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IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between :

ERLAX PROPERTIES (PROPRIETARY) LIMITED ..... Appellant

and

THE REGISTRAR OF DEEDS, JOHANNESBURG ..... First Respondent

THE BODY CORPORATE OF CHELSEA SQUARE ..... Second Respondent

FRANK JOHN McCLEMENT ..... Third Respondent

RENA MARGARET MATHEWS ..... Fourth Respondent

ANDRE EDWARD BEDDY and

MARGARET JANET BEDDY ..... Fifth Respondent

YOLANDE STELLA THERESE COMTURSI ..... Sixth Respondent

ELIN-MARLISE PRINZEN ..... Seventh Respondent

ALFRED ZIMMERMAN ..... Eighth Respondent

IAN BABICEAU ..... Ninth Respondent

Coram: JOUBERT, E M GROSSKOPF, FRIEDMAN, NIENABER J J A

et KRIEGLER A J A

Date of Hearing : 21 May 1991

Date of Delivery : 29 November 1991

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J U D G M E N T

JOUBERT : J A

This is an appeal against a judgment of GOLDBLATT A J in the Witwatersrand Local Division dismissing an application of the appellant for a declaratory order against the respondents. The judgment of the Court a quo is fully reported in 1990(3) SA 262 (W). With leave of the Court a quo the appellant appeals to this Court.

The appellant ("Erlax") is the developer of a sectional title scheme, known as Chelsea Square (the "scheme"), which was established on Erf 1514 situated in Berea Township, Johannesburg, in accordance with the provisions of the Sectional Titles Act No 66 of 1971. The scheme was registered in the Deeds Registry, Johannesburg, on 10 September 1985. This was effected in terms of sec 8 (1)(a) by the registration of sectional plan No SS 171/1985

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(the "sectional plan") and the opening of a sectional title register relating to the land subject to the scheme. Simultaneously therewith the Registrar of Deeds closed certain entries in the land register with reference to Erf 1514 (sec 8(2)(a)). In law Erf 1514 ceased to exist. The Act provides for the creation of units, each consisting of a section, as defined, together with an undivided share in the common property. "Common property" refers to the land on which the buildings are situated and such parts of the buildings are not included in a section. Thus it is stated in LAWSA, vol. 24 s.v. Sectional Titles and Shareblocks para. 218: "All lands included in a sectional title scheme, whether it is the soil under the building, the land for for the yet undeveloped parts of the scheme or developed land, is considered to be common property."

Erlax, as developer, envisaged that

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the development of the scheme was to proceed in two phases. Technically such a development is referred to as a "phased development" of a scheme. According to the first phase development the scheme would initially comprise 8 units. Each unit was to consist of a duplex flat together with a carport (the "section") and an undivided share in the common property apportioned in accordance with the participation quota of its section. See sec 1 s.v. "unit". The second phase development was to be undertaken <u>in the future</u> by the development of an additional 14 units on the common property in accordance with the provisions of sec 18(1). Section 18(1) reads as follows:

> "Where a building, in respect of which a sectional plan has been registered under this Act, is to be extended in such a manner that <u>an existing section is to be added to</u> - - - -, the developer or,

if the developer has ceased to have any share in the common property, the body corporate, with the consent in writing of all the owners of sections and of all holders of mortgage bonds shall -

(a) prepare a scheme in respect of the extension and, in terms of section 4, submit that scheme to the local authority for approval;

(b) if the scheme in question is approved by the local authority, upon the extension being certified by an architect or a land surveyor as being sufficiently complete for occupation, apply to the registrar for the registration of a plan in respect of the relevant extension."

(My underlining).

Section 18(1) prescribes the procedure to be followed by a

developer in implementing his right of extension of an existing development scheme.

On 10 September 1985 the Registrar of Deeds, acting under sec 8(2)(d), simultaneously with the opening of the sectional title register, issued to Erlax, as developer, a certificate of registered sectional title in respect of each of the initial 8 units comprised in the scheme. A duplicate of each sectional title deed was incorporated by the Registrar of Deeds in the sectional title register. See sec 1 s.v. "sectional title register". After the opening of the sectional title register Erlax in accordance with the provisions of sec 8 A(1) sold and transferred to purchasers all the units in the scheme, except for unit No 7 of which it has remained the registered owner. Transfer of the sold units to the purchasers was effected by means of endorsements made by the Registrar of Deeds in the prescribed

form on their sectional title deeds (sec 11(1)(a)).

By divesting himself of the ownership of all units comprised in a scheme a developer would cease to have any share in the common property (sec 26(2)). He would accordingly cease to have any say in the affairs of the scheme. In order to secure its right as developer to extend the scheme for the second phase development of the additional 14 units on the common property, Erlax retained the ownership of unit No 7.

Furthermore, simultaneously with the opening of the sectional title register on 10 September 1985, Erlax in terms of sec 5(3)(d)(i) caused the sectional plan to be endorsed with certain conditions of sectional title "burdening the sections and common property and binding the owner/s from time to time, his/their heirs, executors, administrators, successors or assigns as well as the holders

of sectional mortgage bonds and other registered real rights, namely :-

1. No person whose consent is required in terms of section 18 of the Sectional Titles Act shall be entitled to withhold his/her/its written consent to the developer as owner of Unit No 7, preparing and submitting a scheme to the local authority in terms of the said section for approval and upon such approval, taking all necessary steps to erect additional buildings on the land in terms of and as indicated on the sketch plan filed of record in my Sectional Titles Protocol, and thereafter applying for the registration of a sectional plan, provided such additional buildings shall harmonise with the existing buildings on the land and shall not exceed two storeys in height nor a total bulk

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of 1600 square metres. Furthermore, not more than 14 units shall be comprised in the said additional building.

2. All persons having an interest in the sections and common property shall be obliged to allow the developer to exercise his positive right to proceed with the development in the manner envisaged herein, and no persons having an interest in the sections and common property shall be entitled to interfere with or obstruct the developer from erecting on the common property the additional buildings in terms of and as indicated on the said sketch plan; nor shall such persons have any rights of access to or use of that portion of the common property described and identified on the said sketch plan

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as 'the remaining extent' until such time as the aforesaid additional buildings have been completed and the sectional plan/s thereof registered, provided that the developer shall pay all rates and taxes and imposts due in respect of such portion while this condition remains applicable.

3. No person mentioned in paragraph 2 above shall have any right to or in any unit comprised in the said additional buildings, of which units the developer shall be the sole owner, and the certificate of registered sectional title shall be issued to and in the name of the developer who will be entitled to dispose of or otherwise deal with such units for his own and exclusive benefit and account.

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4. The owners shall not be entitled to refuse to acknowledge and accept that upon registration of the sectional plan/s of the aforesaid additional buildings their participation quotas will be reviewed and adjusted as provided for in the Sectional Titles Act No 66/1971."

(My underlining).

In the certificates of registered sectional titles in respect of each of the 8 units comprised in the scheme reference was made inter alia to the aforementioned conditions of sectional title in the following manner:

> "- - and that the said owner's title to the said section and undivided share in the said common property is subject to or shall benefit by -
> (i) the servitudes, other real

rights and conditions, if any, endorsed on the said sectional plan and the servitudes referred to in Section 19 of the Sectional Titles Act, 1971;

and

(ii) - - - - - - - - ."

(My underlining).

Accordingly all the sections and the common property comprised in the scheme were made subject to the said registered conditions of sectional title. Moreover, the 14 additional sections to be erected on the common property were indicated on a sketch plan as a schedule to the sectional plan.

Although Erlax originally intended itself to undertake the development of both phases of the scheme it decided, after the completion of the first phase development, to dispose of its ownership of unit No 7 as well as its rights as developer under sec 18(1) and (8) to extend the

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scheme for the second phase development of the additional 14 units on the common property (as provided for in the aforementioned conditions of sectional title), to a third party. The latter, however, requires transfer of the developer's right of extension to be effected to it by registration in a deeds office. In order to do so Erlax claims to be entitled in terms of sec 64(1) of the Deeds Registries Act No 47 of 1937 to a certificate of registration of a real right in respect of its developer's right of extension.

The said sec 64(1) reads as follows:

> "Any person who either before or after the commencement of this Act has transferred land subject to the reservation of any real right in his favour (other than a right to minerals) may on application in writing to the registrar accompanied by the title deed of the land obtain a certificate of registration of that real

right as nearly as practicable in the prescribed form."

Form Y is the prescribed form.

Since the attitude of the Registrar of Deeds, Johannesburg, was that Erlax was in the circumstances not entitled to a certificate of registration without the authority of an order of court, Erlax applied for a declaratory order in the Court a quo, citing the following respondents, viz. the Registrar of Deeds, Johannesburg, as first respondent; The Body Corporate of Chelsea Square as second respondent; and the registered owners of seven of the eight units comprising the scheme as third to ninth respondents. The respondents did not oppose the application and abided the decision of the Court a quo save that the Registrar of Deeds filed a report containing his reasons why the declaratory order should

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not be granted. I shall in due course refer to his report. The attitude of the respondents remains unaltered as regards the present appeal.

The terms of the declaratory order sought have been set out fully in the reported judgment of the Court a quo (pp 263 H to 264 C).

In this Court, Mr Heher, on behalf of Erlax, directed his argument to the relief claimed in prayer 1 of the declaratory order, viz. :

> "1. Declaring that the applicant is entitled to obtain a certificate of registered real rights under s 64(1) of the Deeds Registries Act 47 of 1937 in respect of the rights acquired by and reserved to the applicant in terms of s 18(1) of the Sectional Titles Act 66 of 1971 and the sectional title conditions registered in accordance with s 5(3)(d)(i) of that Act to extend the sectional title scheme

for the development known as 'Chelsea Square' by the addition of a further 14 units."

In his report the Registrar of Deeds made the following relevant remarks in regard to prayer 1 of the declaratory order:

"2.1 The Sectional Title Scheme concerned was registered in terms of the Sectional Titles Act No 66/1971, which was repealed in its entirety and replaced by Act 95/1986 with effect from the 1st of June 1988. In terms of Section 60(1)(b) of the said Act 95/1986, the right of extension of a building acquired in terms of Section 18 of the said Act 66/1971, shall be completed or exercised in terms of the provisions of the 1971 Act as if it has not been so repealed.

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2.2 It is my respectful submission that a certificate of real rights cannot be issued in terms of Section 64(1) of the Deeds Registries Act No 47/1937, as amended, as no (real) right was reserved on the transfer of land, as envisaged by the said Section 64(1)."

The contents of para 2.1 are correct and indisputable. The Court a quo agreed with the submission made in para 2.2. The correctness of the said submission, as accepted by the Court a quo, was challenged by Mr Heher in this Court.

The first question to be decided is whether or not the right to extend the scheme to include the additional 14 units is a real right capable of registration. Without embarking upon a jurisprudential discourse regarding the nature of a real right, it suffices to say for purposes of this judgment that a real right consists basically of a legal

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relationship between a legal subject (holder) and a legal object or thing (res) which bestows on the holder a direct power or absolute control over the thing. The content of the absolute control may vary depending on the various real rights which may range from full ownership to jura in re aliena and other real rights. "To determine whether a particular right or condition in respect of land is real and thus registrable the courts have developed two requirements, namely -

(a) the intention of the person who creates the real right (testator or contracting party) must be to bind not only the present owner of the land, but also his successors in title; and

(b) the nature of the right or condition must be such that registration of it results in a 'subtraction from the dominium' of the land against which it

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is registered."

(LAWSA, vol 27 s v Things para 46).

It appears clearly from the introductory portion of the conditions of sectional title that the intention of Erlax as developer in creating and imposing them as burdening the initial 8 units, including unit No 7, was to bind their owners and successors-in-title from time to time. That intention was also manifested in the certificates of registered sectional titles of the 8 units by the express reference to the conditions of sectional title endorsed on the sectional plan. There was accordingly compliance with the first of the said two requirements.

There is also compliance with the second of the aforementioned requirements, since the registration of the right to extend the scheme to include the additional

14 units resulted in a diminution of the ownership of each of the initial 8 units in regard to their undivided shares in the common property in accordance with their respective participation quotas as provided for in condition 4 of the registered conditions of sectional title. In other words, condition 4 constituted a burden on the common ownership of the initial 8 units, including unit No 7.

Hence the first question must be decided affirmatively, viz. that the right to extend the scheme to include the additional 14 units, as provided for in the conditions of sectional title, is a real right in land which is, in principle, registrable in a deeds registry. Moreover, condition 1 of the conditions of sectional title restricts the owners of the units, their successors in title and the holders of sectional mortgage bonds from withholding their consent to the subsequent development of the additional units

by the developer.

The next crucial question is to determine the nature of the real right to extend the scheme to include the additional 14 units. Inasmuch as the real right to extend the scheme was constituted over the common property of the initial 8 units it follows that the latter, including unit No 7, are servient tenements (praedia servientia). In whose favour was the real right as a servitude made? Was it established as a praedial servitude in favour of unit No 7 as the dominant tenement (praedium dominans)? Or was it created as a personal servitude in favour of Erlax as developer?

In the present matter the following indicia militate against the construction of the real right to extend the scheme as a praedial servitude in favour of unit No 7 as a dominant tenement, viz.:

1. No reference to a dominant tenement was either

expressly or impliedly made in the conditions of sectional title. No unit - not even unit No 7 - was to be entitled to the right of extension. On the contrary, the said conditions were "burdening the sections and common property and binding the owners from time to time".

2. It is of the essence of a praedial servitude that it should be for the economic benefit or advantage (praedio utilitas) of the dominant tenement. D 8.1.15 pr, Huber H R 2.43.9, Van der Keessel ad Gr 2.33.4, Voet 8.4.15 (Gane's translation): "Besides just as by rule a servitude is not established for the benefit of any other than the dominant tenement, so on the other hand such a servitude is not correctly granted if it would bring no benefit either in the present or the future to the dominant tenement".

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It is, however, apparent from the very nature of the real right to extend the scheme that it does not confer any economic benefit or advantage on any unit as a dominant tenement. Nor can an intention be gathered from the conditions of sectional title to confer any economic benefit or advantage on any unit as a dominant tenement.

In his written supplementary heads of argument Mr Heher contends that the developer's right of extension is not a personal servitude but a praedial servitude. He relies on the fact that the expression "developer" in the conditions of sectional title should be construed in the same sense as the word "developer" in sec 1 which includes a developer's "successor-in-title". According to his contention it could relate to "any successor-in-title" in which event "the servitude would be praedial since the identity of the

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owner is purely incidental to the land itself, the only claim to the right arising from ownership of particular land".

This contention, however, overlooks other relevant provisions of the Sectional Titles Act No 66 of 1971. According to sec 26(3) a developer has a successor-in-title where he has alienated in one transaction the whole of his interest in the land and the buildings comprised in the scheme. That is not the factual position in the present matter where Erlax has alienated seven of the 8 units of the scheme while it retained Unit No 7 for itself. Moreover, if Erlax were to dispose of its ownership of Unit No 7 to a purchaser, as it intends doing, it would in terms of sec 18(1), read with sec 26(2), thereby cease to have any share in the common property. Thereupon The Body Corporate of Chelsea Square would acquire its right of extension. There is accordingly, in my judgment, no substance in this contention in favour

of the construction of the developer's right of extension as a praedial servitude.

It now remains to consider whether or not the real right to extend the scheme was created as a personal servitude in favour of Erlax as developer. In Willoughby's Consolidated Co Ltd v Copthall Stores Ltd, 1913 AD 267 at p 282 INNES J authoritatively described the essential characteristics of a personal servitude as follows: "From the very nature of a personal servitude, the right which it confers is inseparably attached to the beneficiary. Res servit personae. He cannot transmit it to his heirs, nor can he alienate it; when he dies it perishes with him (Voet 8.1.4; Louw v Van der Post, etc.)".

There are in the present matter indicia which strongly support the construction that the real right to extend the scheme was intended to be a personal servitude

in favour of Erlax as developer, viz:-

1. Condition 2 of the conditions of sectional title expressly refers to the obligation of "all persons having an interest in the sections and the common property to allow the developer to exercise his positive right to proceed with the development in the manner envisaged herein" (My underlining).

2. It is clear from condition 3 of the said conditions that the owners of the initial 8 units (including Erlax as owner of No 7) would gua owners have no right to or in any unit comprised in the scheme of the additional 14 units. The latter would belong solely to Erlax as developer in whose name the certificates of sectional title in respect of them would be issued and who would be entitled to deal with them "for his own and exclusive benefit and

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account". (My underlining). Since Erlax as developer financed the scheme comprising the initial 8 units for its own benefit and account, it stands to reason that Erlax as developer would also finance the second phase development of the additional 14 units on the common property for its own benefit and account.

3. The real right to extend the scheme was inseparably attached to Erlax qua developer of the scheme. It would accordingly retain this right of extension as long as it continued to qualify as a developer (See LAWSA vol 24 s.v. Sectional Titles and Share Blocks para 297). In order to continue to qualify as a developer Erlax would have to retain the ownership of at least one unit in the scheme, i.e. it would have to remain owner of unit No 7. Compare secs 18(1) and 26(2).

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In the light of the aforementioned considerations I am of the view that on a proper construction of the conditions of sectional title the right of extension was created as a personal servitude in favour of Erlax as developer.

Is the validity of this personal servitude affected by the legal principle that the holder of a personal servitude and the owner of a servient tenement cannot be the same person, since a person cannot have a servitude over his own property (nulli res sua servit)? See de Groot 2.37.2, 2.39.17; Van Leeuwen RHR 2.19.6, C F 1.2.14.7; Voet 7.4.3, 8.4.14, 8.6.2. In the present matter the personal servitude of Erlax as developer was constituted over the entire servient land, i.e. the common property which belongs in undivided shares to the initial 8 units, for the purpose of erecting 14 additional sections on it. Since the common property as

servient land is indivisible among the initial 8 units, it follows that the personal servitude of Erlax as developer can exist over the entire common property as servient land irrespective of the fact that Erlax is also the owner of unit No 7 which is entitled to an undivided share in the common property. In my judgment it cannot therefore be said in the absence of any subdivision of the common property that the personal servitude of Erlax as developer is affected by merger (confusio) in accordance with the maxim nulli res sua servit. Compare D 8.2.30.1, D 8.3.27 in fine and Voet 8.6.2 which deal with praedial servitudes. I am mindful of the fact that according to Caepolla (obit 1477) in his authoritative Tractatus I De Servitutibus tam Urbanorum quam Rusticorum Praediorum, 1759, cap. 10 nr 1, all servitudes, with the exception of usufruct, are indivisible. Although the right of extension is a personal servitude in favour of Erlax as

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developer it is, however, not a usufruct, since it does not confer on Erlax the right to use and enjoy the fruits of the servient land.

I have mentioned supra that sec 18(1) prescribes the procedure to be followed by a developer in the implementation of his right to extend an existing development scheme. The procedure is also referred to in conditions 1 and 2 of the registered conditions of sectional title. The Registrar of Deeds correctly indicated in para 2.1 of his report, supra, that sec 60(1) of the new Sectional Titles Act 95 of 1986 has preserved a developer's right to extend an existing development scheme acquired in terms of sec 18 of Act No 66 of 1971, as well as the completion of the extension in accordance with the provisions of Act No 66 of 1971, notwithstanding the repeal of Act 66 of 1971 with effect from 1 June 1988.

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The final question to be decided is whether or not Erlax is entitled to obtain a certificate of registered real rights under sec 64(1) of the Deeds Registries Act No 47 of 1937 in respect of its developer's right to extend the existing scheme by the addition of another 14 units. It is clear from the aforegoing that the Registrar of Deeds on 10 September 1985 performed the following acts of registration simultaneously, viz.:-

1. closed certain entries in the land register regarding Erf 1514 (sec 8(2)(a));

2. opened a sectional title register (sec 8(1)(b));

3. registered sectional plan No SS 171/1985 (sec 8(1)(a)) on which the conditions of sectional title imposed by Erlax as developer in terms of sec 5(3)(d)(i)) were endorsed, and to which a sketch plan of the 14 additional sections to be erected on the common

property was added as a schedule; and

4. issued to Erlax as developer certificates of registered sectional title in the prescribed form in respect of each of the 8 units with their undivided shares in the common property (sec 8(2)(d)) while a duplicate of each sectional title deed was incorporated in the sectional title register (sec 1 s.v. "sectional title register").

It is also clear from the conditions of sectional title, as endorsed on the sectional plan No SS 171/1985 and as referred to in the certificates of registered sectional title, that Erlax as developer on 10 September 1985 reserved to itself a right to extend the scheme by an additional 14 units. This reservation of its right to extend the existing scheme was effected simultaneously with the opening of the sectional title issue and the transfer of the 8 units

by means of registered sectional titles. In my judgment Erlax has accordingly complied with the provisions of sec 64(1) of the Deeds Registries Act No 47 of 1937.

In the result the appeal succeeds.

The following orders are granted:

1. The order of the Court a quo is set aside.

2. The following order is substituted for the order of the Court a quo :

(i) The applicant is entitled to obtain a certificate of registered real right under s 64(1) of the Deeds Registries Act 47 of 1937 in respect of its inalienable real rights acquired by and reserved to the applicant in terms of s 18(1) of the Sectional Titles Act 66 of 1971 and the sectional title conditions

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registered in accordance with s 5(3)(d)(i) of that Act to extend the sectional title scheme for the development known as 'Chelsea Square' by the addition of a further 14 units.

(ii) The Registrar of Deeds, Johannesburg, is authorised and directed upon application by the applicant to confer on it a certificate of registration of its inalienable real right referred to in (i) above.

C.P. JOUBERT, JA

FRIEDMAN J A concurred.

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Saaknr. 599/89

In the matter between:

ERLAX PROPERTIES (PTY) LTD	Appellant
and	
THE REGISTRAR OF DEEDS, JOHANNESBURG	First Respondent
THE BODY CORPORATE OF CHELSEA SQUARE	Second Respondent
FRANK JOHN McCLEMENT	Third Respondent
RENA MARGARET MATHEWS	Fourth Respondent
ANDRE EDWARD BEDDY and MARGARET JANET BEDDY	Fifth Respondent
YOLANDE STELLA THERESE COMTURSI	Sixth Respondent
ELIN-MARLISE PRINZEN	Seventh Respondent
ALFRED ZIMMERMAN	Eighth Respondent
IAN BABICEANU	Ninth Respondent

CORAM: JOUBERT, E M GROSSKOPF, FRIEDMAN, NIENABER, JJA et KRIEGLER AJA

HEARD: 21 May 1991

DELIVERED: 29 November 1991

J U D G M E N T

E M GROSSKOPF, JA

I have read the judgment of JOUBERT JA and agree with his main conclusions, but do not consider that they fully answer the case presented by the appellant. I therefore find it necessary to add some further reasoning to that set out in my brother's judgment.

I agree with JOUBERT JA that the right to extend the scheme so as to include the additional 14 units, as provided for in the conditions of sectional title, is a real right in land which is, in principle, registrable in a deeds registry. I also agree that section 18(1) of the old Act, read with section 26(3), precludes the appellant in the present case from alienating his rights as developer. In terms of these provisions he can do no more than dispose of his title to unit no. 7. If he were to do this, the body corporate would in terms of section 18(1) acquire the rights of extension granted by that section. The effect of these conclusions is that the appellant would not be able in law to dispose of its rights of extension as it proposes doing. Any order which this court may grant pursuant to the old Act could

accordingly not provide the benefit which the appellant sought to obtain by instituting the present proceedings.

The conclusion that the old Act does not avail the appellant does not, however, conclude the matter. The appellant also sought a further declaratory order in the following terms:

> "2. Declaring that the rights acquired by and reserved to the Applicant in terms of section 18(1) of the Sectional Titles Act, 1971 and the sectional title conditions registered in accordance with section 5(3)(d)(i) of that Act to extend the sectional title scheme for the development known as Chelsea Square by the addition of a further fourteen units are, by reason of the terms of section 60(9) of the Sectional Titles Act, 1986, deemed to have been reserved by the Applicant to itself in terms of section 25(1) of the last mentioned Act."

The background to this prayer is that the new Act introduced, in its section 25, much wider rights of extension. Section 25(1) provides inter alia as follows:

> "'A developer may ... 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 time, but within a period stipulated in such condition, for his personal

account -

(a) a further building or buildings; or

(b) a horizontal extension of an existing building; or

(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 of such sections."

In terms of section 12(1)(e) the registrar of deeds is obliged to issue the developer a certificate of real right in respect of any reservation made by him in terms of section 25(1), subject to any mortage bond registered against the title deed of the land.

A right reserved in terms of section 25(1) in respect of which a certificate of real right has been issued is for all purposes to be deemed to be a right to urban immovable property which admits of being mortgaged and may be transferred by the registration of a notarial deed of cession (section 25(4)). Moreover, a right reserved in terms of section 25(1) may be exercised by the developer or his successor in title thereto,

even though the developer or his successor-in-title, as the case may be, has no other interest in the common property (section 25(5)).

From the above provisions of section 25 of the new Act it is apparent that, had the appellant's right of extension derived from section 25(1) of the new Act, the appellant would have been entitled effectively to alienate it in the manner in which it wishes. The relief claimed in prayer 2 of the Notice of Motion, which I have quoted above, in effect seeks to enable the appellant to enjoy the benefits of the new Act. Whether this relief should be granted depends on the construction of certain of the provisions of section 60 of the new Act, to which I now turn.

The relevant subsections are subsections (1) and (9). They read as follows:

> "(1) Notwithstanding the repeal of the Sectional Titles Act, 1971 (Act No. 66 of 1971), by section 59 of this Act -
>
> (a) the registration of a sectional plan and the opening of a sectional title register in

respect of a development scheme which was prior to the date of coming into operation of this Act (in this section referred to as the commencement date) already approved by a local authority under the provisions of the Sectional Titles Act, 1971; or

(b) a right of extension of a building acquired in terms of section 18 of the Sectional Titles Act, 1971,

shall be completed or exercised in terms of the provisions of the Sectional Titles Act, 1971, as if it has not been so repealed: Provided that nothing in this Act shall prevent -

(a) the registration of a sectional plan and the opening of a sectional title register;

(b) the acquisition of a real right of extension; or

(c) the exercising of a right of extension,

in terms of the provisions of this Act.

.....

(9) Subject to the provisions of this section, anything done under a provision of a law repealed by section 59, shall be deemed to have been done under the corresponding provision of this Act."

Prayer 2 in the Notice of Motion expressly relies on subsection (9) and it will be convenient to deal first with that provision. Subsection (9) is a blanket savings provision applying generally to anything done under a provision of a law repealed by section 59. This covers the old Act and all its

amending acts.

The appellant seeks to invoke subsection (9) as follows. It is clear that the registration of the rights contained in paragraph 1 of the Condition of Sectional Title was brought about in terms of section 5(3)(d)(i) read with section 18(1) of the old Act. The appellant contends that the new Act contains provisions corresponding to the last-mentioned sections. In particular reliance is placed on sections 11(2), 11(3)(b), 25(1) and 25(9) of the new Act. Pursuant to section 60(9), the appellant says, these sections must now define its right of extension. The appellant thus argues that section 60(9) has imbued its right of extension under the old Act with the content and attributes of a right of extension under the new Act, and, in particular, with the power to alienate the right of extension under section 25(4). In considering this argument the essential question, it seems to me, is whether the two sections providing for rights of extension (viz. section 18(1) in the old Act, and section 25 in the new Act) can be regarded as

corresponding provisions for the purpose of section 60(9) of the new Act.

The use of the word "corresponding" in savings provisions like the present is very common. Clearly it does not require that the provisions to which it is sought to be applied must be identical. An earlier provision may "correspond" with a later one even though there are some differences between them. See, e.g., Oranjeville Dorpsbestuur v. Gulliver and Others 1970(1) SA 554 (O) at p. 556 E-H and Winter v. Ministry of Transport 1972 NZLR 539 at p. 541 lines 10 to 40. Whether there is a correspondence or not would depend on the nature and degree of the differences. As was stated by the New Zealand Court of Appeal in Winter's case, supra, at p. 540 lines 23 to 28:

> "We read 'corresponding' ... as including a new section dealing with the same matter as the old one, in a manner or with a result not so far different from the old as to strain the accepted meaning of the word 'corresponding' as given in the Shorter Oxford English Dictionary - 'answering to in character and function; similar to'".

In the present case there are vast differences between

section 18(1) of the old Act and section 25 of the new Act. I do not propose enumerating all of them. The basic difference seems to be the following. Section 18(1) of the old Act allowed the developer himself a limited right of extension with the consent of all the owners of sections and the holders of sectional mortage bonds. He was not, however, entitled to alienate his right of extension otherwise than by alienating the whole of his interest in the scheme in one transaction, and when he ceased to have a share in the common property, the right of extension passed to the body corporate. Section 25(1) of the new Act, on the other hand, permits the developer to reserve a right of extension with a wider ambit than that allowed by section 18(1) of the old Act, and without the consent of any other section owner. He may alienate his right freely - the body corporate acquires a right of extension only if the developer did not reserve a right for himself, or if his right has lapsed for any reason (section 25(6)). The relative disadvantage in which the body corporate is placed by section 25 as against its

position under section 18(1) represents, in my view, a substantial difference between the two sections.

In line with the different nature of the rights of extension granted by the respective provisions, different procedures were also laid down for their creation and exercise. Compare, for instance, the procedure laid down by section 25(2) of the new Act with that set out in section 18(1) of the old Act.

I am accordingly of the view that although both sections deal with rights of extension, the nature of the rights, and the manner of their creation and exercise, are so different that the respective provisions cannot be regarded as "corresponding" for the purpose of section 60(9) of the new Act.

This conclusion is, I think, fortified by the content and structure of section 60 of the new Act. Subsections (1) to (8) contain a number of specific savings and transitional provisions necessitated by the repeal of the old Act. Among these are the provisions of subsection (1) dealing with, inter alia, rights of extension. The fact that these specific

provisions were enacted is a clear indication, in my view, that the legislature did not regard the general provisions of subsection (9) as applicable to this topic.

In the alternative the appellant argued that it was entitled under section 60(1) of the new Act to the relief asked for in prayer 2 of the Notice of Motion. For present purposes section 60(1) has two main features. It firstly provides that a right of extension of a building acquired in terms of section 18 of the old Act shall be completed or exercised in terms of the old Act as if it has not been repealed. It is pursuant to this provision that the appellant is still in full possession of the rights granted to it by the old Act. To this provision provisos are added, laying down, inter alia, that nothing contained in the new Act would prevent the acquisition of a real right of extension or the exercising of a right of extension in terms of the provisions of the new Act. In the ordinary process of interpretation the savings provision and the provisos must be reconciled. As a matter of language and logic this can, I

consider, be done as follows. The savings provision lays down that a right of extension acquired under the old Act must be completed or exercised under the old Act. The proviso lays down that this provision does not prevent the acquisition of a real right of extension, or the exercising of a right of extension, in terms of the new Act. The preservation of rights of extension acquired under the old Act therefore does not bestow any rights under the new Act: it merely does not prevent the acquisition or exercising of rights in terms of the new Act. If a person is entitled to acquire a real right of extension or to exercise a right of extension in terms of the new Act, the mere fact that he or somebody else had previously acquired a right of extension under the old Act (which right is preserved by section 60 of the new Act) would accordingly not, by itself, stand in his way. However, in order to acquire the real right of extension, or to exercise a right of extension, the person claiming such right must show that he is entitled thereto under the new Act. If he can show this, it becomes immaterial to his acquisition or

exercise of rights under the new Act that rights under the old Act are preserved by section 60(1). Of course, if there is a repugnancy between rights claimed under the new Act and those still in force under the old Act, existing rights would clearly prevail, and to that extent rights under the new Act may not be available. However, the provisos to subsection (1) would in my view cater for cases where a right of extension acquired under the old Act has lapsed, or has been abandoned, or is not inconsistent with rights for which the new Act makes provision.

In the present case the appellant has acquired rights under the old Act. For the reasons stated above this would not by itself prevent its acquiring or exercising rights under the new Act. The appellant does not, however, lay claim to any rights under the new Act. It claims to be entitled to exercise its rights under the old Act as if they had been bestowed under the new Act. Although the appellant has not reserved a right of extension under section 25(1) of the new Act, it wishes to exercise the rights of a person who has reserved such a right,

and, in particular, to exercise the power of alienation granted by section 25(4). But, as I have already indicated, the provisos to section 60(1) do not change or enlarge rights existing under the old Act. Their effect is purely negative - they ensure that rights granted by the new Act should not be thought to be *diminished by the preservation of rights which had accrued under* the old Act. It follows that in my view section 60(1) of the new Act is of no assistance to the appellant.

To sum up: I agree that the appellant had a right of extension in terms of section 18(1) of the old Act, and that this right is in principle capable of registration. Moreover, whether or not this right can properly be described as a personal servitude, I agree that it is not transferable. In addition I consider that neither section 60(9) nor section 60(1) of the new Act serves to extend the right granted to the appellant by the old Act. I consequently concur in the order granted by JOUBERT JA.

JOUBERT, JA
FRIEDMAN, JA
NIENABER, JA
KRIEGLER, AJA

Concur

E M GROSSKOPF, JA