THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO. 484/2004

In the matter between

DIRK LEONARDUS EHLERS	**First Appellant**
A W WESSELS N.O.	**Second Appellant**
M F C WESSELS N.O.	**Third Appellant**
G L BISHOP N.O.	**Fourth Appellant**

and

RAND WATER BOARD	**Respondent**

CORAM: MPATI DP, ZULMAN, CAMERON, NUGENT JJA and COMBRINCK AJA

HEARD: 18 NOVEMBER 2005

DELIVERED: 30 NOVEMBER 2005

Summary: Removal of habitable buildings and structures in a Sectional Titles Scheme deemed to be a Regional Structure Plan in terms of s 37(2)(a)(i) and (ii) of the Physical Planning Act 125 of 1991 requiring, inter alia, written consent for habitable buildings or structures to be permitted below the defined flood control line.

JUDGMENT

ZULMAN JA

[1] This is an appeal against a judgment ordering:

1.1 The first appellant (the fifteenth defendant in the court *a quo*) to remove all habitable buildings and structures, including toilets and drains, on units 18 and 19 of the Sectional Titles Scheme known as Klub 40 (the Scheme) within 120 days of the order.

1.2 The appellants to pay the costs of the action (limited in the case of the second, third and fourth appellants (the tenth, eleventh and twelth defendants in the court *a quo*) to the costs incurred prior to the preparation for trial).

The appeal is with the leave of the court *a* quo (Van Coppenhagen J).

[2] The first appellant is the owner of two sectional title units in the Scheme. The second, third and fourth appellants, are parties to the appeal in their capacities as trustees of the AWW Trust (the Trust), which owns unit 14 in the Scheme. The Scheme was built on a part of the farm Anniesrus 763 in the district of Sasolburg and falls within the Vaal River Barrage area and is riparian to the Vaal River.

[3] The respondent instituted action in the court *a quo* against twenty

seven defendants, including the appellants, who were all owners, or who represented owners, of units in Klub 40, for the demolition of the habitable buildings on their respective units. The basis of the relief claimed was that the defendants, or their predecessors in title, had erected buildings below the defined flood control line, without the written consent of the respondent.

[4] When the matter was heard by Van Coppenhagen J all the defendants, except the appellants and the thirteenth defendant, concluded settlements with the respondent, which were made orders of court. In terms of the settlements they conceded the substantive relief claimed by the respondent. Default judgment was granted against the thirteenth defendant. Only the first appellant persisted in his resistance to the relief claimed by the respondent. As the Trust had altered the buildings on its unit, to the satisfaction of the respondent, before the trial started, only a limited costs order was granted against the second, third and fourth appellants.

[5] The members of Klub 40 were originally tenants of the farm owner, Mr P J Malan, who let parts of the river front to them. Malan in turn transferred the land on which the units were situated to a company, Anniesrus Ontwikkelings (Pty) Limited (the Company), of which he was the only shareholder and director. The Company was cited as the fourth defendant. The Company sold units indicated to various persons.

6.1 Since 1992 there were numerous problems with regard to structures

erected below the defined flood control line. Several meetings were held, and much correspondence passed between representatives of the respondent and Malan.

6.2 Malan and the tenants who were members of Klub 40 decided to convert the Klub into the Scheme. The Scheme was registered on 30 January 1997.

6.3 The Surveyor General (the third defendant) required proof of permission granted by the respondent for the erection of buildings on the Sectional Title Plan submitted before registration of the Scheme.

6.4 A meeting was held on 7 May 1996 between the respondent, represented inter alia by Mr F P du Plessis (du Plessis) who was a legal adviser employed by the respondent who had dealt with the Klub 40 problem since 1991, and Malan, the latter accompanied by his attorney Mr Bouwman, to discuss the illegal structures and plans for the proposed sectional title development.

6.5 At the meeting agreement was reached with regard to which structures were considered to be illegal by the respondent and which had to be removed. This is evidenced in a letter dated 7 May 1996 sent by Bouwman to the respondent which attached the proposed Sectional Title Plan to it for approval.

6.6 Du Plessis replied in a letter dated 5 June 1996 and granted approval for the proposed sectional scheme development. The condition was that the

scheme had to comply with the requirements of Annexure C to a Guide Plan, to which I will refer presently, and that the undertakings set out in Bouwman's letter had to be executed.

6.7 A stamp of approval was placed on the plan and signed by du Plessis. Such approval was intended to be conditional on behalf of the respondent and was accepted to be conditional by Malan.

7.1 The Scheme is laid out within a strip of land 500 metres wide measured from the edge of the water course (the relevant base line) and which is situated on the Orange Free State side of the Vaal River between the wall of the Vaal Dam and the north eastern boundary of Richmond Village.

7.2 The property falls within the Vaal River Barrage area as defined in s 6A(a) of the Physical Planning Act[1] by the Vaal River Complex Guide Plan (the Guide Plan)

7.3 After the repeal of s 6A by s 36(1)(a) read with schedules 1, 2, 3 and 4 of the Physical Planning Act, the Guide Plan remained in force by virtue of s 37(1) of the subsequent Physical Planning Act. [2]

7.4 On 9 February 1996[3] the Deputy Minister of Land Affairs declared in terms of s 37(2)(a)(i) and (ii) of the Physical Planning Act, that sections 37(1)(c) and (d) of that Act would no longer apply to the Guide Plan and that the Guide Plan would be deemed to be a Regional Structure Plan with

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1 Act 88 of 1967
2 Act 125 of 1991
3 Government Notice 169

effect from that date (the Regional Structure Plan).

7.5 In terms of clause 5.4.1 of the Regional Structure Plan the area where the Scheme is laid out falls within an area that must be protected against injudicious use on account of ecological, aesthetic or recreational value.

7.6 Clause 5.13 of the Regional Structure Plan reads as follows:

'THAT the requirements for development, as set out in annexure "C" shall apply to any development in the riparian areas of the Vaal Dam and the Vaal River Barrage area;

THAT the Administrators, where at all possible, include those requirements for development in all town planning or planning schemes in the area;

THAT the Minister of Health and Welfare, where at all possible make these requirements for development applicable to the area by means of regulations in terms of the Health Act, 1977 (Act 63 of 1977); and

THAT the Minister of Environmental Affairs take the initiative in the co-ordination of action in order to combat pollution in the area as far as possible.'

7.7 Clause 2.2 of Annexure C reads as follows:

'Except with the written consent of the Rand Water Board no habitable buildings or structures, toilets, french drains, conservancy or septic tanks, sewage pumping installations or sewage works shall be permitted below the flood control line, as defined.'

7.8 In terms of clause 5.12 of the Regional Structure Plan the February 1975 flood line as determined by the respondent serves as the flood control line as defined in the Vaal River Barrage area.

7.9 The first appellant acquired ownership of unit 18 from the Company

on 8 October 1998 and of unit 19 on 2 August 2002 from the Trust the latter having acquired the unit from Lusanda van der Merwe who in turn acquired it from the Company.

[8] The appellants contend that the requisite written consent of the respondent is contained in a stamp on the plan referred to in du Plessis' letter of 5 June 1996. The stamp reads as follows:

APPROVED on behalf of the RAND WATER BOARD IN TERMS OF ANNEXURE C OF THE GUIDE PLAN FOR THE VAAL RIVER COMPLEX 1982 Date/Datum 6/6/1996	GOEDGEKEUR namens die RANDWATERRAAD INGEVOLGE BYLAE C VAN DIE GIDSPLAN VIR DIE VAALRIVIER- KOMPLEKS, 1982 (Get) ? du Plessis ……. CHIEF EXECUTIVE / UITVOERENDE HOOF RAND WATER BOARD / RANDWATERRAAD

[9] The objective evidence placed before the court *a quo* makes it clear that no inference can be drawn other than that the approval of the plans was conditional, as was correctly found by the court *a quo*. Accordingly, the Company was not given the requisite consent by the respondent to have habitable buildings on its land below the defined flood control line.

[10] The Company was bound by the statute to which I have referred and so is its successors in title. Simply put the appellants did not have the consent of the respondent to have any habitable buildings on the land below the defined flood control line.

[11] In the absence of consent, and there was avowedly none, the sectional title holders were themselves directly bound by the obligation in the Guide Plan.

[12] The appellants also invoke the provisions of s 48(1)(a) of the Sectional Titles Act[4] by contending that any condition requiring demolition of structures indicated on the Guide Plan would have rendered approval and registration of the Sectional Title Plan 'nonsensical'. It would contemplate, from the outset, so the argument ran, the destruction of certain sections as envisaged in s 48(1)(a) of the Act. This would require rebuilding and re-instatement of the transfer of the interests of owners of sections that had been destroyed to other owners, in terms of section 48(3) of the Act. In my view the court *a quo* correctly found that section 48 of the Sectional Titles Act does not apply to the circumstances which pertain in this matter and that reliance thereon is accordingly inappropriate. Furthermore even if s 48 were applicable this cannot override the statutory consent required to be given by the respondent for the erection of habitable structures below the defined flood control line.

[13] Finally the appellants submit that if the illegal structures were removed this would cause the Sectional Title Plan to be incorrect, because the plan would indicate structures no longer in existence. The witnesses Malan and du Plessis stated that concrete slabs were shown on the

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4 95 of 1986

Sectional Title Plan as structures. It was possible to alter the structures suitably and to the satisfaction of the respondent, by removing walls, but leaving the concrete slabs in place. Even if the Sectional Title Plan became incorrect, this did not absolve the Company from its obligation to obtain the respondent's consent to erect habitable structures below the defined flood control line.

[14] Counsel for the respondent submitted that costs consequent upon the employment of two counsel by the respondent should be allowed in the event of the appeal being dismissed. The court *a quo* awarded only the costs of one counsel. In my view the costs of two counsel on appeal are not warranted. The appeal is not one of undue complexity warranting the employment of two counsel by the respondent.

[15] The appeal is accordingly dismissed with costs.

R H ZULMAN
JUDGE OF APPEAL

MPATI DP	**)**	**CONCUR**
CAMERON JA	**)**	
NUGENT JA	**)**	
COMBRINCK AJA	**)**	