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THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No:21283/12

In the matter between: Reportable

WILLIAM MALCOLM McKERSIE **APPLICANT**

And

SDD DEVELOPMENTS (WESTERN CAPE) (PTY) LTD **FIRST RESPONDENT**

HARBOUR TERRACE SECTIONAL TITLE SCHEME **SECOND RESPONDENT**

REGISTRAR OF DEEDS,CAPE TOWN **THIRD RESPONDENT**

Coram: **ROGERS AJ**

Heard: **15 JANUARY 2013**

Delivered: **6 MARCH 2013**

JUDGMENT

ROGERS J:

Introduction

[1] This application came before me on 22 January 2013 as an unopposed return day in Third Division. After hearing the applicant's counsel, Ms van der Walt, I reserved my decision as I was not satisfied that the relief could or should be granted.

[2] On 14 December 2012 the court authorised the issuing of a rule *nisi* calling upon all interested parties to show cause (if any) on 22 January 2013 why an order should not be granted [a] declaring the applicant to be the owner of exclusive use area OB2 ('the property') in the sectional title scheme known as Harbour Terrace in Sea Point ('the scheme'); and [b] directing the Registrar of Deeds ('the Registrar') to register the property in the applicant's name within three months of the order. Directions were also given for service and publication of the rule *nisi*.

[3] The applicant cited, as the respondents, SD Developments (Western Cape) (Pty) Ltd ('SDD'), the body corporate of the scheme and the Registrar. Service and publication were effected in accordance with the court's directions. There was no opposition on the return day. The Registrar did not file a report.[1]

[4] The founding papers disclose the following facts. The scheme was established in 1998 in terms of the Sectional Titles Act 95 of 1986 ('the ST Act'). SDD was the 'developer' as defined in the ST Act.

[5] In January 2005 the applicant purchased from one Derick Robert Humphrey ('Humphrey') for R490 000 Section 1 in the scheme together with an exclusive use area being an open parking bay identified as V1. On 22 February 2005 transfer of Section 1 was passed to the applicant. The parking bay (now known as exclusive use area OB2) was not simultaneously registered in his name by notarial deed of cession in accordance with s 27(4) of the ST Act. The deed of transfer recorded the true price of Section 1 as being R490 000 and transfer duty was paid on that sum. This was in

[1] In terms of s 97(1) of the Deeds Registries Act 47 of 1937 the Registrar should, I think, have received seven days' notice of the application for the issuing of the rule nisi. However, this failure should not in my view stand in the way of the applicant, given that the Registrar has been cited as a respondent and has received timeous notice of the substantive relief sought on the return day.

fact the price which had been agreed with Humphrey for Section 1 together with the parking bay.

[6] The applicant only discovered in early 2012 that he was not the registered owner of the parking bay. The conveyancer who attended to the transfer in 2005 was aware of the need to transfer the exclusive use area to the applicant and prepared a draft notarial deed of cession. It appears that this was not executed and registered because the conveyancer ascertained that Humphrey himself was not the registered owner of the parking bay. Unfortunately the applicant only learned this in 2012.

[7] Although Humphrey was not and is not the registered owner of the parking bay, the applicant states his understanding to be that Humphrey purchased Section 1 and the parking bay from SDD in 2003.

[8] According to a CIPC report annexed to the founding affidavit, SDD was finally deregistered on 20 April 2007 (this must have been pursuant to s 73 of the Companies Act 61 of 1973). Unless restored to the register, SDD cannot transfer the parking bay to Humphrey so that the latter can transfer it to the applicant. The applicant submits that because SDD had been 'deregistered' rather than 'dissolved', the parking bay registered in its name did not devolve upon the State as *bona vacantia* but became the property of the members of the deregistered company as an unincorporated association. The applicant stated that he did not know the members' identities. (As will appear hereunder, the applicant corrected this contention in a supplementary affidavit filed on 18 January 2013.)

[9] The applicant avers, somewhat laconically, that he has been 'unable to trace or contact' Humphrey. Humphrey has not been cited as a respondent.

[10] After reserving my decision I requested the applicant's legal representatives to file a supplementary affidavit [a] setting out the date on which SDD transferred the last of the sections registered in its name; [b] explaining the steps taken to locate Humphrey; and [c] explaining the basis for the applicant's understanding as to what Humphrey had bought from SDD. The supplementary affidavit was delivered to me on 21 February 2013. This affidavit stated in summary the following: [a] SDD

transferred the last units to third parties in 2003. [b] The applicant was still unable to trace Humphrey. Deeds office searches reflected that he may well have been sequestrated. [c] The applicant had not been able to obtain a copy of the deed of sale between SDD and Humphrey. The applicant's understanding of what Humphrey had bought was said to be based on deeds office searches relating to the relevant sections and exclusive use areas. (It is not clear to me how such searches could have established that SDD sold the exclusive use area in question to Humphrey in 2003 or at all since no transaction in respect of the exclusive use area was ever registered at the deeds office.)

[11] I invited the applicant's legal representatives to file written submissions on two aspects which I had not put to counsel for comment during the oral hearing. Such submissions were duly filed.

Effect of SDD's deregistration

[12] Because SDD was deregistered as a company on 20 April 2007 and has not been restored to the register, SDD could not properly be cited as the first respondent in the current proceedings. A non-existing company cannot be a party to legal proceedings.[2]

[13] The applicant's submission that the property owned by SDD at the time of its deregistration devolved on the company's members and not the State is plainly wrong. If a company ceases to exist by virtue of deregistration, its property is vested in the State as *bona vacantia*. That is why the courts insisted on the joinder of the relevant representatives of government when applications were made for the restoration of deregistered companies in terms of s 73 of the 1973 Companies Act.[3]

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[2]See, for example, *Walker Engineering CC t/a Atlantic Steam Services v First Garment Rental (Pty) Ltd (Cape)* 2011 (5) SA 14 (WCC) para 2; *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgery Clinic (Pty) Ltd & Others* 2012 (4) SA 484 (WCC) para 20.
[3]See *Suid-Afrikaanse Nasionale Lewensassuransiemaatskappy v Rainbow Diamonds (Edms) Bpk* 1982 (4) SA 633 (C) at 637H-638C and on appeal at 1984 (3) SA 1 (A) at 14F-I; *Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) at 478F-G; *Peninsula Eye Clinic supra* para 14.

[14] If the parking bay which belonged to SDD and was registered in its name immediately prior to its deregistration devolved upon the State as *bona vacantia*, the present application could not be granted without the joinder of the relevant representatives of government.

[15] However, in a supplementary affidavit dated 18 January 2013 the applicant's attorney said that the applicant, when submitting in his founding affidavit that the parking bay vested in SDD's members upon the company's deregistration, had overlooked s 27(4)(b) of the ST Act. The applicant's attorney submitted that the effect of this provision was that upon SDD's deregistration the parking bay vested in the body corporate (the second respondent).

[16] Section 27(4)(b) provides as follows:

'If an owner ceases to be a member of the body corporate as contemplated in section 36(2), any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond or registered real right.'

The above provision seems to me to apply to an owner other than the developer. The provision which the applicant's attorney should have cited was s 27(1)(c) which reads thus:

'If a developer ceases to be a member of the body corporate as contemplated in section 36(2), any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond.'

[17] In terms of s 36(2) the developer ceases to be a member of the body corporate when he ceases to have a share in the common property as contemplated in s 34(2). Section 34(2) provides in turn that when the ownership in every section is held by a person or persons other than the developer, the developer shall (subject to the provisions of s 25(1)) cease to have a share or interest in the common property. The practical effect of these provisions is thus that when the developer gives transfer of the last section or sections held by him, he ceases to have a share or interest in the common property and thus ceases to be a member of the body corporate, so that any exclusive use area still registered in his name will devolve upon the body corporate.

[18] The supplementary affidavit filed at the court's request reveals that the last sections owned by SDD were transferred to third parties in 2003. It follows that upon such transfer in 2003 the parking bay still registered in SDD's name (by which I mean the exclusive use right in respect of the parking bay) vested in the body corporate. This may seem a hard result where the exclusive use right has been the subject of a sale by the developer and is only still registered in its name due to an oversight. However there is no escape from the clear terms of the Act. It is of interest to note that this very problem was apparently debated at the Registrars' Conference of 2006 in relation to s 27(4)(b).[4] In the case they considered the exclusive use right was registered in A' name. A sold a unit and the exclusive use area to B and there were then successive transactions in which the unit and exclusive use area were sold by B to C, by C to D and finally be D to E. Due to an oversight only the unit had on each occasion been transferred. The Registrars' conclusion (in the form of a Conference Resolution) was that if A was still a member of the body corporate transfer could and should be passed by registration of notarial deeds in accordance with the successive sales; but that if A had ceased to be a member of the body corporate (because he no longer owned a unit) the right of exclusive use vested in the body corporate in terms of s 27(4)(b).

[19] The applicant's attorney submitted in written argument that SDD had not, after selling the bay to Humphrey, remained the 'true owner' of the parking bay, and that Humphrey (and thus presumably now the applicant) became the '*de facto* owner' of the bay. I do not think the addition of the words 'true' or '*de facto*' add anything to the enquiry. In order to conclude that the applicant is the 'owner' of the exclusive use area one would need to find that the right of exclusive use was transferred to him and that he is thus currently vested with (ie the holder) of the right. The applicant is not the holder of the right. A right of exclusive use created under s 27 (as distinct from rule-based rights of exclusive use under s 27A) is transferred by registration of a notarial deed: see ss 27(1)(b), 27(3) and 27(4)(a). This is in my view the sole way of becoming the holder of a right of exclusive use created under s 27 (save of course for the vesting of such rights in the body corporate pursuant to ss 27(1)(c) and 27(4)(b)). The right was not transferred by SDD to Humphrey by registration of a notarial deed with the result that Humphrey was never the holder of the right. There was also

[4] See Van der Merwe *Sectional Titles, Share Blocks and Time-sharing* Vol 1 para 11.5.3.

no transfer to the applicant by registration of notarial deed, whether from SDD or Humphrey.

[20] The case must thus be approached on the basis that the applicant is seeking to have registered in his name an exclusive use area which is currently vested in the body corporate (the second respondent). The State has no interest in the relief sought by the applicant and no representative of government needs to be joined

Section 33 of the Deeds Registries Act

[21] The founding papers did not explain the source of the court's power to grant the requested relief. I put to counsel, and she did not contest, that the only source of jurisdiction was s 33 of the Deeds Registries Act 47 of 1937 ('the DR Act'). Section 33(1) reads thus:

'Any person who has acquired in any manner, other than by expropriation, the right to the ownership of immoveable property registered in the name of any other person and who is unable to procure registration thereof in his name in the usual manner and according to the sequence of the successive transactions in pursuance of which the right to the ownership of such property has devolved upon him, may apply to the court by petition for an order authorizing the registration in his name of such property.'

The holding of a registered right of exclusive use does not strictly constitute ownership of immovable property. However, s 27(6) of the ST Act deems a registered right to exclusive use to be for all purposes a right to immovable property. And s 90 of the DR Act includes in the definition of 'owner' the registered holder of a real right in immovable property. I think the holding of a registered right of exclusive use thus constitutes the ownership of immovable property for purposes of s 33 of the DR Act.

[22] One of the reservations which I had about the present application concerned the scope of the words 'has acquired … the right to the ownership of immoveable property' in s 33(1). The few reported decisions on s 33 are cases where the applicant had acquired ownership of the property but could not obtain registration in his name in the usual way. The most obvious example is where a person has

become the owner by acquisitive prescription[5] though there are other ways in which this could occur (including the State's acquisition of ownership of land in terms of the principles governing *bona vacantia* and statutory provisions such as s 27(1)(c) of the ST Act). This view of s 33(1) appeared to be supported by the broader statutory context. The preceding two sections (ss 31 and 32) deal with the expropriation of land and servitudes and the vesting of land and servitudes in the State by legislation. These are cases where the State becomes the owner of the land or the holder of the servitude without registration.[6] Section 33(1) goes on to deal with cases where a person has acquired the right to ownership of property in any manner other than by expropriation, suggesting that s 33(1) caters for cases of acquisition of ownership in all ways other than those covered by ss 31 and 32. It would arguably make sense to confine s 33(1) to such cases, since registration in the applicant's name then (as in the case of ss 31 and 32) merely brings the land register in line with the actual legal position.

[23] Despite the applicant's allegation that he is the owner of the parking bay, he clearly is not. Ownership vests in the body corporate pursuant to s 27(1)(c) of the ST Act. The applicant has (or had) a personal contractual claim against Humphrey for transfer of the parking bay (by registration of a notarial deed of cession), an obligation Humphrey could only perform by first himself enforcing his personal right of transfer against SDD (assuming he had indeed bought the bay from SDD). If a s 33(1) application can only be brought by a person who is in fact the owner, the applicant could not obtain the desired relief.

[24] However, and despite my earlier reservations, I am on further reflection satisfied that the scope of s 33(1) of the DR Act is wider and includes the case of a person with a personal right to claim ownership, even though he is not yet owner.

[25] Firstly, the phrase 'right to the ownership of immoveable property' is not the natural way to express the right of ownership itself. If s 33(1) were confined to ownership, the section would simply have referred to any person who 'has acquired

[5]See, for example, *Ex parte Glendale Sugar Millers (Pty) Ltd* 1973 (2) SA 653 (N); *Ex parte Van der Horst* 1978 (1) SA 299 (T).
[6]For the position in regard to expropriation, see s 8(1) read with s3(3) of the Expropriation Act 63 of 1975 – ownership vests in the State on the date of expropriation without the need for registration.

… ownership of immoveable property'. Furthermore, s 33(9) provides that registration under s 33 has 'the effect of vesting such person with a title to such property which shall be liable to be annulled, limited or altered …' etc. The reference to vesting the applicant with title suggests that registration under s 33(1) can have the effect of conferring a right of ownership which the applicant did not previously have. And then there is s 33(10) which states that the applicant shall not be liable (upon registration under s 33) to pay any tax, duty, quitrent or interest thereon which the owner or any intermediate holder of the right to such property may have become liable to pay 'unless he shall by agreement have bound himself to pay such tax, duty, quit rent or interest'. The lawmaker in this provision contemplated that there might be a person other than the applicant who was the 'owner'. Moreover, I find it difficult to conceive of a case where an agreement of the kind envisaged by s 33(10) could exist in circumstances where the person in question had already acquired ownership, since the circumstances in which ownership can be acquired without registration of transfer are cases where the *causa f*or the acquisition of ownership is not a contract.

[26] The history of s 33 places the matter beyond doubt. The forerunners of s 33 were the provincial statutes dealing with so-called derelict lands. Their provisions are quoted and briefly explained in Court and Haylett *Practice and Procedure in Conveyancing* 2nd edition (1954) at 131-137.[7] In the Cape Colony the Titles Registration and Derelict Lands Act 28 of 1881 applied to any person 'who shall, by prescription, or by virtue of any contract or transaction, or in any other manner, have acquired the just and lawful right to the ownership of any immoveable property' (my underlining). Similar wording was used in the Transvaal and Orange River Colony statutes. The reference to the acquisition of a 'right to the ownership' of property by virtue of a contract or transaction (and not only by prescription) points to the inclusion of personal rights to claim ownership. Provincial legislation shows that these provisions were applied not only to cases where an applicant was already the owner by virtue of acquisitive prescription but also to cases where the applicant had a personal claim to acquire ownership.[8]

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[7]And see also *Glendale Sugar Millers supra* at 656H-657H.
[8]See, for example, *Estate J Cundill* (1880) 1 NLR 190; *In re Miller* (1881) 2 NLR 87; *Ex parte Durr* (1886) 4 SC 147; *In re Naidoo* (1902) 23 NLR 367; *Ex parte Meyer* 1914 CPD 459; *Ex parte Vilikazi* 1939 WLD 217.

[27] For example, in *Ex parte Durr* (1886) 4 SC 147 the petitioner was in possession of the whole of a farm but due to oversight he and several intermediate predecessors had only received transfer of a half-share and a quarter-share respectively of the farm. The registered owner of one of the outstanding shares in the farm had been sequestrated and his trustee had died, while the registered owner of the other outstanding share in the farm was deceased and his estate had been finally wound up. In each of the intermediate but erroneous transfers, transfer duty had been paid with reference to the value of the larger share and not with reference to the smaller share erroneously transferred. Dwyer J (dissenting) held that the Cape statute applied only where it was impossible to obtain transfer and not merely where it was difficult. De Villiers CJ (with whom Smith J concurred) disagreed and granted the petition, observing as follows:

'I cannot agree with my brother Dwyer that the Act does not apply. It was to meet difficulties of this kind, I believe, that the Act was passed. The two important matters which the Court has to provide against in this application are, first, to take care that the revenue is not defrauded; and, second, that all persons interested should have full and due notice of the application.

It appears from the facts that the revenue cannot be defrauded of any rights by this order, because transfer was passed upon the supposition that the whole land was transferred, and therefore the purchase price which was paid would not have been more if the whole land had been transferred. And, in order that no person interested may be prejudiced, due notice must be given; and there must also be some publication in the *Gazette* giving the same notice.

In the present case, the land stands registered in the name of two persons; one has died, and her executor has administered the estate; the other is insolvent, and the trustee of the insolvent estate has died, and the question is now whether we are to compel the applicant to go through the process of obtaining the appointment of a trustee, and of bringing an action against him, and upon obtaining transfer from him, to proceed against all the intermediate parties. I think not; of the persons in whose name the property stands registered, one is dead and one insolvent; and, as it is practically impossible for the applicant to obtain transfer, I think the Act applies, and that the Court ought to grant the rule nisi.'

[28] The provincial statutes were not initially repealed with the introduction of the DR Act in 1937. Section 33 in its initial form entitled an applicant (in circumstances similar to those now to be found in s 33(1)) to apply to a statutory Standing Commission for registration. The phrase 'has acquired … the right to the ownership of immoveable property' as found in the provincial legislation was adopted. The procedure for petition to court under the various provincial statutes continued to exist until s 33 was brought substantially into its current form and the provincial legislation repealed by the Deeds Registries Amendment Act 43 of 1957. Section 33(1) in its original and amended form did not (as the provincial statutes had done) refer to specific causes of acquisition (such as prescription, agreement or transaction), instead opting for the wide expression 'in any manner, other than by expropriation'. The lawmaker did, however, adopt from the earlier statutes the phase 'has acquired … the right to the ownership of immoveable property', and this strongly supports a conclusion that no material change in the scope of the new countrywide provision was intended.

[29] I thus conclude that although the applicant cannot allege that he is the owner of the parking bay, this does not in itself preclude reliance on s 33(1).

Right to ownership

[30] The question remains whether the applicant has a right to ownership of the kind contemplated in s 33(1). In the discussion which follows I shall assume in favour of the applicant, despite the absence of satisfactory evidence, that Humphrey in fact concluded a deed of sale with SDD for the purchase of the parking bay.

[31] Where a person is not yet the owner of property but is one on whom the 'right to the ownership' of the property has allegedly devolved by way of a transaction, the person must I consider establish that he has an extant right to claim transfer of the property but that it is not possible to obtain registration of transfer in the usual way. This would typically be because the registered owner and (where applicable) intermediate purchasers and sellers of the property are no longer available to give transfer. The *Durr* case, from which I quoted earlier, affords an example.

[32] The present case is quite different. Ownership of the parking bay vests in the body corporate, a juristic entity which exists, is active and has been cited as a respondent. Although SDD has been deregistered and Humphrey cannot be traced, those circumstances are not the real explanation for the difficulty confronting the applicant. The true obstacle in the applicant's way is that ownership of the parking bay vests in the body corporate, with whom neither the applicant nor Humphrey contracted. Even if SDD were still in existence, this would not alter the fact that in 2003 (about four years prior to its deregistration) SDD lost ownership of the parking bay pursuant to s 27(1)(c) of the ST Act. The result is that Humphrey, even if he were still on the scene and even if SDD were still in existence, could not obtain transfer of the parking bay from SDD in order to give transfer in turn to the applicant.

[33] This naturally does not mean that Humphrey did not conclude a valid contract with SDD or that the applicant did not conclude a valid contract with Humphrey (since a seller may sell what he does not own) but it does mean that the applicant's right against Humphrey would be confined to a claim for damages for the latter's failure and inability to give transfer of the parking bay. Under these circumstances I do not think it can be said that the right to the ownership of the parking bay has devolved upon the applicant.

Inability to obtain transfer

[34] The above reasoning justifies the further conclusion, also fatal to the application, that the applicant has not demonstrated that he is 'unable' to obtain registration in the usual way.

[35] The entity which owns the parking bay (the body corporate) is alive and well, and could give transfer to the applicant if it were willing to do so. Because the body corporate has become the owner of the parking bay in terms of s 27(1)(c) of the ST Act, the body corporate is entitled in terms of s 27(1)(d) to apply to the Registrar for the issuing in its favour of a certificate of real right of exclusive use. Armed with this certificate, the body corporate could by notarial deed transfer the parking bay to the applicant, subject to compliance with ss 27(2) and 27(3).

[36] It may be said that the applicant has no right to compel the body corporate to transfer ownership to him because he has no contract with the body corporate. That is true, and it is for that reason that I consider that the applicant has not acquired a right to the ownership of the parking bay within the meaning of s 33(1) of the DR Act. If, despite the equity of the applicant's case, the body corporate is not willing or entitled to transfer the parking bay to the applicant free of consideration (I hope it can), the court cannot use s 33(1) to deprive the body corporate of its ownership. The applicant would then be confined to his contractual claim for damages against Humphrey. If, on the other hand, the body corporate is willing to transfer ownership of the parking bay to the applicant in order to give effect to what SDD, Humphrey and the applicant all intended, an order under s 33(1) is not needed nor competent, because the applicant would then be able to obtain registration in the usual way.

[37] I do not lose sight of the fact that the body corporate has been cited as a respondent and has not opposed the relief sought by the applicant. The applicant's attorney in his written submissions highlighted this point by stating that the body corporate is not asserting any right of ownership. This cannot justify the granting of relief which is otherwise incompetent. If the body corporate's non-opposition signifies that it is willing to transfer the parking bay to the applicant free of consideration, that must occur in the usual way. (Whether the body corporate is aware that it is the owner of the parking bay and has agreed to surrender its ownership to the applicant is by no means clear. The contention that ownership of the parking bay vests in the body corporate was not raised in the founding papers served on the respondents. The supplementary answering affidavit by the applicant's attorney, where s 27(4)(b) – more accurately s 27(1)(c) – was raised for the first time, was not, so far as I can tell, served on the respondents. The supplementary affidavit of 18 January 2013 was filed shortly before the return day for the benefit of the court and on the supposition that the respondents had elected not to oppose and thus need not be served. The body corporate may well have been overlooked, as the applicant and his attorneys initially did, the provisions of s 27(1)(c).)

Discretion

[38] In terms of s 33(6) the granting of relief under s 33 is discretionary. I do not think the discretion arises in this case, because the applicant has failed in my view to bring himself within the jurisdictional requirements of s 33(1). There may, however, be cases where an applicant can bring himself within the terms of s 33(1) but where a court might nevertheless in the exercise of its discretion decline to grant relief. This might particularly be so where there is another party who could more appropriately obtain the relief and where the grant of relief to the applicant in question would deprive the fiscus of transfer duty.

[39] It so happens that a case I dealt with in Third Division several weeks ago affords an illustration. There the land was still registered in the name of a person (X) who had died in 1926. The executor in the deceased estate of another person (Y) who had acquired ownership of the land by acquisitive prescription sold the land to Z on condition that the purchaser (Z) should obtain registration in her own name in terms of s 33. Z brought such an application which was not opposed. The Registrar of Deeds filed a report in which he raised no objection. The case was covered by s 33(1), because Z had acquired a contractual right to the ownership of the property and because transfer could not be effected by Y to Z in the usual way since the land was registered in the name of Z who had died many years previously and whose estate had been finally wound up. Nevertheless, the appropriate person to have brought the s 33 application was Y's executor, because Y had acquired ownership by acquisitive prescription and because Y's executor was still in office and the deceased estate had not been finally wound up. Upon obtaining registration in terms of s 33, the executor could then give transfer to Z in the usual way. In that scenario, Y's executor would pay transfer duty in terms of s 33(10) upon registration in the estate's name, and further transfer duty would be payable on the transfer from Y's estate to Z. To have permitted Z to obtain registration directly under s 33 would mean that transfer duty would be paid only once, to the prejudice of the fiscus. (After I put difficulties along these lines to counsel in the earlier case, the application was withdrawn.)

[40] Because of the transfer duty implications of s 33 applications, I believe it would be a salutary practice to require the rule nisi in such applications to be served on the South African Revenue Service unless it is perfectly clear that the fiscus' interests could not be prejudiced by the grant of the relief.

Conclusion and order

[41] From what I have said above it is apparent that the application must fail. I leave open, without expressing any opinion thereon, the possibility that the vesting of the exclusive use right in the body corporate in terms of s 27(1)(c) so vested subject to the personal obligation which the developer owed to Humphrey to give him transfer of the right and that the body corporate is thus under a contractual obligation (delegated to it by operation of law) to effect transfer to Humphrey who would then be obliged to effect transfer to the applicant. Whether in those circumstances, and because of Humphrey's disappearance, relief could and should be granted in terms of s 33 of the DR Act and at whose instance is not something I am called upon to decide. The application was not presented on that basis and the body corporate has not had occasion to consider its position in relation to such a contention.

[42] My order is that the application is dismissed with no order as to costs.

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ROGERS J

APPEARANCES

For Applicant: L VAN DER WALT

Instructed by:

STBB Smith Tabata Buchanan Boyes

Cape Town