached Annexure "B") . . . '. In Annexure 'A' the unit was described as '2nd floor (approximately 700 sqm) – For guidance purposes only' and, after the parking bays are referred to, the exclusive use areas are set out as '2nd floor

[13] Section 25(12).
[14] Section 27(1)(a).

balconies approximately 106sqm – For guidance purposes only'. Annexure 'B' contains a plan of the second floor of the building indicating the property sold. The plant area was depicted on it but not as a part of the property sold. In clause 15 of the agreement of sale it was recorded that the sectional title plan had not been registered but it was stated that the seller warranted that the boundaries indicated 'will be substantially in accordance with those pointed out by the Seller . . . and incorporate the entire second floor . . . a portion which is currently occupied by Moksha Yoga.' It follows clearly that the plant area was not sold and remained part of the common property. It was not contended in this court that any other construction of the agreement of sale was possible.

[15] Not only the plans submitted but also the negotiations between the parties demonstrate the intention that the plant area would be 'extended' into section 401 or that the exclusive use of that area would be made available to the owner of section 401. In a proposal made by the appellants on 10 September 2007 the construction of a deck from section 401 extending into the plant area was envisaged. The appellants were to bear the costs involved. However, their proposal concluded:

'Based on the above factors, and given the considerable cost of constructing the 2 parts of the deck, it seems unreasonable that any additional payment would be required in order to get permission for the construction of the deck. Given the costs to resolve all the above issues . . . any additional payment cannot be justified. . . . Should permission not be forth-coming on the basis of this agreement, we are happy to forgo the option of the deck . . .'.

The correspondence between the parties shows that the developer intended selling the plant area to the appellants. On 4 May 2007 an email message was sent to the first appellant's representative wherein it was stated that the area concerned measured some 140 square meters and that '[w]e need to establish a price and conclude a deal asap regarding the space so that we can incorporate rights over the space in the Sectional Title Plan . . . Please put forward an offer amount in this regard.' On 16 and again on 21 May 2007 the floor below section 401 was offered for sale to the appellants. The appellants declined the offers. On 26 July 2007 the appellants wrote to the developer alerting it to the fire risk posed by the ceiling in the plant area separating the two floors. On 22 August 2007 the appellants referred to the unsightly state of the air

conditioning unit in the plant area adding that they would revert to the developer the following week with a proposal concerning the construction of the deck. This was followed by the letter of 10 September 2007 referred to above. The developer recorded on 11 September 2007 that the proposal was being studied. On 11 October 2007 a further proposal was made by the appellants: 'We are no longer considering turn[ing] the entire roof into a deck. The costs are proving to be too onerous.' The message contained suggestions for 'an aesthetic solution' to the plant area. The developer's response on 8 November 2007 contained two alternative suggestions: the first was that it kept the space because '[t]his allow us the possibility to go up from below in the future adding value to the lower space. This area does possess value for us which may increase in time to come.' The second suggestion was to offer the plant area for sale to the appellants at a price of R 120 000. The appellants declined the offer to purchase the plant area. On 16 January 2008 the appellants requested clarification regarding the 'current open space between the two floors' and enquired whether the sale of the second floor had affected the plant area and what the implications for the third floor were. The developer responded on 17 January 2008 that they were still negotiating but that no sale of the second floor had as yet been concluded. The message contained the following paragraph:

'Regarding the areas you are querying – the real rights regarding these areas are described in the rights of extension etc. as registered in the deeds office. Whether these rights will be part of the sale concluded or will remain with Blue Dot Props remains to be seen once the deed of sale is finalized. Then what the new purchaser/Blue Dot does with the area remains to be seen.'

The first appellant reacted on the next day by making an offer to purchase the plant area for the price originally suggested, R 120 000. The developer replied that they would consider the offer but would first have to complete the negotiations they were engaged in. The second floor including the right reserved pertaining to the plant area was, however, sold to the seventh respondent on 30 January 2008.

[16] In *SP&C Catering Investments (Pty) Ltd v Body Corporate of Waterfront Mews & others*[15] Hurt AJA described the purpose of s 25(13):

[15] Para 9.

'The section is plainly designed to enable unit owners to enforce compliance by the developer with the specifications. It gives the developer an opportunity to justify non-compliance with his original specifications on the ground of "changed circumstances" and no more. The concept that the legislator intended to give him an opportunity, in the face of a complaint by an aggrieved unit owner, effectively to obtain a variation of his registered real right to the detriment of the rights of other registered owners is ludicrous.'

This remark was made in the context of an application to extend the period within which the right reserved had to be exercised. The court, for the reasons stated, declined the application and emphasized that a developer had to carry out the extended phases 'strictly in accordance with the documents referred to in s 25(2)'.[16]

[17] The importance of the documents referred to in s 25(2) is emphasized when the history of the section is considered. Prior to the Sectional Titles Amendment Act 63 of 1991 building plans approved by the local authority had to be submitted with an application for the registration of a sectional title plan and for the purpose of acquiring a right of extension.[17] In 1991 the obligation to submit comprehensive and approved building plans was replaced with the duties contained in s 25(2). The purpose of the amendment was to alleviate the position of developers who experienced delays in achieving municipal approval of building plans prior to selling the units and without knowing whether the whole development would be feasible. Since 1991, the developer has been obliged to submit only plans to scale containing the details required by s 25(2). These plans are less detailed, and delays experienced in obtaining the local authority's approval for building plans could be avoided. Where the developer decides to proceed with the extension of the scheme, building plans of the extension will, however, still have to be approved by the local authority.[18] Under this system the developer needs to disclose only the real right of extension to every purchaser in the deed of alienation. The other information relating to the proposed extension is contained in the schedule filed with the sectional plan and in the documents required by s 25(2). These requirements are imposed for the benefit of future owners or purchasers of the sections in the scheme. The right of a developer to extend the scheme involves a

[16] Para 8.
[17] Section 15(b) of Act 63 of 1991 and see Van der Merwe p 12-18.
[18] Van der Merwe p 12-18.

diminution of the rights of owners of sections otherwise attaching to the scheme, in particular their rights of ownership in an undivided share in the common property. Should the developer fail to proceed with the extension or if no reservation was made the right to extend the scheme vests in the body corporate which is entitled to obtain a certificate of real right in respect thereof.[19] In the certificate of reservation of a real right issued by the registrar of deeds to the developer, the right reserved is described with reference to the plan referred to in s 25(2)(a) filed with the registrar. It is thus with reference to this plan that content must be given to the right reserved. The plan clearly indicates that the right of extension must be exercised for the benefit of section 401: it entails the creation of the plant area as an exclusive use area for the benefit of that section.[20]

[18] Van der Merwe[21] summarises the position as follows:

'A developer, his successor in title or the body corporate in exercising the right of extension is obliged to erect and divide the building or buildings included in the extension into sections strictly in accordance with the documents submitted when the right was reserved. Due regard is taken of changed circumstances which would make strict compliance impracticable. The courts seem to be prepared to allow the developer to effect deviations on account of changes in market conditions. The rationale is that no developer would regard it as practicable to build units that are not saleable. An owner of a unit in the first phase who is prejudiced by the developer's (or body corporate's) failure to comply in this manner, may approach the court, whereupon the court may order proper compliance with the terms of the reservation, or grant such other relief, including damages, as it may deem fit' .

He, however, adds the following cautionary words: [22]

'[i]n practice the developer would not be allowed to change parts of the common property into additional sections or even exclusive use areas.'

[19] I am prepared to accept for the purposes of this judgment, but need not decide, that financial considerations may bring about a change in circumstances making strict

[19] Section 25(6).
[20] It is not necessary for the purposes of this judgment to determine the nature of the right reserved. See *Erlax Properties (Pty) Ltd v Registrar of Deeds & others* 1992 (1) SA 879 (A) where the majority left the question whether the right of extension was a personal servitude under the Sectional Titles Act 66 of 1971 as held by Joubert JA (at 886 I – 887 E) open (per EM Grosskopf JA at 489 C-D).
[21] At p 12-32 para 12.3.8.
[22] At 12-32 para 12.3.8 n128.

compliance with the terms of the reservation as set out in the documents filed in terms of s 25(2) impractical.[23] This, however, is not the end of the matter. Section 25(13) requires a developer to comply 'strictly' with the documents referred to in s 25(2). These documents give content to his right of extension. He has no other right of extension and where changed circumstances are present he is not excused from compliance with the documents altogether but only from complying with them 'strictly'. In the present matter the developer's right of extension consists in conferring, should he wish to exercise it, the right to the exclusive use of the plant area upon the owner of section 401.[24] The developer is not entitled to confer the right to the exclusive use on the owner of section 302 or any other sectional owner. To allow such an exercise of his right would in effect be to grant him a right of extension quite different from the right reserved. He would not only not be exercising his right of extension 'strictly' in accordance with the documents referred to in s 25(2) but he would also not be exercising the right reserved at all. Such a deviation is not sanctioned by the legislature and it follows that the appellants are entitled to an interdict.

[20] It is common cause that the developer built a brick wall on the common property in the plant area next to the clear glass windows and doors of section 401 installed by the appellants. The relief claimed by the appellants include a prayer for the demolition of the wall. The court a quo rejected this relief. It did so for four reasons. First, it rejected the argument that, because the wall was constructed without the prior approval of the trustees of the body corporate contrary to rule 9.1 of the Conduct Rules the appellants were entitled to the relief sought: any breach of these rules was exigible at the instance of the trustees and the body corporate and not of an individual owner. This is clearly correct. Secondly, the appellant relied on clause 1.3 of the agreement of sale which requires the seller, ie the developer, to obtain the consent of the purchaser to effect any alternations or improvements 'to the premises' which were not fully recorded in Annexure 'A'. The court a quo correctly dismissed this argument because the construction of the wall did not amount to an alteration or improvement 'to the premises'. The wall was built, not on section 401, but in the plant area which is common

[23] *Knoetze v Saddlewood CC* [2001] 1 All SA 42 (SE) at 46-8.
[24] Section 27(1)(a).

property and not part of section 401. Thirdly, it rejected the contention that there was a tacit agreement that, by agreeing to the installation to the windows at the expense of them, the developer could not thereafter nullify the advantages the clear windows offered to appellants, ie an uninterrupted view of Devil's Peak. The court found that on the first respondent's version the consent given by the developer was without prejudice to its rights. Moreover, and also because there was a dispute as to whether permission was given for the installation of the sliding doors, the court could not conclude that there had been the tacit agreement contended for. Finally, the court a quo dismissed the appellants' reliance on s 25(13) and found that there were 'changed circumstances' present which rendered strict compliance with the terms impractical. These circumstances were the necessity to erect a brick wall as a result of the installation of the windows and, mainly, the glass sliding doors, thereby replacing what had previously been 'a solid wall' and creating both a safety and fire hazard. The developer was thus excused from complying strictly with the terms of the reserved right with respect to the construction of the wall and could not be ordered to demolish the wall.

[21] In this court the argument on behalf of the developer proceeded somewhat differently. As far as the wall was concerned the submisssion was made that, since the wall was constructed on common property, and in view of s 41 read with the Conduct Rules, the appellants had no standing to seek an order for the demolition of the wall. The appellants' refusal to pay for the plant area, on the other hand, constituted 'changed circumstances' as contemplated by s 25(13) entitling the developer to 'incorporate' the plant area into section 302 and not into section 401 as indicated on the plan reserving the right of extension.

[22] Section 41 of the Act provides for the circumstances under which the owner of a unit may institute proceedings where the allegation is made that both he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in s 36(6) and the body corporate has not instituted proceedings for the recovery of the damages, loss or benefit.[25] Where the body corporate has not instituted proceedings, a unit owner may do so on its behalf but only

[25] Section 41(1) also deals with the situation where the body corporate does not take steps against an owner of a unit 'who does not comply with the rules'.

after having given the notice referred to in s 41(2)(a) to the body corporate and the latter's failure to comply with it, as provided for by s 41(2)(b). Before proceedings may be instituted by an individual owner, the court must be approached for the appointment of a provisional curator ad litem, and only in the event of a positive report may the court give directions as to the institution of proceedings by the unit owner on behalf of the body corporate. This procedure has not been followed in this case.

[23] Section 36(6) empowers the body corporate to sue or be sued in its corporate name in respect of

'(a) any contract made by it;

(b) any damage to the common property;

(c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;

(d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; and

(e) any claim against the developer in respect of the scheme if so determined by special resolution.'

[24] A body corporate is constituted by law,[26] and it is charged with responsibility for the enforcement of the rules and the control, administration and management of the common property for the benefit of all members.[27] A body corporate has perpetual succession and is capable of suing or suing in its own corporate name in respect of the five matters referred to.[28] Some of the powers, such as the one in paragraph (a), are only declaratory but the power granted in paragraph (b) - and in some circumstances paragraph (c) as well - gives it an entitlement it would otherwise not have had. Under normal circumstances only all the owners of the common property, ie the owners of the sections, would have been able to do so jointly as the common property is owned by them jointly.[29] Section 36(6)(e) also bestows a power it would not otherwise have had on the body corporate: there is no contractual arrangement between the developer and

[26] Section 36(1).
[27] Section 36(4).
[28] Section 36(6).
[29] Section 16(1).

the body corporate and, while there may be cases where a developer is contractually bound to a sectional owner to give effect to the scheme, the body corporate is in no such relationship with the developer. However, s 41 is not intended to detract from the powers enjoyed by the owner of a section to institute proceedings where his own rights whether of ownership[30] in his unit or otherwise are infringed. In addition, the owner of a section who is prejudiced by a developer's failure to comply in this manner, may apply to court in terms of s 25(13) for an order for proper compliance with the terms of the reservation or other relief, including damages. Such an owner is, in other words, given the required standing to enforce strict compliance with the reservation. This is essentially the relief prayed for by the appellants in this case. The body corporate is empowered by s 36(6)(e) to institute proceedings against the developer 'in respect of the scheme; if so determined by special resolution'. This general power of the body corporate, however, does not detract from the specific right given to the individual owner under s 25(13).

[25] The prayer for the demolition of the wall is a different matter. Normally the body corporate would have the power to litigate where damage to the common property is concerned.[31] This, however, is not the appellants' case. They complained about the obstruction to the flow of light to and of their view from the premises. The appellants' allegations were that the wall obliterated any natural light and deprived them of the view and sense of space they enjoyed. They also stated that the wall was constructed surreptitiously and over a weekend while settlement negotiation between the parties were pending. This allegation was met by a denial that the construction of the wall took place 'surreptitiously'. The developer's response was that, given that the natural light entered through the opaque windows, very little light in any event came through. In addition, the ventilation remained the same. Because section 401 adjoined the plant area which in its original state was 'unsightly' and posed a fire and safety risk, the wall was constructed. In addition, the respondents annexed a report by their architect showing that the opaque windows were manufactured of 'Georgian wire' with no light coming through them, ie effectively a solid wall. Moreover, the report continued, light

[30] Van der Merwe at p 2-10 ff paras 2.3.1 ff.
[31] Section 36(6)(b) and (c).

comes into section 401 through an opening which remained in place. The light and ventilation, the report concluded, remained the same as it was when the section was purchased. These allegations were contained in the answering affidavit which, for the purposes of this matter must be accepted. While it is correct that the fire and safety hazard existed some time before the construction of the wall the appellants have not demonstrated that it in any way affects their use and enjoyment of the section as they had purchased it. It follows that the appellants have not demonstrated that the construction of the wall infringed any of their rights of ownership. Nor have they demonstrated that in constructing the wall, the developer had caused the plant area to be 'incorporated' into section 302 or the exclusive use of that area to be transferred or ceded to the owner of that section.

[26] As a result the appellants have shown that they are entitled to an interdict restraining the first respondent from transferring to the seventh respondent or any person other than the owner of section 401 the right to the exclusive use of the plant area or to incorporate it in any other way into any other section in the sectional title scheme. The following order is made:

(1) The appeal is upheld with costs including the costs of two counsel where so employed.

(2) The order of the court a quo is set aside and substituted with the following:

'(a) The first respondent is interdicted from exercising the right reserved to extend the Theba Hoskens Sectional Title Scheme and contained in the certificate issued to the first respondent on 28 November 2007 in terms of s 12(1)(e) of the Sectional Titles Act 95 of 1986 in any way other than by transferring or ceding the right to the exclusive use of the plant area to the owner of section 401 in the said Scheme.

(b) The first respondent is interdicted from transferring or ceding the said right reserved to any person other than to the owner of section 401 in the said Scheme.

(c) The first respondent is ordered to pay the costs of the applicants.'

_____
F R MALAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant: Derek Mitchell SC

Instructed by:

Bowman Gilfillan
Cape Town

Matsepes Inc
Bloemfontein

For Respondent: JG Gauntlett SC assisted by FSG Sievers

Instructed by:

C K Friedlander Shandling Volks
Cape Town
c/o
Webbers Attorneys (1st Respondent)
Bloemfontein

Jan S De Villiers Attorneys (2nd Respondent)
Tygervalley
c/o
McIntyre & Van der Post
Bloemfontein