

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: 6096/2011

In the matter between:

<b>ROSE PARK ADMIN CC</b>	First Applicant
<b>PARALELL THIRTY FOUR PROPERTY DEVELOPMENT CC</b>	Second Applicant
<b>MARGARET DOROTHEA LERM N.O.</b>	Third Applicant

and

<b>THE REGISTRAR OF DEEDS, CAPE TOWN</b>	First Respondent
<b>FERNWOOD BODY CORPORATE</b>	Second Respondent

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**THE APPLICANTS' HEADS OF ARGUMENT**

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**A. INTRODUCTION – THE BACKGROUND FACTS**

1. The subject-matter of this application is the First Respondent's refusal to extend the sectional title register, at the instance of the First Applicant, of the sectional title scheme which had been established with the registration of sectional plan number SS443/2003 (on 6 October 2003), in respect of the property described as the remainder of Erf 4312, Onrust River.<sup>1</sup>
2. When the aforesaid sectional plan was registered, the developer of the

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<sup>1</sup> Record p.7, par 10.

property, the Chante Clair Eiendomstrust (*“the developer”*) reserved in favour of itself the right to erect further buildings on the common property of the said sectional title scheme (*“the scheme”*),<sup>2</sup> in addition to the four buildings which had been constructed as the first phase of the scheme.

3. Section 25(1) of the Sectional Titles Act, No. 95 of 1986 (*“the Act”*), provides for such reservation of the right in respect of further developments on the common property of a sectional title scheme (which is imposed as a condition in terms of section 11(2) of the Act).
4. During February 2004, the developer exercised this right of extension and caused the registration of an amending sectional plan of extension, which added a further 5 units to the existing 5 units of the scheme.<sup>3</sup>
5. Subsequently, in order to improve the economic viability of the scheme, the developer obtained an amendment of the sectional plan, which would allow individual persons/entities to acquire and develop individual portions of the common property. This entailed that the undivided right of extension to develop the common property (which vested in the developer), was subdivided and allocated into specific reserved portions of the common property.<sup>4</sup>
6. On 1 April 2004, an amending sectional plan for real rights (SG number

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<sup>2</sup> Record p.7, par 13.

<sup>3</sup> Record p.8, par 17.

<sup>4</sup> Record p.8, par 16.

D98/2004) was approved and registered, which divided the right of extension in respect of the common property, into 40 reserved portions.<sup>5</sup>

7. The Applicants are the cessionaries of the right, title and interest in respect of all such reserved portions.<sup>6</sup>
8. During the period 2004 to 2008, the Applicants from time to time exercised their rights to develop the reserved portions which vested in them respectively, and for this purpose caused 8 further amending sectional plans of extension to be registered (pursuant whereto further extensions to the scheme were constructed).<sup>7</sup>

#### **B. THE ISSUE**

9. A dispute arose between the First Applicant and the First Respondent, when the First Applicant attempted to exercise its right of extension in respect of reserved portion R31.
10. During June 2010, the First Applicant procured the approval, by the Surveyor-General, of an amending sectional plan, in terms of which a new section, being section 37, as well as an exclusive use area, being Yard No. Y28, were created.<sup>8</sup> (The residential building which had been erected on this section, pursuant to such amending sectional plan, is known as section

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<sup>5</sup> Record p.9, par 19.

<sup>6</sup> Record p.9, par 21 to 24.

<sup>7</sup> Record p.10, par 26.

<sup>8</sup> Record p.12, par 27; Record p.13, par 29 and 30.

37.)

11. However, on or about 20 December 2010, the First Respondent refused to –

11.1 register this amending sectional plan of extension, which would have included section 37 (together with exclusive use area Y28) in the sectional title register of the scheme;<sup>9</sup>

11.2 transfer section 37 and exclusive use area Y28 to the new owners, being Reino and Ilse-Marie Thiart.

12. The reasons for the First Respondent's aforesaid decision, were as follows:

12.1 The building on section 37 had not been constructed strictly in accordance with the documents as contemplated in section 25(2)(a) and (b) of the Act.

12.2 Accordingly, a court order, as envisaged in section 25(13), should be obtained, in order to obtain "*condonation*" of the alleged "*deviations*".<sup>10</sup>

13. The First Respondent did not divulge any detail of the alleged deviation(s) in respect of which the First Applicant had to obtain the Court's *condonation*".<sup>11</sup>

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<sup>9</sup> Record p.13, par 32.

<sup>10</sup> Record p.16, par 35 and 36; Record p.18, par 39 to 43.

<sup>11</sup> Record p.19, par 41.

14. The Applicants on the other hand contend that –

14.1 the Act does not assign to the First Respondent any authority (or duty) to investigate and adjudicate upon the question as to whether an amending sectional plan of extension in fact deviates from the documents referred to in section 25(2); and

14.2 the First Respondent's position is based on a (misconception) of the reasoning of this Court (with regard to the meaning and effect of section 25(13)) in the unreported judgment of Dolphin Whisper Trading 10 (Pty) Ltd v Registrar of Deeds and Others.

15. It is submitted that the First Respondent's decision at issue, constituted administrative action as contemplated by section 1 of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA").<sup>12</sup> It is therefore subject to this Court's power of review, as set out in section 6 of PAJA.

**C. THE JUDGMENT IN DOLPHIN WHISPER TRADING 10 (PTY) LTD v REGISTRAR OF DEEDS**

16. In this unreported judgment (hereinafter referred to as "Dolphin Whisper"), the Registrar of Deeds rejected an application by a property developer for the registration of a plan of extension, in terms of section 25(9) of the Act.

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<sup>12</sup> See in this regard Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) at 405F-507E.

17. The refusal to register the plan of extension was based upon the following grounds:<sup>13</sup>
- 17.1 The developer had failed to erect and divide the buildings on the new sections, strictly in accordance with the documents which had originally been submitted in terms of section 25(2).
- 17.2 The developer had not established the existence of changed circumstances, which would have justified the “*non-compliance*” with section 25(13).
18. This “*non-compliance*” related to the participation quota in terms of the amending sectional plan of extension, which differed substantially from the participation quota contained in the section 25(2) documents.
19. The developer, whilst conceding that the amended participation quota differed from the original proposed participation quota, based its application to court on the fact that such amendment had been necessitated by “*a mere technicality in the registration process*”. In its replying affidavit, it elaborated on this aspect and relied on “*changes in the current property market*”, as a factor which had necessitated the amendment of the original proposed participation quota.<sup>14</sup>
20. It was submitted on behalf of the developer that, *inter alia*, the Registrar of

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<sup>13</sup> See par 25 of the judgment, at record p.162.

<sup>14</sup> Par 32 to 34 of the judgment, at record p.164.

Deeds acted unlawfully in determining that changed circumstances had not been established.<sup>15</sup>

21. The Court approached the matter on the basis that the issue for determination was “... *whether the applicant has shown that there were ‘changed circumstances’ which made strict compliance with the documents lodged in terms of section 25(2) of the Act impracticable*”.<sup>16</sup>

22. It concluded that there was insufficient evidence “... *which would support the notion that there have been changed circumstances ... which would justify the changes in respect of the participation quota*”.<sup>17</sup>

23. It is submitted that the remark of the Court in paragraph 42 of the judgment,<sup>18</sup> namely that a court may, on application by a developer, condone non-compliance with the provisions of the Act, was made *obiter* (the application was based on the provisions of section 6 of PAJA) and is in any event, with respect, incorrect.

24. Section 25(13) provides that (an owner of a unit in a scheme) who is prejudiced by the developer’s failure to effect extensions strictly in accordance with the documents referred to in subsection (2), may apply to the Court for an order that there should be strict compliance with the reservation.

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<sup>15</sup> Par 27 of the judgment, at record p.162.

<sup>16</sup> Par 38 of the judgment, at record p.166.

<sup>17</sup> Par 48 of the judgment, at record p.169.

<sup>18</sup> At record p.167.

25. It is therefore submitted that the First Respondent's decision in the present matter, was clearly based on a misconception of the reasons for the Court's judgment in Dolphin Whisper. ✓

**D. THE PROVISIONS OF SECTION 25(13)**

26. Section 25(13) provides as follows:

*"(13) A developer or his successor in title who exercises a reserved right referred to in subsection (1), or a body corporate exercising the right referred to in subsection (6), shall be obliged to erect and divide the building or buildings into sections strictly in accordance with the documents referred to in subsection (2), due regard being had to changed circumstances which would make strict compliance impracticable, and an owner of a unit in the scheme who is prejudiced by his failure to comply in this manner, may apply to the Court, whereupon the Court may order proper compliance with the terms of the reservation, or grant such other relief, including damages, as the Court may deem fit." (emphasis provided)*

27. It is submitted that, on a proper construction of this section (a developer) (or his successor-in-title) who exercises a section 25(1) right of extension, is entitled to deviate from the documents which had originally been lodged in compliance with section 25(2), but only to the extent that changed circumstances would make strict compliance impractical and necessitate such deviations.

28. It is submitted that the eventuality of an application to court as envisaged in



subsection (13), would only arise when an aggrieved owner (of a unit in the scheme) feels that he or she is prejudiced by the failure of the developer to design and construct an extension strictly in accordance with the section 25(2) documents.

29. It is submitted that subsection (13) clearly presupposes that a building has already been erected in terms of the right of extension, but not strictly in accordance with the section 25(2) documents. It is the prejudice to another owner in the scheme, caused by such non-compliance, which would entitle the aggrieved owner to apply to court for the proper compliance with the terms of the reservation (or other appropriate relief).
30. It is submitted that this is also how subsection (13) was interpreted in Dolphin Whisper<sup>19</sup> and the unreported judgment of PCL Trust v Registrateur van Aktes.<sup>20</sup>
31. As pointed out by the Court in PCL Trust,<sup>21</sup> the Act does not contain any provision to the effect that –
- 31.1 a developer should first obtain the Court's sanction before it applies in terms of section 25(9) for the registration of an amending sectional plan of extension, which deviates from the section 25(2) documents; and

<sup>19</sup> See par 22 and 23 of the judgment, at record p.161.

<sup>20</sup> Record p.177.

<sup>21</sup> Record p.176.

31.2 the Registrar of Deeds is obliged to approve (or disapprove) amending sectional plans of extension, which has been submitted for registration in terms of section 25(9).

(The latter function is the domain and the responsibility of the Surveyor-General.)

32. It is submitted that the following facts and circumstances militate against the interpretation placed on subsection (13) by the First Respondent:

32.1 The First Respondent does not have the expertise to determine whether an amending sectional plan of extension in fact deviates from the section 25(2) documents.

32.2 Moreover, the First Respondent has neither the expertise, nor the means, to determine whether there exist changed circumstances which would make strict compliance with the section 25(2) documents impracticable. This is simply not the First Respondent's function.

32.3 It is implicit in the economic viability of a sectional title scheme (which allows for future developments in phases in terms of section 25(1)) that the developer (or its successor-in-title) should be able to design and construct such developments according to changed circumstances (as dictated by market factors).

32.4 As pointed out by the Court in PCL Trust,<sup>22</sup> it would have a stultifying effect on such developments if a court order would be a prerequisite for any deviations from the section 25(2) documents.

32.5 This would negate the very purpose of section 25, which was to introduce the flexibility of developing a sectional title scheme in phases. (See in this regard the attached judgment of Knoetze v Saddlewood CC.<sup>23</sup>) It is submitted that this judgment is clear authority for the Applicants' interpretation of subsection (13).

32.6 When an amending sectional plan for extension is lodged for registration by the First Respondent, it would already have been approved by the Surveyor-General (as required by subsection (9)).

32.7 Deviations that would come to the attention of the First Respondent, would in any event only be those which would be apparent from a comparison between the amending sectional plan, and the section 25(2) documents. Deviations which would only be visible by means of a physical inspection of the building in question, would not be subject to the First Respondent's scrutiny.

33. The arbitrary nature of the First Respondent's decision at issue, in the context of the history of the present matter, is further illustrated by the

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<sup>22</sup> Record p.177.

<sup>23</sup> [2001] 1 All SA 42 (SE).

following facts and circumstances:

33.1 When the developer, during April 2004, obtained the division of the right of extension of the common property into 40 reserved portions, the nature of the scheme, more in particular the way in which further developments thereof would be affected, underwent a material change.<sup>24</sup>

33.2 When this occurred, the Surveyor-General as well as the First Respondent must have realised that any further development pursuant to the amending sectional plan, would not strictly comply with the section 25(2) documents. This important consequence was apparent from the fact that the amending sectional plan, which divided the common property into 40 reserved portions, envisaged that the future development thereof would not occur strictly in accordance with the section 25(2) documents.<sup>25</sup>

33.3 A number of material deviations from the original section 25(2) documents were allowed in respect of all the previous extensions of the scheme.<sup>26</sup>

34. In his report dated 21 April 2011, the First Respondent attempts to justify his decision, on the basis that Registrars of Deeds have to follow directions

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<sup>24</sup> Record p.9, par 19 and 20.

<sup>25</sup> Record p.29, par 18.

<sup>26</sup> Record p.17, par 37.

issued by the Chief Registrar of Deeds. It is submitted that any such directive which is clearly in conflict with any statutory provision or common law principle, is unlawful and should be disregarded by a Registrar of Deeds.

## E. CONCLUSION

35. It is accordingly submitted that –

35.1 the First Respondent had no authority to refuse to effect the registrations at issue, and to insist that the First Applicant should first obtain a court order to “*condone*” the alleged deviations;

35.2 the First Respondent's aforesaid conduct amounted to a decision which constituted an administrative action as contemplated in section 1(a)(ii) of PAJA;

35.3 such decision was materially influenced by an error of law, in that it was based on a misconception of the reasons for this Court's judgment in the Dolphin Whisper matter, as well as an incorrect interpretation of subsection (13);

35.4 moreover, such decision was taken arbitrarily and adversely affected the First Applicant's rights in respect of the registrations it required.

36. In the premises –

36.1 the First Respondent's aforesaid decision should be set aside in terms of section 8 of PAJA; and

36.2 the First Applicant is entitled to an order in terms of paragraphs 2 and 3 of the notice of motion.



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5 May 2011