THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 39/2002
REPORTABLE

In the matter between:

Wimbledon Lodge (Pty) Ltd	**Appellant**
and	
Stephen Malcolm Gore NO	**First Respondent**
Robert John Walters NO	**Second Respondents**
Trevor Philip Glaum NO	
Harbour's Edge Body Corporate	**Third Respondent**

Before: Olivier, Schutz, Zulman, Streicher JJA and Heher AJA

Heard: 7 March 2003

Delivered: 31 March 2003

Sectional titles – disparity between deeds of sale and registered sectional plan – common areas lost – fraud – voting – use of nay votes gained by fraud – resolution deemed passed – appointment of curator to body corporate – whether sum of deeds of sale equivalent to pre-incorporation contract for benefit of body corporate – powers of same.

JUDGMENT

SCHUTZ JA

[1] The applicant below (now appellant) complains that a fraud was committed on him, and others, by one Scharrighuisen. The latter's estate has been sequestrated and two of the corporations which he used for his schemes have been liquidated. The first two respondents (below and here), Messrs Gore, Walters and Glaum, are liquidators of the one or the other of these corporations.

[2] The appellant, Wimbledon Lodge (Pty) Ltd ('Wimbledon'), owns a unit in a sectional title development on erf 4600 Gordon's Bay. The third respondent (here and below) is the Harbour's Edge Body Corporate, which controls the scheme. Wimbledon is owned by one Cuninghame, who deposes on its behalf. His accusation is that a large part of the common property was secretly appropriated by Scharrighuisen for the benefit of the two corporations which he controlled. They are Casisles Coastal Property Investments CC ('Casisles') (which was the 'developer' in terms of the Sectional Titles Act 95 of 1986 – 'the Act') and Harbour's Edge Commercial Properties Holding (Pty) Ltd ('Harbour's Edge').

[3] The building was not intended to be occupied by the unit-holders. It was to be used as a hotel. The rentals earned were to be placed in a pool which, after expenses had been met, was to be distributed according to individual participation quotas. According to the plan which was annexed to the deeds of sale, the common property was to include restaurants, kitchens, a parking basement, a squash court, necessary service areas and much more. That plan showed that there would be 86 sections with a total area of 5 886 square metres. It is not Wimbledon's case that a fraudulent misrepresentation was made when the sales took place, in the sense that Scharringhuisen then already

intended to cheat buyers. Wimbledon's case is that the sectional title plan which Scharrighuisen had registered in the Deeds Registry subsequently, without informing buyers, provided for 120 sections with a total area of 14 420 square metres. The extra area was achieved, not by enlarging the building, but by the appropriation of a large part of the common property. Of the 34 extra sections, 10 are registered in the name of Casisles and 12 in the name of Harbour's Edge. How the 12 sections reached Harbour's Edge (these are the valuable ones) we are not told, as, despite a challenge to disclose, there came only the statement that the sections 'were purchased' from Casisles. As the entries in the Deeds Registry stand those 22 sections are owned by the one or the other of the two corporations, now in liquidation, and their area has been subtracted from the common property of the other unit-holders. It is these doings that Cuninghame describes variously as a fraud or a theft. The exact legal categorisation hardly matters. These allegations stand essentially unchallenged.

[4] Section 41 of the Sectional Titles Act 95 of 1986 provides:

'Proceedings on behalf of bodies corporate.-(1) When an owner is of the opinion that he and body corporate have suffered damages (sic) or loss or have been deprived of any benefit in respect of a matter mentioned in section 36 (6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2) (a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the

Court for an order appointing a *curator ad litem* for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The court may on such application, if it is satisfied –

(a) that the body corporate has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.

(4) The Court may on the return day discharge the provisional order referred to in subsection (3), or confirm the appointment of the *curator ad litem* the body corporate, and issue such directions as it may deem necessary as to the institution of proceedings in the name of the body corporate and the conduct of such proceedings on behalf of the body corporate by the *curator ad litem*.'

[5] The relief that Wimbledon seeks is the appointment of a curator to the body corporate, so that he may investigate these events, and, if so advised, take action against Casisles and Harbour's Edge, aimed at somehow restoring the position. The three liquidators resist this claim on a variety of legal, not factual, grounds, mainly directed against Wimbledon's *locus standi* to apply for the appointment of a curator or against the body corporate's *locus* to bring the proceedings contemplated. Van Reenen J, sitting in the Cape Provincial Division of the High Court, held in favour of the respondents. The body corporate, acting through its

trustees, did not resist the application.

[6] It will be observed that one of the jurisdictional facts provided for in s41(1) is, that an owner be of the opinion that he and the body corporate 'have been deprived of any benefit in respect of a matter mentioned in section 36 (6)'.

[7] Section 36 (6) provides:

'The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of –

(a) any contract made by it;

(b) any damage to the common property;

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

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

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

[8] Van Reenen J found against Wimbledon, *inter alia* on the ground that no special resolution in terms of s36(6)(e) to sue Casisles had been passed, which is indeed the case. The 'developer' was, as stated, Casisles, so that against it a special resolution was required. An ordinary resolution to allow Harbour's Edge to be sued was also rejected. The uncontradicted evidence of Cuninghame makes it plain that if it had not been for the improprieties to be described below the ordinary resolution would have been passed. Whether, but for them, the special resolution would also have been passed is nowhere clearly stated.

[9] Confining myself then to the ordinary resolution, in order to decide

whether it was properly rejected one must have regard to how the voting went, and why it went the way it did. At the general meeting 44 unit-holders voted in favour of a resolution that the body corporate take action against Scharrighuisen's two corporations. All the trustees, who included Cuninghame, voted in favour of the motion. But their votes were swamped by the votes that Casisles and Harbour's Edge had acquired in the way described, plus the contrary votes of six other unit-holders. Those six were all controlled by one Krecklenburg, a chartered accountant who worked for Scharrighuisen. Had the two corporations not voted against it, the resolution would have been carried. (In terms of the definition contained in s1 of the Act a special resolution requires a three-fourths majority both in number and in value. What the requirements for an ordinary resolution may be depends upon s32(3) and (4) of the Act and upon the content of the rules. We do not have the rules before us.)

[10] Can this situation be countenanced? I think not. I am content to start with the Roman Law. In D50.17. 134.1 Ulpian tells us '*Nemo ex suo delicto meliorem suam condicionem facere potest*', rendered in Watson's translation as 'No one is allowed to improve his own condition by his own wrongdoing'. This fundamental principle has been applied expressly at least twice in this court, in *Principal Immigration Officer v Bhula* 1931 AD 323 at 330 and *Parity Insurance Co Ltd v Marescia and Others* 1965 (3) SA 430(A) 433 and 435. It finds exact application to this case. Scharrighuisen,

through his corporations, by means of his fraud, obtained at least apparent ownership of the contested sections. That carried with it the apparent right to direct the votes of the owners of those sections. This vote was then used to smother an attempt to reverse the consequences of the fraud; ie his successors, the liquidators, in casting their votes were using his estate's strengthened position, obtained by fraud, to maintain the hold over those sections.

[11] Not confining oneself to the language of delict or wrongfulness, one finds the quoted precept scattered about the law. The principle of fictional fulfilment in contract is an example. If a party is under a duty not to prevent the fulfilment of a condition, he is treated as if has been fulfilled, if he fails in that duty. Similarly the principle that a provision in a contract that has been obtained by fraud may be rectified: *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 288, 292 and *Benjamin v Gurewitz* 1973 (1) SA 418(A) at 422A, 425if-426A.

[12] Applying the principle, the case must then be seen as if the resolution had been passed. But the trustees, whilst finding themselves among the 44 aye voters, and being apparently sympathetic to Cuninghame's cause, consider themselves to be incompetent to bring action because of what they assumed to be a vote binding them not do so. Perhaps it would have been wise for the trustees and/or Cunninghame to have proceeded to court, before the meeting or during its adjournment, in order to obtain a determination that the votes of the liquidators and the six were not to be counted against the proposed resolutions. And I would suggest to the trustees and Cunninghame that they may choose to dispense with the services of the curator to be appointed once this court has made it clear that the resolution should be treated as having been

passed. I shall make provision in the order at the end of this judgment to facilitate agreement along these lines. However, as things stand now the body corporate declines to institute action and the question remains whether Wimbledon is entitled to have a curator appointed. Although I have confined myself to the clear case of the ordinary resolution, the reasoning is equally applicable to a special resolution procured by reliance on a voting base derived from fraudulent conduct. There is no reason why the curator should not investigate this question and, if the established facts justify action against the developer, deal with the matter in his report to court.

[13] The jurisdictional facts that an owner must establish in order to entitle him to apply for the appointment of a curator are set out in s41(1). They are:

1. The owner must hold an opinion.

2. The opinion must be either (a) that he and the body corporate have suffered damages (again sic) or loss or (b) that he and the body corporate have been deprived of a benefit in respect of a matter mentioned in s36(6).
3. The body corporate has not instituted proceedings for recovery.

[14] The third requirement has been established. That this should be a requirement seems to me to be a necessary counterpart to the sections of the Act divesting individual owners of control and vesting it in the body corporate. If the body corporate is seen not to do its duty, then an individual's powers may, to an extent, be restored.

[15] As to the first requirement, it is clear that Wimbledon, through the mind of Cuninghame, held the opinion. I shall assume, without deciding the point, that the mere existence of a subjective opinion is not enough, but that there is also an implicit requirement that such an opinion can reasonably be held. The argument for the respondents is essentially that on the facts of this case it is not legally possible to reasonably form the opinion. Whether this is correct is bound up with the enquiry into the second requirement, which is concerned with the content of the opinion.

[16] The first legal argument is that neither the body corporate nor the trustees, as opposed to individual members, may pursue an action against the developer or his creatures, based on a difference between what he has sold to them, on the one hand, and the building as actually built according to the registered sectional title plan – this in fraud of them. The argument is that when the corporation comes into being it does so to administer what has been built according to the registered plan, so that it has and can have no concern with what has gone before. (But note that fraud in relation to the parking area may have been practised after the body corporate was formed.) I do not agree with the argument. In the first place, s36(6)(e) expressly contemplates a developer being sued by the corporation (or failing it by a curator) 'in respect of the scheme'. In the second place, section 1 defines a 'scheme' as a 'development scheme' and the latter is defined as meaning 'a scheme in terms of which a building or buildings situated *or to be erected* on land . . . is . . . for the purposes of selling . . . to be divided into two or more sections . . .' (emphasis supplied). So the scheme may exist before even the building has been erected. See also the definition of 'developer' in s1 in which the phrase 'or to be erected' also appears. In the legislative contemplation it would have been strange if the developer could be sued by the corporation for deviation from the registered plan but not for deviation from the plan on which the whole development was sold.

[17] Indeed it seems to me that a developer's position is closely analogous to that of a promoter of a company, who owes fiduciary duties to the company being formed before it is able to function for itself. These duties bear close comparison with the duties of directors once the company is operational. A promoter's position was described by Bristowe J in *In re The Contributories of the Rosemount Gold Mining Syndicate in Liquidation* 1905 TH 169 at 196:

'It is well established that promoters stand in a fiduciary relation to the company which they promote. They are not merely its parents, but they are its creators. They fashion and mould it according to their will. They endow it with powers or limit its activities in any manner they think fit. And they cannot complain if the law makes them (as it does) the guardians and protectors of its infant life. The duties and obligations which this position of trust places upon promoters are (to use the words of LINDLEY, LJ, IN *Re Olympia Limited*[1898] 2 Ch 165) "imposed by the plainest dictates of common honesty as well as by well-settled principles of company law". They include the duty of not making a secret profit at the company's expense, and also (if they wish it to enter into contracts with or make payments to themselves) to furnish it with a board of directors, "who can and do exercise an independent and intelligent judgment on the transaction" (see *Erlanger v New Sombrero Phosphate Co*3 AC 1236 *per*Lord CAIRNS). It was held in the *Erlanger*case that a contract for sale between the promoters and the company could not stand where the company's concurrence had been obtained by means of a board of directors who were merely the nominees and creatures of the

promoters.'

[18] These remarks seem to me apposite to the developer of a sectional title scheme. According to the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189, it is the company (in this case the corporation) and not individual members, which should, in the first place and unless other factors be present, hold a developer responsible for his misdeeds. It is then only right (as I think the statute provides) that the individuals complaining should have the advantage of the information and the funds of their corporation in pursuing an allegedly errant developer.

[19] Supporting the conclusion that the developer in this case should be equated to a promoter, is the fact, in my view, that there was a pre-incorporation contract, in part for the benefit of the third party yet to come into being, the body corporate, which would come into being upon the registration of the transfer of the first unit. That contract, in my view, consists of the sum of the contracts between the developer and individual buyers and it explicitly includes in what was to be received those parts of the common property which have since been excluded. It is suggested that a difficulty may arise if it emerges that all the plans attached to deeds of sale were not the same. That has not been raised by the respondents, but if there is indeed a problem then the curator may have to think about it. The possibility is no reason for refusing relief now. As far as acceptance of the benefit goes, it is plain that the body corporate implicitly accepted the benefits and duties of the

pre-incorporation contracts.

[20] The other legal argument for the respondents is that because it is the unit-holders and not the corporate body who own the common property (in undivided shares), there can be no talk of the corporation having suffered damage or loss or having been deprived of a benefit, upon its not receiving a large part of the hitherto common property. I am of the view that in order to satisfy the subsection these adverse events must be suffered not only by the applicant for the appointment of a curator but by the body corporate as well, for the reasons that the 'and' in 'he and the body corporate' not only ordinarily conveys a conjunctive meaning, but that the word is twice succeeded by the plural verb 'have', indicating that both he and the body are being referred to. Moreover, one would hardly expect that the legislature would require the body corporate to sue in matters which did not concern it.

[21] Does the fact that the body corporate arguably (I leave the matter open) does not own the common property in the technical legal sense mean that it does not suffer loss in a case like this, where it has not received an important part of what it was supposed to receive, so that it might control and use it? I think not. Again ignoring the legal technicalities of how a sectional title scheme is structured, the substance of the matter is that the body corporate is little more than the aggregation of all the individual owners. Their good is its good. Their ill is its ill. The body corporate is not an island, whatever the law of persons may say. Most of the rent that it earns may ultimately go to the owners, but in the meantime it collects the rent and uses a part of it to perform its manifold duties of control, administration and management, of not only the common property but of the scheme as a whole – see sections 36(4), 36(6), 37, 38 and 39.

[22] It will be observed that one of the subsections which I have just listed is s36(6), already quoted. Section 41(1) states as an express alternative matter upon which an opinion may be formed, the deprivation of a benefit in respect of a matter mentioned in that subsection. Does the contemplated action fall within any of its subdivisions? Let me start with s36(6)(a), which confers the power to sue in respect of 'any contract made by it'. I have already explained why, in my opinion, there is a pre-incorporation contract in existence which confers on the body corporate benefits with regard to the common property. If that be so then (a) is satisfied.

[23] It this be not correct, another basis is provided by s36(6)(d), which gives power to sue in respect of 'any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule'. Once one rejects the argument that the

body corporate is entitled only to what is presently registered in its favour and not what was undertaken to be given prior to registration, then, in my opinion the body corporate is under a duty to recover for its members and itself that to which it was entitled.

[24] That leaves s36(6)(e) – dealing with a claim against the developer. The reason for the inclusion of this subsection seems to be to require that a strong majority is needed before the unit-holders may turn against the person who has been responsible for the creation of their units. A decision to proceed against any other person could be taken by ordinary resolution under s36(6)(d) or one of the other subsections.

[25] For the reasons given I am of the opinion that Wimbledon has established also that it will be competent for the body corporate to institute action in some or other form, so the last bar to establishing its *locus standi* falls.

[26] As to whether a curator ought to be appointed, the court has a discretion under s41(3), having regard to whether it is satisfied that the body corporate has not sued (satisfied), that there are *prima facie* grounds for such proceedings (a strong *prima facie* case of fraud has been made) and that an investigation into the desirability of instituting proceedings is justified. In my opinion there is ample justification.

[27] Finally, we are sought to be persuaded of the incompetence or ultimate futility of any action that is contemplated. Wimbledon has not spelt out what relief the body corporate ought to seek. It has merely suggested possibilities. The Act does not require exact specification. That should, in my view, await the completion of the investigation. The respondents know that the case that the estates that they are liquidating face is fraud. That is enough. The curator should obtain proper advice and properly investigate the facts. There has been no complete investigation in the case before us and that is unsurprising. Fraud is a

crime committed in a corner. To give an instance of the arguments raised by the respondents, it is said that if a claim for rectification of the deeds registry is brought (this is one of the suggested remedies) the interests of *bona fide* third parties may be affected. These include bondholders. The bondholders are not before us. In the order I propose, provision will be made for them to be served. It may be (I say may) that if the Deeds Registry is rectified their bonds will have to stand. I do not know. There was also reference to a lease over part of the property, but that lease appears to have expired.

[28] I can see other possible difficulties ahead, difficulties which may be overcome, or which may prove fatal, but it is not for me to express opinions at this stage. For the respondents' arguments to succeed they will have to persuade me, at least, that there is little chance of any claim ever succeeding. That they have not done.

[29] The appeal is allowed with costs including the costs of senior counsel. The order of the court *a quo* dismissing the application with costs is set aside and replaced with the following order:

1. Mr D R Mitchell SC, a practising advocate of the Cape Bar is appointed to act as a provisional curator *ad litem* to the third respondent in terms of section 41(3) of the Sectional Titles Act, 95 of 1986.

2. The return day of this order before the Cape High Court is to be Thursday, 12 June 2003 when the provisional order may be discharged or the appointment of a curator *ad litem* may be confirmed and further directions may be given by the Court for the institution of proceedings in the name of the third respondent.

3. This appointment of the provisional curator *ad litem* shall take effect two weeks after the date of this order.

4. The provisional curator *ad litem* is directed to:

4.1 conduct an investigation into the grounds and desirability of the institution of proceedings on behalf of the third respondent in order to:

4.1.1 take such steps as are necessary to obtain registration of the immovable property listed in the schedule annexed to this order as common property of the Harbour's Edge Sectional Title Scheme; and/or

4.1.2 claim such damages as may be legally recoverable as a result of the alleged misconduct of the developer and any of its successors in title as set out in the affidavits filed of record on behalf of the applicant.

4.2 Report the results of his investigation and his recommendations to the Cape High Court on the return day.

5. The fees and disbursements of the provisional curator *ad litem* shall be paid by the third respondent, subject to such rights of recovery thereof from the first and/or second respondents as may be a part of the proceedings referred to in paragraph 4.1 above.

6. Service of this order is to be effected upon:

6.1 The Registrar of Deeds;

6.2 Nedbank Limited;

6.3 The third respondent.

7. This order shall be published once in the Cape Times and Die Burger newspapers.

8. The first and second respondents, in their nominal capacity as cited, are ordered to pay the costs occasioned by their opposition to the application for the appointment of a provisional curator *ad litem*, jointly and severally, the one paying the other to be absolved.

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W P SCHUTZ
JUDGE OF APPEAL

CONCUR
OLIVIER JA
ZULMAN JA
HEHER AJA

STREICHER JA/

STREICHER JA:

[1] The appellant applied in the Cape of Good Hope Provincial Division in terms of s 41 of the Sectional Titles Act 95 of 1996 ('the Act') for an order (a) appointing a provisional *curator ad litem* ('the curator') to the third respondent being the Harbour's Edge Body Corporate ('the body corporate') and (b) directing the curator to conduct an investigation as to the grounds and desirability of the institution of proceedings on behalf of the body corporate 'in order to claim and re-transfer certain immovable property'. In the replying affidavit filed by the appellant it is stated that the reference to the re-transfer of the property was perhaps unfortunate as 'the claim on behalf of the body corporate essentially (boiled) down to the rectification of the sectional plans'. It is stated further that the curator would 'naturally also investigate an alternative claim of damages' based on a fraudulent or negligent misrepresentation. The proceedings envisaged by the appellant were therefore claims for rectification of the sectional plan and for damages. The court *a quo* dismissed the application. Schutz JA, with whom the other members of this court agree, is of the view that the appeal against the court *a quo*'s judgment should be upheld. I disagree for the following reasons.

[2] Section 41(1) of the Act provides as follows:

'When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of a matter mentioned in

section 36 (6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, . . . the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.'

I accept that the appellant is of the opinion that he and the body corporate suffered damage or loss or have been deprived of a benefit in respect of a matter mentioned in s 36(6). It is common cause that the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit. It follows that I accept that the appellant could initiate proceedings in the manner prescribed in the section.

[3] Subsection (2) provides as follows:

'(a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the Court under paragraph (b) will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court for an order appointing a *curator ad litem* to the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.'

Again I accept that the formalities prescribed in this section were complied with and that the appellant could in terms of the section apply for an order appointing a *curator ad litem* to the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

[4] Subsection (3) provides as follows:

'The court may on such application, if it is satisfied-

(a) that the body corporate has not instituted such proceedings;

(b) that there are *prima facie* grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified,

appoint a provisional *curator ad litem* and direct him to conduct such investigation and to report to the Court on the return day of the provisional order.'

It follows that the appellant had to satisfy the court *a quo* that there were *prima facie* grounds for the proceedings it required the body corporate to institute. In my view the appellant failed to make out a case which could satisfy a court that there were *prima facie* grounds for such proceedings.

[5] A sectional title development at Harbour's Edge, Gordon's Bay gave rise to these proceedings. The development comprises hotel rooms, penthouses, basement parking, recreational facilities, shops, a dining room or restaurant, kitchen and conference facilities. A Mr Scharrighuisen through Casisles Coastal Property Investments CC ('the developer') conducted the development. The developer is presently in liquidation and the first respondent has been appointed its liquidator. During the planning stages of the development a Mr Cuninghame, who deposed to the founding affidavit filed by the appellant, and other prospective purchasers, became interested in purchasing apartments also described as a hotel suites in the development and conducted negotiations with Scharrighuisen and his representatives. According to Cuninghame he attended a meeting with such other prospective purchasers at which an agent of the seller told them 'that they were not only purchasing a fully-furnished hotel suite (section) but also an undivided share in the common property, which included parking, conference facilities, hotel

reception and offices, hotel dining-room and kitchen, passages, squash court, swimming pool, etc'. He says, furthermore, that during the negotiations Scharrighuisen relied heavily upon the income that the hotel/conference facility would generate, and produced cash flow projections which showed that one could settle his bond in seven years from the income generated by the hotel/conference facilities after which the investment would be 'a great pension plan'.

[6] On 18 June 1996 'Cuninghame or nominee' ('the purchaser') as purchaser concluded a written agreement of sale ('the deed of sale') with the developer as seller in terms of which the developer sold to the purchaser a unit in a proposed sectional title development scheme in respect of a hotel it intended to erect on erf 4600, Gordon's Bay. The unit consisted of a section, being apartment no B82, together with an undivided share in the common property apportioned to the section in accordance with its participation quota of 1,1893%. It was recorded in clause 8.1 of the deed of sale that it was the intention of the parties that the scheme would operate as a hotel apartment scheme and that 'to this end the SELLER has retained various sections within the scheme in order to provide the necessary facilities for the operation of the hotel'. The parties agreed that the seller would 'place these sections at the disposal of the Management Company so as to enable the Management Company to contract with the Operator for the operation of the scheme as a hotel apartment scheme'. The purchaser similarly undertook and agreed to place the section purchased at the disposal of the management company and to enter into a rental pool agreement, as per a draft annexed to the agreement of sale, with the management company.

[7] The rental pool agreement was to be an agreement between the developer, the purchaser and a management company which was to be appointed by the developer. It provided that the purchaser would let the relevant unit to the management company; that the management company would enter into a similar agreement with the owners of other units in order to create a rental pool; that the management company would contract with an operator to endeavour to let the units to guests; and that the management company would pay to the purchaser a monthly rental calculated according to the following formula:

A x owner's points/total points

Where: ‘A’ represents the net accommodation revenue received from the rental pool:

‘Owner’s points’ represents those points allocated to the owner and calculated as the product of the number of nights in any one month that the unit was pooled and the income participation share allocated to the unit: and

‘Total points’ represents the sum of all points allocated to the owners participating and whose units together form the rental pool for the month in question.

[8] At the time when the agreement of sale was concluded the building had not been erected yet. Drawings were, however, annexed to the deed of sale and the purchaser acknowledged that he had read and approved the drawings and that he would be obliged to accept delivery of the unit completed substantially according to the drawings and as finally depicted and delineated on the sectional plan. The parties agreed that the buildings, being the ‘Harbour’s Edge Hotel’, would be built substantially in accordance with the drawings provided that the developer was entitled to *inter alia* substitute items of a similar standard and quality for any specified item referred to in the finishing schedule or the schedule of furnishings or vary the sectional plans for the building should the seller consider it reasonably necessary for technical or aesthetic reasons.

[9] According to Cuninghame the basement parking, conference facilities, utility rooms and staff canteen (‘the disputed properties’) were all defined as common property in the deed of sale. However, no such definition is to be found in the deed of sale. In terms of s 1 of the Act the land and such parts of the building as were not included in a section would have constituted common property. I have already referred to the provision in the deed of sale to the effect that the seller ‘retained various sections within the scheme in order to

provide the necessary facilities for the operation of the hotel'. The appellant contends that the sections referred to must be hotel suites in that only hotel suites are mentioned in the Participation Quota List annexed to the deed of sale. The contention cannot be sustained. Firstly, hotel suites do not provide *facilities* for the operation of a hotel. Secondly the list, despite adding up to a participation quota of 100%, does not purport to be a list of all the sections in the development. It is quite apparent that the list only relates to residential sections or apartments. Each residential apartment is identified by its number according to the drawings annexed to the deed of sale. Cuninghame was well aware that the list was not intended to be a list of all the sections in the building. He states that during the negotiations with the seller the seller pointed out 'that the areas designated "shop 1 – shop 5", the "restaurant" and the "tavern" reflected on the ground floor plan were to be "commercial property", i.e., property retained by the Seller' and not common property. Section 32(1) provides that in the case of a scheme for residential purposes only, the participation quota of a section shall be expressed as a percentage arrived at by dividing the floor area of the section by the floor area of all the sections in the building or buildings comprised in the scheme. In the case of a scheme that is not for residential purposes only, the developer has to determine the participation quota (subsection (2)). To the extent that the scheme is residential the total of the quotas allocated by the developer to the residential sections shall be divided among them in proportion to a calculation of their quotas made in terms of subsection (1). The appellant's contention that the reference in clause 8.1 must be a reference to hotel suites is, therefore, wrong. The retention of various sections within the scheme in order to provide facilities for the operation of the hotel together with an undertaking to 'place these sections at the disposal of the Management Company so as to enable the Management Company to contract with the Operator for the operation of the scheme as a hotel apartment scheme' may have obliged the developer to place these sections at the disposal of the management company (maybe at a fair rate depending on the proper interpretation of the undertaking) but not to have these sections designated common property.

[10] Cuninghame also contends that the operating budget in respect of the first year of operating the hotel indicates that the disputed sections formed part of the common property of the development. He suggests that that is so because parking revenue is listed and because no expenditure is listed for the hiring of the conference rooms. Apart from parking revenue (R142 312) the only sources of revenue listed are rooms revenue (R10 455 604), telephone

revenue (R347 873) and sundry revenue. No revenue is budgeted in respect of the dining room, food and beverages or the conference facilities. That in my view is a clear indication that in terms of the deed of sale the dining room and conference facilities were not intended to be common property.

[11] Cuninghame concludes that it is 'clear from the various provisions of the Deed of Sale and the Act quoted above, that all property outside hotel suites, penthouses and the commercial properties described above were intended to, and did, constitute common property for the benefit of all individual purchasers/owners'. In my view, for the reasons set out above, that conclusion is wrong. At best for the appellant, it appears from the provisions of the deed of sale that, of the disputed properties, only the basement parking was intended to be common property.

[12] Cuninghame nevertheless alleges that he was under the impression that all the disputed properties were common property. As proof that he was under that impression he refers to the fact that he, as a qualified land surveyor, during October 1996 submitted a quotation for the preparation of sectional plans in terms of which quotation he treated all the disputed properties as common property. He says that Scharrighuisen referred him to Mr Rick Granville, the architect, to obtain plans for the quotation and that he confirmed the common property areas with Granville. Although Granville was never consulted with regard to which portions of the building would be either common property or sections he states in a supporting affidavit that his own understanding of the matter was that the conference facilities were intended to be common property. He states, furthermore, that the fact that the kitchen was designed such that it could serve one of the conference rooms indicated that it was also intended to be common property.

[13] The initial working drawings prepared by Granville in mid-1996 were revised 15 times between 19 August 1996 and 2 September 1997. As a result the building eventually erected on erf 4600 was not built substantially in accordance with the drawings annexed to the deed of sale as was required by the deed of sale. According to these drawings the ground floor was to consist of inter alia a restaurant, a tavern, five shops, two conference rooms and a squash court. However, the layout of the ground floor was changed and

eventually the tavern had to make way for a hotel dining room *cum* restaurant; the restaurant and the squash court disappeared and a kitchen and two more shops were added. The layout of the first floor also changed in that a hotel dining room and kitchen were replaced with five new hotel suites.

[14] Sections 4 and 7 of the Act require a developer who intends to establish a development scheme to cause a draft sectional plan to be submitted to the Surveyor-General. The scheme may relate to an existing building or to a building to be erected or being in the process of erection (s 4(2)). The draft sectional plan has to be prepared by a land surveyor or architect from an actual measurement undertaken by him or under his direction (s 6(1)). It has to include a plan to scale of each storey in the building shown thereon; define the boundaries of each section; distinguish each section by a number; show the floor area of each section and the total floor area of all the sections; and have endorsed upon or annexed to it a schedule specifying the quota of each section in accordance with section 32(1) or (2) and the total of the quotas of all sections shown thereon (s 5). After approval of the draft sectional plan by the Surveyor-General the developer may apply to the Registrar of Deeds concerned for the opening of a sectional title register in respect of the land and building and for the registration of the sectional plan (s 11(1)). Simultaneously with the opening of the sectional title register the Registrar of Deeds has to issue to the developer a certificate of registered sectional title in respect of each section and its undivided share in the common property. Thereupon the

building and the land shown on the sectional plan are deemed to be divided into sections and common property as shown on the sectional plan (s 13(1)). It is only after such deemed division has taken place that ownership in a unit in the sectional title development can be transferred by means of a deed of transfer (s 15B(1)). All of these formalities were apparently complied with on or before 19 September 1997 being the date of the certificate of registered sectional title in terms of which all the disputed properties were registered in the name of the developer. Subsequently some of the disputed properties were transferred to Harbour's Edge Commercial Property Holdings (Pty) Ltd ('Harbour's Edge Commercial Property Holdings'). Like the developer Harbour's Edge Commercial Property Holdings is presently in liquidation and the second respondents have been appointed its liquidators.

[15] With effect from the date on which the first person other than the developer became the owner of a unit in the sectional title development scheme there was deemed to be established for that scheme a body corporate of which the developer and such person were members. Every person who thereafter became a member of a unit also became a member of the body corporate. (S 36(1)).

[16] Cuninghame attended the official opening ceremony of the hotel in November 1997 and then realized that the basement parking was not being treated as common property. By that time the sectional title plan had been registered and the sectional title register had been opened. The various sections and the common property in the development had, therefore, already been determined. The purchaser had, however, not yet taken transfer of a section in the sectional title development. It was only on 11 February 1998 that Cuninghame's nominee, the appellant, took transfer of section 91. The appellant is a company of which Cuninghame is the sole director and a shareholder.

[17] On these facts the court *a quo* had to decide, before a *curator ad litem* could be appointed, whether there were *prima facie* grounds for proceedings

for the recovery of damages, loss or benefit in respect of a matter mentioned in s 36(6). The section reads as follows:

'(6) The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of-

(a) any contract made by it;

(b) any damage to the common property;

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

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

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

[18] Counsel for the appellant submitted that 'Scharrighuisen had clearly indicated (and indeed promoted sales on this basis) to all concerned that the areas in question would be part of the common property, and then, unbeknown to them, had prepared the sectional title plan in such a manner that this was not the case, enabling him to appropriate/sell off such sections, which, in the circumstances, constitutes fraudulent conduct on his part'. He submitted that the appellant was entitled to rectification of the registered sectional plan so that it would reflect the contract between the parties alternatively that the appellant was entitled to the rectification of both the deed of sale and the registered sectional plan so as to reflect the true intention of the parties which was that the disputed properties should be common property. In making these submissions he relied on *Weinerlein v Goch Buildings Ltd* 1925 AD 282 and

Benjamin v Gurewitz 1973 (1) SA 418 (A) at 428. In the alternative he submitted that the body corporate is entitled to claim damages in respect of the misrepresentations.

[19] At best for the appellant, the aforesaid facts establish, *prima facie*, that Scharrighuisen or the developer misrepresented to Cuninghame that in terms of the deed of sale the disputed properties were going to be common property whereas in terms of the deed of sale, of the disputed properties, only the basement parking was going to be common property. Thereafter the developer proceeded to erect a building that differed substantially from the building that was to be erected in terms of the drawings annexed to the deed of sale. It also proceeded to have a sectional plan registered and a sectional title register opened in respect of a scheme substantially different from the proposed scheme according to the deed of sale. One of the differences being that the basement parking was shown as a section and not as common property. The appellant became aware of the fact that a sectional plan in respect of a substantially different scheme had been registered before transfer of section 91 was passed to it. In particular it became aware that the extent of the common property differed materially from the common property according to the proposed scheme as per the deed of sale in that the basement parking was not common property in terms of the scheme that was registered. The appellant was, therefore, aware that the seller was not able to perform in terms of the deed of sale. However, it did not resile from the deed of sale as it was entitled to do but now wants the body corporate to claim, by way of rectification of the sectional plan, a conversion of the disputed properties into common property and/or damages. The basis upon which the appellant wants the body corporate to claim rectification and/or damages is spelt out in paragraphs 2.4, 2.5 and 4.5.2 of the appellants founding affidavit. These paragraphs read as follows:

‘2.4 The application/potential claim by the body corporate as against the Respondents is based thereon that certain parts of the development, which had, in terms of the Deeds of Sale with the various purchasers of the units, and in terms of representations made by the developer, been designated as common property . . . were, contrary to the said Deeds of Sale/representations, sold/registered in the name of the Respondents, which properties the majority of bona fide purchasers of the units now wish to recover as common property.’

‘2.5 Since the body corporate is, by definition and in terms of the Act, the custodian of

common property, it is appropriate that the Body Corporate seeks the retransfer of the properties concerned, and, to the extent necessary, rectification of the sectional plans, and /or damages.'

'4.5.2 We accordingly seek the rectification of the sectional plans to the extent that the common property will constitute the portions of the building defined as common property in the Deed of Sale agreement and retransfer of the properties, alternatively, a claim for damages.'

Before us the appellant argued, *inter alia*, that the registration of the sectional title plan constituted a fraud. That is not the case advanced in the founding affidavit. In fact, there is no express allegation of any fraudulent conduct to be found in the founding affidavit. In the replying affidavit there is a reference to fraudulent alternatively negligent misrepresentation but it is not at all clear what representation is being referred to. In any event, the registration of the sectional title register and the transfer of some of the disputed properties to Harbour's Edge Commercial Property Holdings could have constituted a breach of the deed of sale on the part of the developer but it is difficult to imagine how these actions by themselves could have constituted a fraud *vis a vis* the purchaser or the body corporate.

[20] I have already stated that in terms of the deed of sale, of the disputed properties, only the basement parking was going to be common property. However, notwithstanding the fact that no express allegation of fraud is made in the founding affidavit, I will assume in favour of the appellant that a case has been made out that a fraudulent misrepresentation as to the terms of the deed of sale was made. I furthermore assume in favour of the appellant that, because of such fraud, the purchaser became entitled to rectification of the deed of sale so as to reflect the disputed properties as common property (see *Benjamin v Gurewitz supra* at 424F-426H). It does, however, not follow that the purchaser, let alone the body corporate in its stead, became entitled to the rectification of the sectional plan and the *Weinerlein*-case, contrary to the submission by the appellant, is not authority for the proposition that it does. In

the *Weinerlein*-case it was alleged that a deed of sale as well as the subsequent deed of transfer, as a result of a mistake, did not reflect the common intention of the parties correctly. An exception to a claim for the rectification of the deed of sale and the deed of transfer was dismissed.

[21] The ownership of immovable property is transferred from an owner to another person when transfer is given by the owner with the intention to transfer ownership and received by the other person with the intention to acquire ownership (see *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 368; *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 301 *in fine* – 302A; and *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) at 577G). Transfer of ownership therefore takes place in terms of an real agreement between the parties (see *Air-Kel (Edms) Bpk H/A Merkel Motors v Bodenstein en `n Ander* 1980 (3) SA 917 (A) at 922F-G). If the deed of transfer, as a result of mistake or fraud does not carry out the real intention with which transfer is given and received the aggrieved person may in terms of the common law apply to court for a rectification thereof (see *Ludolph and Others v Wegner and Others* 6 SC 193 at 198; *Saayman v Le Grange* 1879 Buch 10). (It is not necessary to consider to what extent, if any, statutory provisions such as the provisions of the Deeds Registries Act 47 of 1937, affected the common law.) It follows that it is the real agreement between the parties as reflected in the deed of transfer which may be rectified in terms of the common law. Kotzè JA said in the *Weinerlein*-case at 294:

‘The written contract and transfer deed were intended to embody a previous verbal agreement between the parties, and to convey to the plaintiffs the property agreed to be sold. . . . The question is whether, under the circumstances, the written instruments can be rectified on the ground of the said mistake. . . .

. . . [T]he Court can, upon the . . . ground of fraud, rectify the mistake in the written instruments, if it is satisfied that these instruments do not in some material respect contain the actual intention of the parties.’

[22] A sectional plan is not analogous to a deed of transfer. The registration of a sectional plan constitutes the approval of a unilateral application by the developer. It is not intended to and does not purport to reflect a common intention between the developer and another party or parties. The remedy of

rectification which is available in respect of agreements, that, due to a common mistake, do not reflect the intention of the parties, is therefore not applicable.

[23] As a result of the fraudulent misrepresentation the purchaser was entitled to rescind the deed of sale and claim damages, or to hold the developer to the contract and claim specific performance, in so far as it was possible for the developer to specifically perform, and damages. The question is, however, whether it has *prima facie* been established that the body corporate suffered damage or loss or has been deprived of any benefit in respect of a matter mentioned in s 36(6), as a result of the developer not having performed in terms of the deed of sale. Put differently has it *prima facie* been established that the body corporate suffered damage or loss or that it was deprived of a benefit and, if it has, does the body corporate, in terms of s 36(6), have the power to sue for such damages or loss or benefit. As s 41 is concerned with a claim in respect of which the body corporate may institute action against a third party 'deprived of a benefit' must in my view be interpreted to mean deprived of a benefit to which the body corporate was entitled. I shall hereinafter refer to 'damage or loss or deprivation of a benefit' as 'a loss'.

[24] The appellant contends that the body corporate suffered a loss in that in terms of the deed of sale the common property should have included the disputed properties which would have generated an additional income to the

body corporate. I disagree. The body corporate came into existence in respect of a scheme as reflected in the registered sectional plan. In terms of s 37(1)(r) it is obliged, in general, to control, manage and administer the common property for the benefit of all the owners. In order to do so it is empowered by s 38(j) to do all things reasonably necessary for the enforcement of the rules and for the control, management and administration of the common property. The common property referred to is the common property as per the registered sectional plan. The disputed properties and the income generated by them never formed part of the common property and the body corporate never had any entitlement to them. The fact that they do not form part of the common property, therefore, cannot constitute a loss to the body corporate.

[25] My colleague Schutz JA is of the view that the deed of sale was a pre-incorporation contract, in part for the benefit of the body corporate which was to come into existence. He is, furthermore, of the view that it is clear that the body corporate implicitly accepted the benefits and duties of the 'pre-incorporation contract'. A contract for the benefit of a third party is not simply a contract which will benefit a third party; 'what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract'. (See *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 625E-G.) In *Joel Melamed and Hurwitz v Cleveland Estates(Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 172B-D Corbett JA quoted the following

passage in *Crookes NO and Another v Watson and Others* 1956 (1) SA 277 (A) at 291E-F with approval:

'[T]he typical contract for the benefit of a third person is one where A and B make a contract in order that C may be enabled, by notifying A, to become a party to a contract between himself and A. What contractual rights exist between A and B pending acceptance by C and how far after such acceptance it is still possible for contractual relations between A and B to persist are matters on which differences of opinion are possible; but broadly speaking the idea of such transactions is that B drops out when C accepts and thenceforward it is A and C who are bound to each other.'

It does not appear from the deed of sale and it was never contended in the papers filed that the parties intended to contract for the benefit of a third party. It has furthermore not been suggested by anybody in the papers filed or anywhere else that if there was such a pre-incorporation contract for the benefit of the body corporate that the body corporate adopted the contract. In the circumstances there is in my view no basis for a finding that the alleged claim relates to a contract made by the body corporate. In any event a body corporate comes into existence in respect of a registered sectional plan from which it will appear which parts of the building is common property. A contract for the benefit of the body corporate in respect of such common property would not make any sense. A contract for the benefit of the body corporate that any other parts of the building, that is to say sections in terms of the registered sectional plan, would be common property would make even less sense. I therefore find it inconceivable that the parties would have

intended to contract for the benefit of the body corporate as to what part of the building to be erected would constitute common property. In terms of the deed of sale the developer bound itself to deliver to the purchaser an apartment in a sectional title development as per the drawings annexed to the deed of sale. It did not bind itself to provide, at that time, a non-existent body corporate with certain common property to administer.

[26] Even if the fact that the disputed properties do not form part of the common property of the development is to be considered a loss to the body corporate, *prima facie* grounds for the proposed proceedings have not been shown to exist as it is not a loss in respect of a matter mentioned in s 36(6) or put differently it is not a loss in respect of which the body corporate has the power to sue in terms of the section.

[27] The alleged loss does not relate to a contract made by the body corporate; it does not relate to damage to the common property; and it did not arise out of the exercise by the body corporate of any of its powers or the performance or non-performance of any of its duties under the Act or any rule. Section 36(6)(a), (b) and (d) are therefore not applicable. Section 36(6)(c) deals with the body corporate's capability of being sued and is, therefore, also not applicable.

[28] It remains to consider whether the alleged loss is a loss 'in respect of the scheme' in which event it will be a loss in respect of which the body corporate may sue in terms of the provisions of s 36(6)(e). 'Scheme' is defined in the Act as a development scheme and a development scheme is in turn defined as 'a scheme in terms of which a building or buildings situated or to

be erected on land within the area of jurisdiction of a local authority is or are, for the purposes of selling, letting or otherwise dealing therewith, to be divided into two or more sections . . . '. There can only be one scheme in respect of a particular body corporate and that is the scheme that brought it into being. In respect of the body corporate we are dealing with, the scheme is the scheme reflected in the registered sectional plan and not the scheme envisaged in the deed of sale which latter scheme was not proceeded with. The body corporate did not suffer loss in respect of the scheme as reflected in the registered sectional plan. Before us the question arose what claims a body corporate could have against a developer if the section was so construed. There are various possibilities. One such possibility is a claim for the costs of correcting an incorrect sectional plan (s 14(2)). Another one is a claim in terms of s 36(7)(a)(ii) which requires a developer to convene a meeting of the members of the body corporate at which he has to furnish the members with a certificate from the local authority to the effect that all rates due by him up to the date of establishment of the body corporate have been paid. Yet another one is a claim in terms of s 36(7)(a)(iii) and s 36(7)(aA) for proof of revenue and expenditure concerning the management of the scheme from the date of the first occupation of any unit until the date of the establishment of the body corporate and for payment of any residue revealed by such proof.

[29] The appellant's claim is a personal claim which remained the appellant's claim when the body corporate was established. Owners other than the developer and Harbour's Edge Commercial Holdings own fifty-three hotel suites and 2 penthouses. Forty-four of those owners supported a resolution that the sectional plans be amended and that, to the extent necessary, action be instituted against the first and second respondents to this end. Six voted against the resolution. The others were apparently not present or represented at the meeting. Cuninghame says in the founding affidavit that the circumstances giving rise to his own deed of sale generally pertained to the other individual units. I do, however, not think that he intended to suggest that misrepresentations or the same misrepresentations were made to all the purchasers or that all their

contracts are identical. The fact that there may be differences illustrates how untenable it is to suggest that the body corporate acquired the rights to performance and damages of the individual owners. If only some purchasers were entitled to damages as a result of a particular section not being common property and if the body corporate were to have acquired their rights to such damages the owners who were not entitled to such damages would benefit at the expense of the owners who were so entitled.

[30] For these reasons I am of the view that the appellant failed to make out a case that there are *prima facie* grounds for proceedings to be instituted on behalf of the body corporate for the recovery of damages, loss or of a benefit of which it had been deprived in respect of a matter mentioned in s 36(6).

[31] It follows that in my view the appeal should be dismissed with costs.

P E STREICHER
Judge of Appeal