



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 735/10

In the matter between:

THE BODY CORPORATE OF SAVANNAH PARK

Appellant

and

BRAINWAVE PROJECTS 1147 CC

First Respondent

VODACOM (PTY) LIMITED

Second Respondent

THE REGISTRAR OF DEEDS, PIETERMARITZBURG

Third Respondent

THE SURVEYOR GENERAL, PIETERMARITZBURG

Fourth Respondent

Neutral citation: *The Body Corporate of Savannah Park v Brainwave Projects 1147 CC (735/2010) [2011] ZASCA 239 (1 December 2011).*

Coram: Mthiyane, Cachalia, Mhlantla, Leach and Majiedt JJA

Heard: 18 November 2011

Delivered: 1 December 2011

Summary: The developer's right of extension in s 25(4) of the Sectional Titles Act 95 of 1986 is a right to develop a section of the common property, not to commercially exploit it. It is not a usufruct.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Griffiths AJ sitting as court of first instance).

The following order is made:

- (a) The application to lead further evidence is dismissed with costs.
- (b) The appeal is upheld with costs and the order of the high court is set aside and is substituted with the following:
 - '1 The first respondent is hereby directed, forthwith upon the granting of this order:
 - 1.2 to deliver to the applicant or provide it with:
 - 1.2.1 true copies of any written contracts it has concluded with the second respondent or any other parties in respect of a cellular telephone mast that has been erected on the common property of the Sectional Title Scheme known as Savannah Park, situate at Sneezewood Avenue, Glenanil, KwaZulu-Natal ('the mast');
 - 1.2.2 true copies of any and all written extensions or amendments of the aforementioned written contracts;
 - 1.2.3 the details of any and all oral contracts that may have been concluded between the first respondent and the second respondent or any other parties in respect of the mast;
 - 1.2.4 a detailed written breakdown of any and all income that:
 - 1.2.4.1 the first respondent has already received from the second respondent or any other persons in respect of the mast from the 19th day of November 2007, being the establishment date of the

Sectional Title Scheme known as Savannah Park ('the date of establishment');

- 1.2.4.2 may have been paid in advance to the first respondent by the second respondent or any other persons in respect of the mast prior to the date of establishment but which would nevertheless pertain to the period following the date of establishment;
- 1.2.4.3 has accrued to the first respondent since the date of establishment or may accrue to the first respondent in the future in respect of the mast but which has yet to be paid to the first respondent by the second respondent or any other persons;
- 1.2.5 copies of any and all other documents of whatsoever nature but excluding correspondence between the parties' respective attorneys that may have passed between the first respondent and the second respondent or any other parties in respect of the mast.
- 2 The first respondent is hereby interdicted and directed forthwith upon the granting of this order, to pay to the applicant:
 - 2.1 any and all income that the first respondent has already received from the second respondent or any other persons in respect of the mast from the date of establishment;
 - 2.2 any and all income that the first respondent received from the second respondent or any other persons in respect of the mast prior to the date of establishment but that pertain to the period following the date of establishment;
 - 2.3 interest on the payment(s) referred to in paras 3.1 and 3.2 above at the rate of 15,5 per cent per annum from the date the first respondent received such payment(s) to date of final payment to the applicant;
 - 2.4 any and all income that has accrued to the first respondent since the date of establishment or may accrue to the first respondent in the future in respect of the mast (but which have yet to be paid to the first respondent by the second respondent or any other persons) as and when such income is received by the first respondent.

- 3 The first respondent is hereby interdicted and restrained from concluding any further contracts, written or oral, with the first respondent or any other persons in respect of the mast or any extensions of any current contracts.
- 4 The first respondent is directed to pay the costs of this application.’

JUDGMENT

CACHALIA JA (Mthiyane, Mhlantla, Leach and Majiedt JJA concurring):

[1] This appeal emanates from the KwaZulu-Natal High Court, Durban (Griffiths AJ). It concerns a dispute between a developer and a body corporate of a sectional title scheme over the income from a lease agreement. The outcome of this appeal turns primarily on a proper interpretation of s 25(4) of the Sectional Titles Act 95 of 1986.

[2] The developer, which is the first respondent, concluded a lease agreement with a cellular telephone company, the second respondent, in September 2005. The agreement allowed the second respondent to erect a cellular telephone mast on a specified portion of the developer’s property. In return the company would pay a rental amount to the developer. The mast was erected and has been operational since early 2006, when the agreement took effect.

[3] The developer thereafter initiated a process to establish a sectional title scheme on the property. This entails first submitting a draft plan to the Surveyor-General for approval,¹ and then applying to the deeds registry for the plan to be registered.² The effect of registration is that the buildings and land are deemed to

¹ Section 4 read with s 7.

² Section 11.

have been divided into sections and common property as shown on the plan.³ In this way, specific sections of the building that could not be the subject of independent rights before registration become independent legal entities, which may be dealt with independently after registration. The developer then no longer owns one entity (the land with the buildings), but owns the individual units which may be sold to individual owners.⁴

[4] When applying for registration of the plan, the developer may reserve a right, in terms of s 25(1) of the Act, to extend the scheme by erecting, completing or including further buildings on a specified portion of the common property within a stipulated period.⁵ The developer reserved this right of extension over a portion of the common property earmarked for future development on which the mast was built. In terms of s 12(1)(e) of the Act the Registrar of Deeds, the third respondent, then issued a 'Certificate of Real Right' to the developer certifying 'that the Developer is the registered holder of the right to erect and complete . . . within a period of 10 years for his personal account a further building or buildings . . . on a specified portion of the common property as indicated on the plan referred to in s 25(2)(a) of the Act . . .'. The plan depicted a small building, which housed components for the mast. The certificate was issued on 19 November 2007, together with another certificate, establishing the 'Body Corporate of Savannah Park' in terms of s 36(1) of the Act. The body corporate, which is the appellant, consists of the owners of individual units in the development. Its main function is to control, manage and administer the common property, which is jointly owned by the owners of the units.⁶

[5] Section 25(5A) of the Act says that if a developer exercises the reserved right, it must, after completing the building which is the subject of the reserved right, immediately apply to register the extension plan so that the completed building is included in the sectional title register. Although there was some

³ Section 13(1).

⁴ 24 *Lawsa* 2 ed para 346, n 1.

⁵ See generally *Oribel v Blue Dot* (454/2009) [2010] ZASCA 78 paras 11 and 12.

⁶ Section 37(1).

dispute in the papers as to whether the building which houses the mast was completed when the proceedings were initiated in the high court, the developer's answering affidavit states that the building 'is still to be erected'. This assertion must be accepted according to the normal rule governing the determination of disputes in motion proceedings. The dispute is any event immaterial to the outcome of this appeal which turns on an interpretation of s 25(4) of the Act.

[6] It is, however, common cause that the relevant unit comprising the building which houses the mast, has not yet been registered in the sectional title register. It must also be accepted that when the mast was erected the developer intended to benefit exclusively from the rental income from the lease agreement – even after it had registered the sectional title plan with the completed unit. It believed that by reserving the extension right it was entitled to the proceeds of the lease while the reservation was extant, and that after the building was completed it would continue to receive the income as the registered owner of the unit. The developer says that as and when new owners joined the scheme, they (and the body corporate) were aware of the purpose of the reservation, but nothing turns on this fact.

[7] Mr Stewart, who appeared for the body corporate, contended that s 25(4)⁷ of the Act merely gives the developer the right to extend the property. It does not entitle it to the exclusive use and enjoyment, and to the fruits, of the specified section of the common property. In other words, the developer can have no usufructuary rights over the common property until the relevant plan is registered and the unit included in the sectional title register. The specified section of the common property over which the extension right was reserved, therefore,

⁷ Section 25(4) provides: 'A right reserved in terms of subsection (1) or vested in terms of subsection (6), and in respect of which a certificate of real right has been issued –
(a) shall for all purposes be deemed to be a right to immovable property which admits of being mortgaged; and
(b) may be transferred by the registration of a notarial deed of cession in respect of the whole, a portion or a share in such right: Provided that in the case of a cession affecting only a portion of the land comprising the scheme only such portion shall be identified to the satisfaction of the Surveyor-General.'

remained subject to the control, administration and management of the body corporate in the interests of all of its members. And, because the developer had no usufruct over that portion of the property, it could not lease it without the consent of the body corporate. The developer, therefore, had no right to the income from the lease agreement. Accordingly, it is obliged to account to the body corporate for all remuneration and to disgorge any profits from the lease.

[8] Mr Rowan, who appeared for the developer, on the other hand contended that the extension right has a broader ambit than what the body corporate contended for, and confers a real right on the holder of the right 'for all purposes'. The right therefore, so it is contended, entitles a developer not merely to mortgage the right and to alienate it, but to lease the land over which the right is reserved. This would include providing a third party with rights under *usus*, *habitatio*, or usufruct over the land for the duration of the right. The high court upheld this contention.

[9] The narrow question that must be answered in this case is whether the right of extension includes a usufruct within its ambit. This necessitates a consideration of the nature of the right. Section 25(4)(a) provides that the real right reserved by the developer to extend the scheme is deemed to be a right to immovable property capable of being mortgaged.⁸ The right may also be transferred by registration of a notarial deed of cession.⁹ At the time when the developer reserved the right in 2007, s 25(5) further stipulated that this right may be exercised by the developer or his successor-in-title even if neither have an interest in the common property.

[10] An attempt to characterise the extension right was first made some two decades ago in *Erlax Properties (Pty) Ltd v Registrar of Deeds & others*.¹⁰ At the time, the Act precluded the developer from alienating this right. This led

⁸ At the time when this dispute arose the section referred to 'urban immovable property' and not to 'immovable property'. The omission of the word urban was effected through s 8(d) of the Sectional Title Amendment Act 11 of 2010. The amendment has no bearing on this case.

⁹ Section 25(2)(b).

¹⁰ *Erlax Properties (Pty) Ltd v Registrar of Deeds & others* 1992 (1) SA 879 (A).

Joubert JA to conclude that even though the right is a real right in land, which is in principle registrable, it was created in favour of the developer as a personal servitude, but not a usufruct, since it did not give the developer the right to use and enjoy the fruits of the land.¹¹ His view was *obiter* because the majority judgment of Grosskopf JA (in which Joubert JA also concurred) held that whichever way the right was characterised, it was not transferable.¹² The Legislature thereafter explicitly made the right transferable.¹³ However, the courts have continued to describe the right as a personal servitude.¹⁴

[11] Academic writers on the other hand have been emphatic in their view that the right is not a personal servitude, but should be construed as a statutory real right *sui generis*.¹⁵ Prof C G Van der Merwe, for example, argues persuasively that because the developer can transfer the right to a third party or transmit it to an heir, this conflicts with the characteristic of inalienability inherent in a personal servitude. Also, when a developer's right to extend the scheme lapses, it does not perish, but vests automatically in the body corporate. He stresses further that the purpose of a personal servitude is to entitle a person during his life-time to use and enjoy the property (and I would add, its fruits) of another person; the purpose of a developer's extension right is different: it is to enable the developer to obtain a mortgageable asset to finance further phases of the development.

[12] In the face of these compelling arguments I do not think that the characterisation of the right as a personal servitude is sustainable. And, considered against its purpose, the right also cannot encompass a usufruct as Joubert JA correctly observed in *Erlax*. The reserved right only gives a developer the right to develop further phases of a scheme. In doing so, the developer must

¹¹ Ibid 887I-888A.

¹² Ibid 893B-C.

¹³ *Croxford Trading 7 v The Body Corporate of the Inyoni Rocks Cabanas Scheme no ss1/1978* [2011] ZASCA 27 paras 3-5.

¹⁴ *SP&C Catering Investments (Pty) Ltd v The Body Corporate of Waterford Mews & others* 2010 (4) SA 104 (SCA) para 4.

¹⁵ P J Badenhorst, J M Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed at 457-458; C G Van der Merwe *Sectional Titles* vol 1 Issue 12 at 12-30 and 12-31.

comply strictly with the documentation¹⁶ and plans¹⁷ accompanying the application for registration of the sectional plan.¹⁸ Having exercised the right, the developer must, as I have mentioned earlier, immediately after completing the relevant unit, apply to register the relevant plan and the inclusion of the completed unit in the sectional title register. It is, therefore, a *limited* real right.

[13] Properly construed the description of the right as ‘a right to immovable property’ ‘for all purposes’ does not change this. The Act clearly does not contemplate the leasing of a unit (or part thereof) – as would be the case with a usufruct – or give the developer any right to exploit the unit commercially before completion.¹⁹ The Registrars of the Deeds Registries took the same view when they passed a resolution in 2007 stating that the Act did not provide for a usufruct to be registered over the right of extension.²⁰

[14] I am fortified in my view by subsequent amendments to the Act. Section 25(5) was amended in 2010²¹ to allow the developer to exercise the right of extension by the addition of the rights of exclusive use over the common property, which appears to indicate a change of intention on the part of the legislature. This addition was made subject to the rights of exclusive use being

¹⁶Section 11(3).

¹⁷Section 25(2).

¹⁸*SP&C Catering Investments (Pty) Ltd v Body Corporate of Waterford Mews & others* 2010 (4) SA 104 (SCA) para 8; *Oribel Properties v Blue Dot* (454/2009) [2010] ZASCA 78 paras 11 and 19.

¹⁹Of course, in terms of s 25(5A)(b), once the developer has completed the unit, but has not within 90 days of its completion for occupation taken steps to include the unit in the sectional title register, it becomes liable to pay the levies due by owners of the units pursuant to s 37(1), even though the unit has not yet been included in the register. The purpose of this section is to ensure that an unscrupulous developer does not derive an income from the completed unit, without paying the registered levies to the body corporate. It does not permit the developer to delay including the unit in the register indefinitely. And it cannot mean that the developer has the right of ownership in the completed unit before registration as the learned judge in the high court thought.

²⁰RCR 6/2007. Van der Merwe above n 14 at p 12-31 n 123 is also of the view that this is probably correct.

²¹Section 8(h) of Sectional Titles Amendment Act 11 of 2010. Section 25(5) now reads: ‘(5) A right reserved in terms of subsection (1) may be exercised by the developer or his or her successor in title thereto, even though the developer or his or her successor in title, as the case may be, has no other interest in the common property, by the addition of rights of exclusive use: Provided that the rights of exclusive use must be ceded within 12 months after their creation, either to the body corporate of the scheme or to one or more registered owners of a section or sections in the scheme.’

ceded either to the body corporate or to one or more registered owners in the scheme within twelve months of their creation. It seems that the purpose of this amendment was to allow the developer to exercise the right of extension by exercising a right of exclusive use of the section of the common property over which the extension right was reserved, but only for the limited period mentioned. This suggests strongly that the legislature could not have intended, before the amendment, an unlimited right of use of the unit for the developer.

[15] The amended section is to be read with s 27(6), which indicates that an exclusive use right permits the registration not only of a mortgage bond, but also of a lease contract, or personal servitude of usufruct, *usus*, and *habitatio*. So, if a developer reserves a right of extension, and chooses to exercise that right by the addition of rights of exclusive use specified in s 27(6), it may do so for a limited period of 12 months. I cannot agree with the tentative suggestion in Badenhorst²² that the right of extension in s 25(4) should be regarded as being of a similar nature to the rights that may be created under s 27 of the Act. Those rights, as the amended s 25(5) now makes clear, are 'in addition' to the right of extension – they are not integral to it.

[16] It is, therefore, clear that in the present case the developer was mistaken in its view that the mere reservation of an extension right, without more, gave it the right to lease that section of the common property over which the mast was erected.

[17] Mr Rowan conceded on behalf of the developer that if his interpretation of the ambit of the right was wrong, the appeal should be upheld and the body corporate would be entitled to an order in its favour in the terms requested. No orders were sought against any of the respondents other than the developer.

²² (See above) n 15 at 458.

[18] One matter remains. The body corporate sought to lead further evidence before this court regarding how far the building had progressed towards completion. In my view this evidence would have had no bearing on the outcome of this appeal, which as I mentioned at the outset, turned on the interpretation of s 25(4). This application must, therefore, fail.

[19] The following order is made:

- (a) The application to lead further evidence is dismissed with costs.
- (b) The appeal is upheld with costs and the order of the high court is set aside and is substituted with the following:
 - '1 The first respondent is hereby directed, forthwith upon the granting of this order:
 - 1.2 to deliver to the applicant or provide it with:
 - 1.2.1 true copies of any written contracts it has concluded with the second respondent or any other parties in respect of a cellular telephone mast that has been erected on the common property of the Sectional Title Scheme known as Savannah Park, situate at Sneezewood Avenue, Glenanil, KwaZulu-Natal ('the mast');
 - 1.2.2 true copies of any and all written extensions or amendments of the aforementioned written contracts;
 - 1.2.3 the details of any and all oral contracts that may have been concluded between the first respondent and the second respondent or any other parties in respect of the mast;
 - 1.2.4 a detailed written breakdown of any and all income that:
 - 1.2.4.1 the first respondent has already received from the second respondent or any other persons in respect of the mast from the 19th day of November 2007, being the establishment date of the Sectional Title Scheme known as Savannah Park ('the date of establishment');

- 1.2.4.2 may have been paid in advance to the first respondent by the second respondent or any other persons in respect of the mast prior to the date of establishment but which would nevertheless pertain to the period following the date of establishment;
 - 1.2.4.3 has accrued to the first respondent since the date of establishment or may accrue to the first respondent in the future in respect of the mast but which has yet to be paid to the first respondent by the second respondent or any other persons;
 - 1.2.5 copies of any and all other documents of whatsoever nature but excluding correspondence between the parties' respective attorneys that may have passed between the first respondent and the second respondent or any other parties in respect of the mast.
- 2 The first respondent is hereby interdicted and directed forthwith upon the granting of this order, to pay to the applicant:
- 2.1 any and all income that the first respondent has already received from the second respondent or any other persons in respect of the mast from the date of establishment;
 - 2.2 any and all income that the first respondent received from the second respondent or any other persons in respect of the mast prior to the date of establishment but that pertain to the period following the date of establishment;
 - 2.3 interest on the payment(s) referred to in paras 3.1 and 3.2 above at the rate of 15,5 per cent per annum from the date the first respondent received such payment(s) to date of final payment to the applicant;
 - 2.4 any and all income that has accrued to the first respondent since the date of establishment or may accrue to the first respondent in the future in respect of the mast (but which have yet to be paid to the first respondent by the second respondent or any other persons) as and when such income is received by the first respondent.

- 3 The first respondent is hereby interdicted and restrained from concluding any further contracts, written or oral, with the first respondent or any other persons in respect of the mast or any extensions of any current contracts.
- 4 The first respondent is directed to pay the costs of this application.'

A CACHALIA
JUDGE OF APPEAL

APPEARANCES

For Appellant:

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