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

**JUDGMENT**

Case No: 174/10

In the matter between:

**CROXFORD TRADING 7 (PTY) LTD** **First Appellant**

**ERROL JOHN HENTY SENEKAL** **Second Appellant**

**v**

**THE BODY CORPORATE OF THE INYONI ROCKS CABANAS SCHEME NO SS1/1978** **Respondent**

**Neutral citation:** *Croxford Trading 7 v The Body Corporate of the Inyoni Rocks Cabanas Scheme no ss1/1978* (174/2010) [2011] ZASCA 27 (18 March 2011).

**Coram:** Brand, Maya, Cachalia, Shongwe JJA and Petse AJA

**Heard:** **24 February 2011**

**Delivered:** **18 March 2011**

**Summary:** A developer who owned an interest in the common property of a sectional title scheme under the Sectional Titles Act 66 of 1971, and subsequently disposes of the interest, has no 'right of extension' that is transferable. The 1993 Amendment to the Sectional Titles Act 95 of 1986, which repealed the 1971 Act, but dispensed with the requirement for the developer to retain an interest in the common property did not remove this requirement in respect of the 1971 Act.

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**ORDER**

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**On appeal from:** KwaZulu-Natal High Court (Pietermaritzburg) (Steyn J sitting as court of first instance).

The appeal is dismissed with costs.

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**JUDGMENT**

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CACHALIA JA (Brand, Maya, Shongwe JJA, Petse AJA concurring):

[1] This is an appeal from the KwaZulu-Natal High Court, Pietermaritzburg granting an application for a declaratory order against the appellant and dismissing a counter-application, also for declaratory relief, against the respondents. With leave of the high court the appellants appeal to this court. The appeal concerns a developer's 'right of extension' under a sectional titles scheme.

[2] The Sectional Titles Act 95 of 1986, like its predecessor, the Sectional Titles Act 66 of 1971, sanctions the construction of a scheme in stages. A developer intending to add a further phase or phases to a sectional title development must, when applying to the local authority for the sectional plan to be registered, reserve a right to extend the scheme. This right is known as the developer's 'right of extension'. Where the developer does not reserve the right, or the reservation has lapsed, the right to extend the scheme vests in the body corporate.

[3] Under s 18 read with s 26 of the 1971 Act, a developer could exercise a right of extension only if it owned at least one unit in the scheme. Moreover, because the right in favour of the developer was akin to a personal servitude, it was not transferrable.[1] The 1986 Act repealed the 1971 Act, but s 60(1)(b), which is a saving and transitional provision, preserved a right of extension acquired under the rescinded Act. In terms of s 25(5) the 1986 Act also created a new dispensation with regard to the developer's right of extension which differed from the previous position in two respects. First, it deemed the right of extension to be 'a right to urban immovable property which admits of being mortgaged',[2] which is transferable by the registration of a notarial deed of cession.[3] Secondly, it removed the requirement for the developer or its successor-in-title to have an interest in the common property. The right of extension under s 25 of the 1986 Act thus became wider in its scope than the content of the right recognized in the repealed Act.[4] It must, however, be emphasized that a right acquired or exercised under the repealed Act did not bestow any new right under the 1986 Act, but did not prevent the acquisition or exercise of rights under the 1986 Act.[5]

[4] On 26 February 1993 the 1986 Act was amended, in the words of the preamble to, among other things, 'provide for the alienation and mortgaging of a right to extend a building in terms of the Sectional Tiles Act, 1971'. Section 4 of the Sectional Titles Amendment Act 15 of 1993 amended s 60(1)(b) of 1986 Act to read thus:

'**Amendment of section 60 of Act 95 of 1986, as amended by section 25 of Act 63 of 1991**

4. Section 60 of the Sectional Titles Act, 1986, is hereby amended by the

1 *Erlax v Properties (Pty) Ltd v Registrar of Deeds & others* 1992 (1) SA 879 (A) at 887E-F and 893B-C; *S P Catering Investments v Body Corporate of Waterfront Mews & others* 2010 (4) SA 104 (SCA) at para 4.
2 Section 25(4)(a).
3 See 24 *Lawsa* 2 ed para 269. Before s 25(4)(b) of the 1986 Act was amended by s18(a) of the Sectional Titles Amendment Act 44 of 1997 the real right of extension could be transferred *in totality* and with regard to the *whole land* affected by the registration of a notarial deed of cession. After the amendment the, the developer is allowed to cede the whole or a *share* of the right or the portion of the land affected. The distinction is not relevant in this case.
4 *Erlax* (above) (n.1) at 889H-890D.
5 See above note 1 at 892D-F.

substitution for subsection (1) of the following subsection:

(1) (a) . . .

(b) a right of extension of a building acquired in terms of section 18 of the Sectional Titles Act, 1971,

shall be completed or exercised in terms of the provisions of the Sectional Titles Act, 1971, as if it has not been so repealed: Provided that a right as referred to in paragraph (b) in respect of which a certificate of real right has been issued –

(i) shall for all purposes be deemed to be a right to urban immovable property which admits of being mortgaged; and

(ii) may be transferred by the registration of a notarial deed of cession . . .'

[5] The proviso to the amendment introduced language identical to s 25(4) of the 1986 Act. Its effect was that a right of extension under s 18 of the repealed Act would for 'all purposes' be deemed to be a right to urban immovable property which admitted of being mortgaged, which was transferable by registration of a notarial deed of cession. The purpose of amendment was to deal with the problem that arose after this court's holding in *Erlax Properties (Pty) Ltd v Registrar of Deeds & others*[6] that s 60(1) of the 1986 Act did not render the developer's rights under the 1971 Act transferrable. The amendment solved this problem by pertinently permitting the transfer of a right acquired under the 1971 Act. The appellants' contention is, however, that the amendment went further by allowing a right of extension acquired under the repealed 1971 Act to be exercised even though the developer or its successor-in-title has no other interest in the common property. I will revert to this contention in due course.

[6] But first I must turn to the facts of this case. A sectional title scheme, known as Inyoni Rocks Cabanas, was registered 1978. The 1971 Act applied at the time. Inyoni Beach Apartments (Pty) Ltd, the developer, owned a unit – unit 64 – in the scheme and reserved to itself the right, which it had recorded in a conveyancer's certificate, to extend the development. The certificate was

6 1992 (1) SA 879 (A).

registered in the developer's name on 13 October 2003, after the 1993 Amendment had taken effect. The relevant part of the certificate provides:

'No person whose consent is required in terms of Section 18 of the Act shall be entitled to withhold his written consent to INYONI BEACH APARTMENTS (PROPRIETARY) LIMITED, being the developer of this Scheme as owner of Section No 64 or its successors in title (hereinafter referred to as the developer), preparing and submitting for its own benefit a scheme to the Local Authority in terms of Section 18 of the Act for approval, and upon such approval taking all necessary steps to erect extensions and additional buildings on the land in terms of and as indicated on the sketch plan filed of record in my Sectional Titles Protocol . . .'

[7] In 2003 the developer transferred unit 64 to a third party and, in 2007, that party, in turn, transferred the unit to a Trust – the Mahlangu Trust. The Deed of Cession, in terms of which the developer purported to transfer the right of extension to the first appellant, was registered on 16 July 2004. So, at the time of registration, the developer no longer owned the unit and thus had no interest in the common property of the scheme. Neither did the first appellant.

[8] The Body Corporate of the Inyoni Scheme, the respondent in this appeal, took the view that because the developer's right had been acquired under the 1971 Act, it had lost that right when it disposed of the unit. At the time of the Deed of Cession to Coxford Trading 7 (Pty) Ltd, the developer therefore had no right to transfer. The Body Corporate thus sought a declarator in the Kwazulu-Natal High Court directing the Registrar of Deeds to cancel the Deed of Cession. The first appellant in this appeal and the purported holder of the right of extension under the Deed, by counter-application, asked for a declaration that the right vested in it. The second appellant, Mr Errol John Henty Senekal, was cited in his capacity as a director of and beneficial shareholder in the first appellant. They maintained that once the certificate was registered in October 1993 the developer's right of extension became a real right, which was capable of being mortgaged and transferred to a third party.

[9] As I mentioned at the beginning of this judgment, the high court (Steyn J)

granted the relief that the respondent asked for and dismissed the appellants' case. The Trustees of the Mahlangu Trust, Inyoni Beach Apartments (Pty)Ltd and the Registrar of Deeds, KwaZulu-Natal, were respectively the third, fourth and fifth respondents in the court below. They took no part in those proceedings and have informed us that they shall abide this court's decision on appeal.

[10] The appellants contend that under the amended legislation the developer's transfer of its right of extension to the first appellant was valid despite the fact that it no longer owned a unit in the scheme at the time. This is because, so the contention goes, s 25(5) of the 1986 Act says that the right of extension may be exercised even though the developer or its successor-in-title has no other interest in the common property.

[11] To succeed in their contention the appellants must overcome the difficulty that even though the 1993 Amendment, in s 60(1)(b)(i), deemed the right of extension 'for all purposes . . . to be a right to urban immovable property' which, when registered, is not dependent upon the ownership of any other property, it did not expressly dispense with the requirement that the acquisition or exercise of the right under s 18 of the 1971 Act is contingent on the developer's ownership of a section of the common property. In addition it retained the language used in s 60(1)(b) of the 1986 Act, which says that the right of extension acquired in terms of s 18 of the repealed Act shall be completed or exercised in terms of that Act as if it has not been repealed. A plain reading of the amendment therefore suggests that by disposing of its ownership in the unit the developer no longer possessed a right of extension that was capable of being transferred.

[12] But this interpretation, contends the appellants, gives rise to an anomaly or inconsistency: the requirement of ownership of a unit would mean that the security afforded to a mortgagee of the right of extension would be compromised if the holder of the certificate parted with ownership of its section in the scheme and thus ceased to have a share in the common property. Put another way, if the

developer or its successor-in-title ceases to own a section in the scheme, the right of extension would be lost and would therefore no longer afford any security to a mortgagee or be worthy of transfer. The ambit of the right would then be uncertain and could not properly be described 'for all purposes' as 'a right to urban immovable property' – a result, the appellants say, the legislature could not have intended.

[13] The solution to the conundrum, the appellants say, is that because the language used in the proviso to the amendment in s 60(1)(b) is identical to s 25(4) of the original 1986 Act, which dealt with rights of extension under that Act, the construction to be placed upon the consequences of the right of extension in the amendment should be the same as the consequences for a right of extension here. And because s 25(5) of the original Act records that a right of extension described in s 25(4) may be exercised even though the developer or its successor-in-title has no other interest in the common property, the same consequence should follow in regard to the interest in the common property in s 60(1)(b). Therefore, the same words that appear in s 25(5), as it read in the original 1986 Act, should be read into s 60(1)(b) following the amendment.

[14] Against the background of this court's reasoning in *Erlax Properties*[7] I do not think that the appellants have met the problem regarding the language of the 1993 Amendment. In that case one of the declaratory orders sought by the developer was in effect, to enable it to enjoy the benefits introduced by s 25 of the 1986 Act even though the rights had been acquired under s 18 of the repealed Act. However, in refusing the relief this court concluded that s 60(1)(b) of the 1986 Act did not change or enlarge the content of the rights existing under the repealed Act.[8] As I have said, the lawmaker introduced the 1993 Amendment cognizant of this judgment. In addition – and despite having dispensed with the ownership requirement in s 25(5) of the 1986 Act – it refrained from also doing so in relation to rights acquired under the repealed Act. And, bearing in mind that s

7 See above note 1.
8 Ibid at 892I-893B.

25(5) was a substantial deviation from the structure of the 1971 Act, this could hardly have been an oversight.

[15] Concerning the appellants' submission that it is anomalous to subject the right of a mortgagee or transferee of a real right (in this case the right of extension) to the ownership of another, it is not unusual for the exercise of a registered real right to be dependent upon the ownership of another property – as is the case with a praedial servitude. As far as mortgages are concerned, nothing would prevent a mortgagee from stipulating a term that precluded the mortgagor – as holder of the extension right – from divesting itself of its whole interest in the common property and thereby trigger the forfeiture of its right of extension in favour of the body corporate.[9]

[16] The appellants have another string to their bow. They contend that the matter may be approached on a different basis, which is this: a distinction must be drawn between the existence of the right and its enforcement by either the developer or its successor-in-title. The 1993 Amendment concerns the changed nature of a right of extension that arose under the 1971 Act. It is no longer akin to a personal servitude, incapable of transfer, but the equivalent of a praedial servitude that is transferable. Nothing is implied about the nature of continued ownership of any section in the scheme. Section 18(1) of the 1971 Act did not characterize the right of extension. It dealt only with who might exercise it ie the developer or the body corporate. The 1993 Amendment then transformed the nature of the old right of extension, from one that was not transferable, to one that was. And because s 18(1) of the 1971 Act dealt with a different kind of non-transferable right, that section is no longer relevant to identify who might enforce a real right of extension that was registered after the 1993 Amendment. The consequence of this approach is that the registration of the right of extension was valid and so is the subsequent transfer of the right to the first appellant.

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9 *Cf Barclays Nasionale Bank Bpk v Registrateur van Aktes Transvaal & 'n ander* 1975 (4) SA 936 (T) 941E-942A.

[17] In *Erlax* this court was content to say that the s 18(1) right of extension is not transferable, without describing it as personal servitude.[10] *In S P & C Catering Investments (Pty) Ltd v Body Corporate of Waterford Mews & others*[11] this court appeared to accept that the right of extension under the 1986 Act was a personal servitude.[12] Some writers have suggested that it is now classifiable as a statutory real right sui generis.[13]

[18] I do not think it necessary for present purposes to decide on the proper classification of the right of extension. However one chooses to classify the right in the 1971 Act or after the changes, it is clear that the retention in the 1993 Amendment of the original provision in s 60(1)(b) (that the s 18(1) right of extension shall be exercised as if the 1971 Act was not repealed) is an insuperable obstacle to the argument that it is no longer relevant to identify who may enforce such a right of extension registered after the 1993 Amendment. The appellants' alternative contention therefore also has no merit.

[19] To conclude, the developer disposed of its unit in the scheme after the 1993 Amendment took effect and thus ceased to have an interest in the common property. Thereafter, it purported to transfer its right of extension to the first appellant by notarial Deed of Cession. But it could not do so because the existence or exercise of a right of extension was dependent upon its continued ownership of the relevant unit. It follows that the high court was correct to grant the declaratory order to the respondent, and refuse it in the case of the appellants.

[20] In the result the appeal must fail.

The following order is made:

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10 Above note 7 at 893B-C.
11 2010 (4) SA 104 (SCA).
12 Ibid para 4.
13 P J Badenhorst, J M Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* 5 ed p 458; 24 *Lawsa* 2 ed para 270.

The appeal is dismissed with costs.

**A CACHALIA**

**JUDGE OF APPEAL**

APPEARANCES

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