THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 217/2011

In the matter between:

THE BODY CORPORATE OF "THE AVENUES" **APPELLANT**

and

BARNEY HURWITZ N.O. **FIRST RESPONDENT**

LAWRENCE NEIL MILLER N.O **SECOND RESPONDENT**

Neutral citation: *The Body Corporate of "The Avenues" v Barney Hurwitz* (217/2011) [2014] ZASCA 80 (29 May 2014)

Coram: Navsa, Shongwe and Leach JJA and Swain and Mocumie AJJA

Heard: **16 May 2014**

Delivered: **29 May 2014**

Summary*:* Sectional Title – competing claims in respect of extension of sectional title scheme – Body Corporate relying upon s 25 of Sectional Titles Act No 95 of 1986 – developers relying upon Rules of Scheme passed by Body Corporate in terms of Sectional Titles Act 66 of 1971 – rule to be read subject to s 18(1) of 1971 Act – rule cannot confer powers beyond those set out in the Act.

ORDER

2

On appeal from Western Cape High Court, Cape Town, (Desai J sitting as court of first instance):

1 The appeal is upheld with costs, such costs to include the costs of two counsel where employed.

2 The order of the court a quo is set aside and replaced with the following order:

„(a) It is declared:

(i) that no right of extension in respect of the sectional title scheme known as „The Avenues‟ No. SS120/87 in the Cape Town Deeds Office ("the Scheme‟) vests in the trustees of The Hurwitz-Smilg Sea Point Trust or The High Level Trust ("the Trusts‟).

(ii) that all rights of extension in respect of the Scheme vest in the applicant. (iii) that the consent of the trustees of the Trusts is not required for the exercise by the applicant of the rights referred to in section 25(6) of the Sectional Titles Act No.
95 of 1986.

(iv) that by virtue of the condition of the establishment of the scheme imposed by the local authority the Trusts are not entitled to continue to have the units currently registered in their names, namely Units 92, 93 and 97 to 103 (garages), Units 94 and 95 (storerooms) and Unit 96 (domestic workers quarters) in the names of the respective Trusts.

(b) The Trusts are afforded an opportunity, within six months of the court‟s order, to sell the said units to qualifying purchasers (namely owners of residential sections in the Scheme) and / or the applicant on such terms as may be acceptable to the respondents, provided that any such sale shall make provision for the transfer of the unit in question to be registered within a period not longer than six months from the date of the sale.

(c) The applicant is authorised to apply to the high court, on the same papers, supplemented insofar as it may be advised, and on notice to the respondents, for

3

further relief in the event of any such unit remaining unsold by the respondents after the expiry of the first six-month period referred to in (b) above.

(d) The respondents, jointly and severally are to pay the costs of the applicant, such costs to include the costs of two counsel where employed.‟

JUDGMENT

Swain AJA (**Navsa, Shongwe, Leach JJA and Mocumie AJA** concurring):

[1] This case concerns competing claims to exercise the right of extension of a Sectional Title Scheme (the scheme). The contesting parties are respectively the appellant, the body corporate of “The Avenues‟ Scheme No SS120/1987 (the body corporate) and the developers of the scheme, being the first respondent, Mr Barney Hurwitz in his capacity as the sole trustee of the Hurwitz-Smilg Sea Point Trust and the second respondent, Mr Lawrence Miller in his capacity as the sole trustee of the High Level Trust (the developers).

[2] The claim of the body corporate to exercise the contested right of extension is based upon the provisions of s 25 of the Sectional Titles Act 95 of 1986 (the 1986 Act). That of the developers is based upon the provisions of rule 77 of the rules of the scheme as adopted by the body corporate and duly registered with the Registrar of Deeds in terms of s 5(3)*(f)* of the Sectional Titles Act 66 of 1971 (the 1971 Act).

[3] The body corporate accordingly launched an application before the Western Cape High Court against the developers in which orders were sought declaring that the right to extend the scheme vested in it and that the developers‟ consent to the extension of the scheme was not required. An additional order sought directed the developers to dispose of certain sections in the scheme registered in their names.

4

[4] The application before the court a quo (Desai J) was dismissed with costs, such costs to include the costs of two counsel. The present appeal is with the leave of the court a quo.

[5] The court a quo held that the provisions of rule 77 were binding upon the body corporate and the developers accordingly were the sole holders of rights of extension. Desai J reasoned that the logical consequence was that the developers were entitled to withhold their consent to the extension of the scheme proposed by the body corporate. In addition, the court a quo held the developers could not be compelled to alienate their sections.

[6] Before us counsel for the developers disavowed any reliance upon the relevant statutory provisions as the basis for the developers‟ claim to the right of extension of the scheme and relied, as they did in the court below, solely upon the provisions of rule 77 of the scheme. In order to properly consider the competing claims of the parties it is necessary to examine the scheme and purpose of the 1986 Act, its provisions and its predecessor, the 1971 Act. First, the historical development of the scheme will be examined to place the dispute in context.

[7] On 6 July 1987 a sectional plan was registered and a sectional title register opened in the Cape Town Deeds Office in terms of s 8 of the 1971 Act. The scheme comprised sections, exclusive use areas and common property. There were 54 units incorporating residential sections, 44 units incorporating garage sections, two units incorporating storeroom sections and two units incorporating sections for the accommodation of domestic workers (referred to in the sectional plan and rules as „maids rooms‟) in the scheme.

5

[8] The conveyancer"s certificate attached to the sectional plan in terms of s 5(3)*(d)*(i) of the 1971 Act provided as follows:

"I certify that the following further conditions were imposed by the Municipality of Cape Town when approving of the Sectional Title Scheme known as "THE AVENUES", namely:-

SUBJECT to the condition "that a garage sectional unit (i.e. one of sections numbered 5588, 90-93 and 97-102 inclusive) a storeroom sectional unit (i.e. one of sections numbered 94 and 95 inclusive) and a maids room sectional unit (i.e. one of sections numbered 89 and 96 inclusive) be not sold or transferred to any person other than the owner of a flat section in the building to which the application relates (i.e. one of the sections numbered 1-54 inclusive)." Such restrictions are not to apply to the Body Corporate where such sections are required by the Body Corporate for management purposes only.

SUBJECT FURTHER to the condition that no flat sectional unit to which a garage sectional unit, storeroom sectional unit and maids room sectional unit as above relates, may be sold or transferred unless such related garage sectional unit, storeroom sectional unit and maids room sectional unit are simultaneously registered either in the name of the transferee of the related flat sectional unit, or in the name of the owner of any other flat sectional unit in the building to which this application relates.

The tie conditions must be enforced by the Developer, and on establishment, the Body Corporate."

These conditions were imposed by the local authority as part of the certificate of approval dated 12 May 1987.

[9] In addition, certain real rights were registered over the property in favour of "The Sisters of the Holy Family in South Africa" (the Sisters) by way of notarial deeds of servitude. As will be seen, the portion of the property subject to the rights of servitude of the Sisters is the subject of the contested right of extension.

6

[10] The rules of the scheme were adopted by a unanimous and special resolution of the members of the Body Corporate on 17 February 1988, in substitution for the rules contained in Schedules 1 and 2 in terms of s 5(3)*(f)* of the 1971 Act.

[11] The rules which are relevant to the present dispute read as follows:

"<u>RIGHTS RESERVED TO THE DEVELOPER</u>

77.(1) Notwithstanding the fact that certain buildings and outbuildings indicated as "Existing Monastery" and situated within the servitude area as appears from Annexure "A" hereto are part of the common property as reflected on the registered sectional plans in respect of THE AVENUES Sectional Title Scheme, the Body Corporate acknowledges that the developers, THE HURWITZ-SMILG SEA POINT TRUST and THE HIGH LEVEL TRUST may (subject to the cancellation of the Notarial Deed of Servitude concluded by the Developers with the SISTERS OF THE HOLY FAMILY IN SOUTH AFRICA) develop at their sole cost and expense the aforesaid buildings which development shall then be for the benefit of the Developers.

(2) The nature and extent of the development contemplated in (1) above shall be within the sole and absolute discretion of the Developer. The Body Corporate further acknowledges that it is aware of the terms and conditions relating to the said possible development imposed by the Developer, which terms and conditions are contained in Annexure "A" to sheet 1 of the registered sectional plans of the building THE AVENUES Sectional Title Scheme.

(3) NOTWITHSTANDING (1) and (2) above it is specifically recorded that the buildings and outbuildings situated within the servitude area aforesaid which are common property, none of the obligations contained in the Notarial Deeds of Servitude concluded by the developers with THE SISTERS OF THE HOLY FAMILY IN SOUTH AFIRCA shall devolve upon the owners save the provisions of clauses 1.D. of the Notarial Deed of Variation and clause (e) of a further Notarial Deed of Servitude which relate to the maintenance of roads, pavements and lighting on the Servitude Area.

7

GARAGES

78. The Unit in which the section is a garage shall not be capable of being owned by any person who is not the owner of a unit in which the section is not a garage, i.e. by a person who is not an owner of a “residential” unit, residential in this instance excluding a maids room.

STOREROOMS

79. The Unit in which the section is a storeroom shall not be capable of being owned by any person who is not the owner of a unit in which the section is not a storeroom, i.e. by a person who is not an owner of a “residential” unit, residential in this instance excluding a maids room.

MAIDS ROOMS

80. The Unit in which the section is a maid‟s room shall not be capable of being owned by any person who is not the owner of a unit in which the section is not a maid‟s room, i.e. by a person who is not an owner of a “residential” unit, residential in this instance excluding a maids room.”

[12] It appears the Sisters had relocated from the property in question and that agreement had been reached with them by the body corporate for the cancellation of their rights of servitude.

[13] The developers are the joint registered owners of units 92 to 102 in the scheme. These comprise garages, storerooms and a so-called „maid‟s room‟, more appropriately described as domestic workers quarters. Since 1987 no other unit and in particular no residential unit in the scheme, has been registered in the names of the developers.

[14] On 18 April 2005 the body corporate entered into an agreement with one

8

Colin Blacher for the sale to Mr Blacher of a portion of the body corporate's alleged right of extension in the scheme being that portion of the property subject to the notarial deed of servitude in favour of the Sisters. The sale was subject to the suspensive condition that the body corporate obtains the written consent of all its members and existing bond holders to the sale in terms of s 25(6) of the 1986 Act.

[15] The developers, as members of the body corporate, however, declined to furnish their consent to the sale. In their answering affidavit they state that there is no obligation on them to do so, nor to give reasons for their refusal. It is clear, however, that their refusal to grant consent is based upon their contention that they possess the right to extend the scheme. As stated above they rely on what they contend to be rights of extension reserved to them in terms of rule 77.

[16] It is against that background that the dispute must be considered. Before doing so, however, the relevant provisions of the 1971 Act and the 1986 Act must be considered as they form the basis for the claim advanced by the body corporate to extend the scheme.

[17] In accordance with the purpose and scheme of the 1971 Act, s 18(1) read with s 18(8) made provision for the phased development of a sectional title scheme on a single piece of land in successive stages. As each stage was completed the developer would be entitled to pass transfer of the units comprising that stage. The sections provide as follows:

> "(1) 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 an existing section is to be added to or that the building may be further divided into more sections, the developer or, if the developer has ceased to have any share in

9

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.

. . .

(8) The provisions of this section shall mutatis mutandis apply with reference to any additional building to be erected on land shown on a sectional plan registered under this
Act."

[18] The developer accordingly acquired the right to extend the scheme, if the developer, as provided by the statutory provisions in the previous paragraph, still owned a share in the common property and had obtained the written consent of all the owners of sections and holders of mortgage bonds. In the event that the developer no longer owned any share in the common property, the body corporate could acquire the right to extend the scheme once it had obtained the necessary consents.

[19] Section 5(3)*(d)*(i) of the 1971 Act provided that the application for the opening of a sectional title register had to be accompanied by a sectional plan relating to the scheme

". . . endorsed with the servitudes, other real rights and conditions, if any, certified by a conveyancer as burdening or benefiting the land or the sections and common property in terms of the developers" title deed or as conditions of sectional title imposed by the developer or the local authority or the Administrator."

10

In terms of s 10(2) the effect of endorsement is that an owner‟s title to his unit is subject to any such servitudes, real rights or conditions. The object was to achieve certainty and minimise any contested future claims in this regard.

[20] Regulation 5(2)*(a)*(x) of the regulations promulgated in terms of s 40 of the 1971 Act provided that the first sheet of the sectional plan (with annexures if necessary) had to contain particulars of the servitudes, other real rights and conditions, certified by a conveyancer as burdening or benefiting the land or the sections and common property. In order for a developer to ensure that conditions imposed by the developer in the individual contracts of sale concluded with purchasers of units in the scheme would be converted into real rights enforceable against subsequent purchasers of units as well as bond holders, such conditions would have to be registered as conditions of sectional title in terms of s 5(3)*(d)*(i) of the 1971 Act.

[21] It is common cause that although rule 77(2) provided that the terms and conditions relating to the developers‟ right of extension were contained in „annexure "A" to sheet 1 of the registered sectional plans‟, no such conditions exist in the annexure. As pointed out above the only real rights registered were those in favour of the Sisters and the condition imposed by the local authority restricting the alienation of garages, storerooms and „maids rooms‟ independently from the alienation of „flats‟ in the scheme.

[22] The 1971 Act was repealed by the 1986 Act with effect from 1 June 1988. Under the 1971 Act a developer could acquire a right of extension provided the developer satisfied the requirements of s 18(1). However, in terms of s 25(1) of the 1986 Act, a developer has to reserve this right in the application for the registration of a sectional plan. The reservation has to be effected by way of a registered condition imposed by the developer in terms of s 11(2) at the time of registration of

11

the sectional title register. The condition has to stipulate a period within which the extension has to be completed.

[23] If the developer makes no such reservation, or such right has lapsed, then in terms of s 25(6) of the 1986 Act, the right to extend the scheme vests in the body corporate, which is entitled, subject to compliance with the requirements of s 25 to obtain a certificate of real right in respect of the right of extension. The body corporate may only exercise such right with the written consent of all its members and the mortgagee of each unit in the scheme. A member or a mortgagee is not entitled to withhold approval „without good cause in law‟.

[24] Section 60(1)*(b)* of the 1986 Act preserved any right of extension „acquired‟ by a developer in terms of s 18 of the 1971 Act. Section 60(1) was thereafter amended to provide for the issue to the developer, on application, of a certificate of real right in respect of a right of extension acquired in terms of s 18 of the 1971 Act. A time period of 24 months was provided within which the developer was obliged to obtain a certificate of real right, failing which the right would lapse. The expiry period was thereafter extended by GNR 1357 (published in Government Gazette 20619 on 19 November 1999) to 31 December 2001.[1] It has however to be noted that for a right to be preserved such a right would have to have been in existence at the relevant time.

[25] The developers concede that they had not „acquired‟ any right of extension under the 1971 Act and accordingly no such right could be preserved in their favour in terms of s 60(1)*(b)*. However they submitted:

(a) Section 27(5) of the 1971 Act and s 35(4) of the 1986 Act provide that the rules shall bind the body corporate, the owners of sections and anybody occupying the sections. (b) The rules have the status of a contract between the body corporate and

1 Section 14*(a)* of the Sectional Titles Amendment Act 11 of 2010 has subsequently repealed s 60(1) of the 1986 Act.

12

its members, including the developers. The rights conferred on the developers by the rules are accordingly binding on and enforceable as against the body corporate. (c) Section 60(4) of the 1986 Act preserved any rights arising from any agreement concluded before its commencement. The developers‟ rights were accordingly explicitly preserved as the provisions of rule 77 were based upon an agreement concluded between the developers and the body corporate.

[26] At the heart of the developers‟ submissions lies the enforceability of rule 77 which must be determined in the context of the 1971 Act, the prevailing legislation at the time. As pointed out above, in terms of s 18 of that Act the developer only acquired a right of extension if the developer owned a share in the common property and had obtained the consent in writing of all the owners of sections and all holders of mortgage bonds. See *Erlax Properties (Pty) Ltd v Registrar of Deeds & others* 1990 (3) SA 262 (W) at 268C.

[27] Counsel for the developers initially submitted that the provisions of rule 77 were simply a „springboard‟, as he put it, in terms of which the developers could then proceed to obtain the requisite consent from owners of sections and mortgage bond holders to exercise the right of extension, as required by s 18(1) of the 1971 Act. This submission sought to resolve the inevitable conflict between the provisions of s 18, which required the consent of all the owners of sections and all holders of mortgage bonds before a right of extension was acquired, and the fact that the agreement relied upon by the developers as embodied in rule 77 only included the consent of the body corporate. In other words, so the argument went, rule 77 did not per se confer a right of extension upon the developers, but simply a right to obtain the necessary consent to acquire such a right. When faced with the consequence of this submission, namely that the developers accordingly possessed no right of extension per se in terms of rule 77, counsel for the developers fairly and properly conceded that his submission would have to be that rule 77 conferred upon the developers a right of extension.

13

[28] It is clear that the body corporate could not, by agreement with the developers, confer a right of extension of the scheme on the developers and thereby deprive individual owners of sections and holders of mortgage bonds of their statutory right to withhold their written consent. The body corporate in concluding this agreement and purporting to represent the interests of the owners of sections, could not compromise the statutory right of the owners to grant or withhold their consent to an extension of the scheme. In addition, because at the relevant time the developers must have still had a share in the common property, the body corporate could not have acquired the right of extension of the scheme in terms of s 18 of the 1971 Act, even if it had obtained all of the necessary written consents. Simply put, the body corporate had not acquired any right of extension at the time of the agreement with the developers, which it was thereby able to confer upon the developers in terms of that agreement.

[29] There is in addition a more fundamental challenge to the developers‟ argument that they acquired a right of extension in terms of rule 77. Section 27(1) of the 1971 Act provides as follows:

"A building and the land on which it is situated shall as from the date of the establishment of the Body Corporate be controlled and managed, *subject to the provisions of this Act,* by means of rules." (My emphasis.)

[30] To be „subject to‟ the 1971 Act, implies that any rule must not conflict with any provision of the Act. See *Sentra-Oes Koöperatief Bpk v Commissioner for Inland Revenue* 1995 (3) SA 197 (A) at 207B-G. If a rule is in conflict with the Act it would be ultra vires the powers of the body corporate to make such a rule. See CG Van der Merwe and DW Butler *Sectional Titles Share Blocks and Time-Sharing* 1 ed at 221 note 12. The conflict between the provisions of rule 77 and s 18(1) of the 1971 Act is readily apparent. Rule 77 was accordingly ultra vires the powers of the body corporate to pass this rule and it is accordingly unenforceable.

14

[31] In addition, whilst notionally in terms of rule 77 the developers could have reserved the right of extension by registering this right together with its specific terms and conditions against the sectional plan, they in fact did not do so. Simply put, whilst the rule purports to reserve the sole right of extension, the terms and conditions of such extension upon which the right is said to be premised do not exist. Essentially the requirements necessary for the statutory reservation of a right of extension referred to above were not met. The developers‟ reliance upon rule 77 is therefore without foundation. The court a quo accordingly erred in concluding that the developers possessed the right to extend the scheme in terms of rule 77.

[32] I turn to the ancillary relief sought by the body corporate, ordering the developers to furnish their written consent to the extension of the scheme, as well as an order directing the developers to alienate the units registered jointly in their names.

[33] As pointed out in para 8, the scheme was subject to the local authority‟s condition in terms of which a garage unit, storeroom unit or „maids room‟ unit could not be sold or transferred to any person other than the owner of a „flat‟ sectional unit in the scheme. In addition, no „flat‟ sectional unit to which a garage unit, storeroom unit or „maids room‟ unit relates, could be sold or transferred unless such a unit was registered either in the name of the transferee of the „flat‟ sectional unit, or in the name of the owner of any other „flat‟ sectional unit in the scheme.

[34] When regard is had to the fact that there were more „flat‟ sectional units (i.e. 54) than the total number of garages, storerooms and „maids rooms‟ (i.e. 48) it is clear that the object of the restrictive condition was to ensure that the garages, storerooms and „maids rooms‟ could not be owned by anybody who did not own a „flat‟ sectional unit in the scheme. This condition was binding upon the developer as the condition expressly provides that „the tie conditions must be enforced by the Developer‟.

15

[35] It appears that, contrary to the restrictive condition, the developers maintained ownership of these units, presumably to continue to exert influence and obtain rights of extension. The developers‟ joint ownership of units 92 to 102 is consequently in contravention of this condition of establishment and is unlawful. They therefore do not possess any right to grant or withhold consent in terms of s 26(5) of the Act to any proposed extension of the scheme by the body corporate. In addition, the developers are not entitled to retain ownership of these units in contravention of the condition and are obliged to sell and pass transfer of these units to the owners of residential units in the scheme. Counsel for the developers fairly and properly conceded that if it were found that the ownership of these units by the developers was unlawful, the body corporate would be entitled to the relief sought.

[36] Counsel agreed that the costs of two counsel where employed would be an appropriate order in favour of the successful party.

[37] The following order is made:

1 The appeal is upheld with costs such costs to include the costs of two counsel where employed.

2 The order of the court a quo is set aside and replaced with the following order:

„(a) It is declared:

(i) that no right of extension in respect of the sectional title scheme known as „The Avenues‟ No. SS120/87 in the Cape Town Deeds Office („the Scheme‟) vests in the trustees of The Hurwitz-Smilg Sea Point Trust or The High Level Trust („the Trusts‟).

(ii) that all rights of extension in respect of the Scheme vest in the applicant.

16

(iii) that the consent of the trustees of the Trusts is not required for the exercise by the applicant of the rights referred to in section 25(6) of the Sectional Titles Act No. 95 of 1986.

(iv) that by virtue of the condition of the establishment of the scheme imposed by the local authority the Trusts are not entitled to continue to have the units currently registered in their names, namely Units 92, 93 and 97 to 103 (garages), Units 94 and 95 (storerooms) and Unit 96 (domestic workers quarters) in the names of the respective Trusts.

(b) The Trusts are afforded an opportunity, within six months of the court"s order, to sell the said units to qualifying purchasers (namely owners of residential sections in the Scheme) and / or the applicant on such terms as may be acceptable to the respondents, provided that any such sale shall make provision for the transfer of the unit in question to be registered within a period not longer than six months from the date of the sale.

(c) The applicant is authorised to apply to the high court, on the same papers, supplemented insofar as it may be advised, and on notice to the respondents, for further relief in the event of any such unit remaining unsold by the respondents after the expiry of the first six-month period referred to in (b) above.

(d) The respondents, jointly and severally are to pay the costs of the applicant, such costs to include the costs of two counsel where employed."

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K G B SWAIN
ACTING JUDGE OF APPEAL

Appearances:

17

For the Appellant:	S C Kirk-Cohen SC
	Instructed by:
	Abrahams & Gross Inc, Cape Town
	Lovius Block Attorneys, Bloemfontein
For the Respondent:	M A Chohan (with him M T A Costa)
	Instructed by:
	Routledge Modise t/a Eversheds Attorneys, Cape Town
	Matsepes Inc, Bloemfontein