

SOUTH AFRICA / JUDGMENT

**Biccari and Another v Body Corporate of
Shoreham and Others (8961/2015) [2018]
ZAWCHC 2; [2018] 2 All SA 36 (WCC);
2018 (3) SA 462 (WCC) (24 January 2018)
[2018] ZAWCHC 2**

COURT

Western Cape High Court, Cape Town

BEFORE

JH Loots

CASE / FILE NUMBER

8961/2015

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IN

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

Case

No: 8961/2015

In

the matter between:

TERESA
ANGELA
BICCARI First
Applicant
DANIELA
ADRIANA
GIURICICH Second
Applicant
and
BODY
CORPORATE OF
SHOREHAM First
Respondent
THE
REGISTRAR OF DEEDS
AND
FORTY SIX OTHERS Second
to Forty Eighth Respondents

Court: Acting Justice JH Loots
Heard: 7 August 2017
Delivered: 24 January 2018
REPORTABLE

JUDGMENT

INTRODUCTION

- [1] The applicants, the co-owners of flat 104 in the sectional scheme known as “Shoreham”, situated on the corner of Beach Road and Marine Drive, Sea Point, Cape Town, seek to have the parking bays allocated to certain other owners of units in the scheme declared to be common property, and thus available for use by all owners of units in the scheme.
- [2] In response the respondents opposing the application (referred to as “the opposing respondents”) in addition to their opposition to the application, have launched a counterapplication in terms of which it is sought that:
- a. the first respondent be directed to issue replacement certificates to the fourth and eighteenth respondents indicating their rights of exclusive use of the parking bays allocated to them;
 - b. the first respondent be directed to issue in favour of the third, fifth to seventh, and ninth to seventeenth respondents certificates indicating their rights of exclusive use in respect of the parking bays allocated to them; and
 - c. in respect of the fourteenth respondent that he[1] be declared to be the holder of a valid certificate recording his rights of exclusive use of bay number 6.
- [3] The applicants oppose the counterapplication.

BACKGROUND

- [4] The Sectional Title Register of what became the Shoreham development was opened on 1 May 1984, whereafter, on 30 May 1984, the developer (Shoreham Mansions (Pty) Ltd) effected a transfer of all units in the scheme to eight trusts[2], with the initial owners of the units obtaining their units from one of these trusts.
- [5] The relevant respondents (and their predecessors in title, where applicable) have exercised and enjoyed such rights of exclusive use until August 2016; when the applicants launched the application which served as precursor to this application.

- [6] In April 1989 certificates recognising the rights of the owners who had been granted rights of exclusive use in respect of the parking bays were issued on behalf of the first respondent by its agent, H Lewis Trafalgar. Further certificates do not appear to have been issued.
- [7] Terrfran CC, of which the first applicant was a member, acquired the applicants' unit on 12 June 1989, with the applicants acquiring the unit in their own right on 6 March 2013. At no time did the applicants' unit have an exclusive use parking bay. Nor, until 2016, did the applicants wish to exercise any rights over any parking bay, save perhaps in terms of a rental agreement entered into with the fourth respondent in terms of which her bay was rented to the applicants for a period.
- [8] In August 2016 the applicants launched an urgent application[3] to prevent the first respondent from formally transferring the rights of exclusive use to the relevant respondents, pending the outcome of further proceedings. As will be seen below, while initially arbitration or review proceedings were envisaged, ultimately declaratory relief substantially in the form of that sought in this application was to be sought.
- [9] The matter, therefore, turns on whether any of the opposing respondents have, on the papers before court (and taking into account the applicable rules of evidence), in any way, acquired the rights to the exclusive use of the parking bays allocated to their units. If so, then in terms of section 60(3) of the Sectional Titles Act[4] they would be entitled to have the rights registered in their favour, the dismissal of the application, and the relief sought in terms of the counterapplication. If not, then the rights of exclusive use in respect of the parking bays in question would vest in the first respondent, the effect of which will be discussed below.

DISCUSSION

Rights of Exclusive Use

- [10] Common property comprises every part of the land in a sectional title scheme, together with those buildings or parts of buildings which have not been included in any section delineated on the sectional plan[5].
- [11] Areas of exclusive use are characterised as portions of the common property in a sectional scheme which have been reserved for use by an owner to the exclusion of the other owners in a scheme. A good example of this is the parking bays forming the subject matter of the present dispute.
- [12] With regard to the acquisition of rights of exclusive use in terms of both the 1971 Act and the 1986 Act, Wallis J (as he then was) in *Herald Inv Share Block (Pty) Ltd v Meer; Meer v Body Corporate of Belmont Arcade*[6] comprehensively set out the position, concluding at paragraph [22] that:

“As matters stand at present, therefore, the Act recognises four different ways in which an exclusive use area can exist and an exclusive use right be enforced. Under the Act such rights can now be created only by way of registration under s 27 or a rule under s 27A. However, by virtue of the transitional provisions of s 60(3), the Act continues to recognise such rights when created by an agreement in force when the 1971 Act applied or under rules produced in terms of the 1971 Act. There is nothing to suggest that the consequences of enjoying such rights vary, depending upon their source, save for the advantages expressly conferred by registration. Certainly there is nothing to indicate that its consequences, in regard to contributing to the costs of maintaining the exclusive use area, should differ from one instance to another. However, s 37(1)(b) has not been amended to follow the other amendments bearing upon this issue.”

[13] Extracted from the above, the four manners in which an exclusive use area, within the parameters of this application, can exist are:

- a. In terms of an agreement in force when the 1971 Act applied[7];
- b. If it was acquired under rules produced in terms of the 1971 Act;
- c. By way of registration under section 27 of the 1986 Act; and
- d. In terms of a rule made pursuant to the provisions of section 27A of the 1986 Act (applicable between 3 October 1997 and 7 October 2016).

[14] In the present matter the rights in question were neither registered in terms of section 27 of the 1986 Act, nor were any rules produced in terms of section 27A of the 1986 Act relating to the allocation of rights of exclusive use in respect of the parking bays to the relevant members of the first respondent. Since the sectional scheme was, however, formed pursuant to the provisions of the 1971 Act, the possibility exists that rights of exclusive use were created in terms of either the management rules of Shoreham produced in terms of the 1971 Act, or in terms of an agreement in force when the 1971 Act applied.

Management Rules

[15] In light of what has been stated above, the starting point for the consideration of whether any of the opposing respondents acquired rights of exclusive use to the parking bays allocated to them is the first respondent's management rules; and specifically rule 52, which provides as follows:

“52. CAR PORTS AND PARKING BAYS

52.1. The parking bays on the common property for motor vehicles depicted on the sketch plan annexed hereto marked “B” are hereby allocated for the exclusive use and occupation of the developer free from the payment of any rental.

52.2.1. The developer shall be entitled either to lease the parking bays to, or alternatively to dispose of its rights in and to such parking bays, to owners of sections in the buildings to which such parking bays relate. Any disposition by the developer of its rights in and to a parking bay shall be effected by cession in the form of the cession annexed hereto marked “C”, the original of

which cession shall be lodged with and retained by the trustees who shall enter the relevant particulars in a parking bay register to be maintained by them. The Trustees (or managing agent on their behalf) shall issue to each sectional owner who has acquired the rights of the developer to a parking bay in the manner aforesaid a certificate in the form of the Certificate annexed hereto marked “D” specifying the number of the parking bay in question and certifying that such owner has the exclusive use, occupation and enjoyment of such parking bay free from the payment of any rental.

52.2.2. The developer may at any time and from time to time, and in consideration for the Body Corporate assuming the obligations and rights of the developer in terms of these Rules, dispose of its rights in respect of any or all of the parking bays to the Body Corporate and the Body Corporate shall be obliged to acquire such rights. Such disposition shall be effected in the manner described in sub-clause 52.2.1.

52.3. The Body Corporate shall, in respect of the parking bays so acquired by it, have the right to lease them or alternatively dispose of them and in such event the provisions of Rules 52.2.1 [sic] above shall apply mutatis mutandis.

52.4. Sectional owners to whom parking bays are leased or who acquire the rights of the developer to parking bays are hereinafter referred to as “the owners” or “an owner”.

52.5.1. Subject to sub- rule 52.5.2, an owner may not without the written consent of the trustees let or sub-let, as the case may be, part with possession of or in any other manner dispose of a parking bay or his rights the very least or disposed of to him, as the case may be, in terms of sub-rule 52.2 above.

52.5.2. an owner who has acquired the rights of the developer to a parking bay pursuant to the cession referred to in sub- rule 52.2.1 above, shall be obliged to dispose of his rights in and to his parking bay to the transferee of his section. Such disposition and acquisition shall be effected in the manner described in sub-rule 52.2.1 above.

52.6.1. The Body Corporate shall be responsible for maintaining the parking bays and for keeping them in a clean, hygienic, neat and attractive condition. The expenses incurred by the Body Corporate in respect of the foregoing shall be apportioned equally over the total number of parking bays and the Trustees of the Body Corporate shall be entitled to recover from the developer and/or the owners, as the case may be, such portions of the expenses as relate to the parking bays in respect of which they have the exclusive right of use and occupation.

52.6.2. The developer and/or the owners shall not use the parking bays of which they have the exclusive use or permit them to be used in such a manner or for such purposes as are likely to impair the safety, appearance or amenity of other sections or other parts of the common property.

52.6.3. The developer and/or the owners as the case may be, shall use the parking bays for the purpose of parking a motor car or a light motor vehicle or motor cycle and for no other purposes whatsoever.

52.6.4. Notwithstanding the provisions of sub- rules 52.1 and 52.2 above, the developer and/or the owners, as the case may be, shall permit the body Corporate and/or other person's access to the parking purpose reasonably five of such bays and any other parking bays. The developer and each owner shall also allow the Body Corporate access to and across his parking bay for any purpose reasonably required for the maintenance of the common property.

52.6.5. If at any time the building is comprised in this scheme are in terms of Section 36 of the Sectional Titles Act 1971, as amended, deemed to be destroyed, and the owners of the units have by majority resolved in terms of the said Act not to rebuild the buildings, all the aforesaid rights in respect of the parking bays shall automatically lapse sign will take sleep with the making by the Registrar of Deeds of the requisite entry on the sectional plan in terms of the Act." [emphasis added]

[16] From the provisions of rule 52 the following is extrapolated in respect of the creation and transfer of the rights of exclusive use:

- a. The management rules themselves did not create original rights of exclusive use in respect of owners of units within the scheme.

These rights were reserved for the developers (or developers);

- b. The rule contemplated that the developer would be entitled to transfer its rights of exclusive use to specific owners;
- c. The method of transfer prescribed was by way of cession.
- d. The cession had to be in the form provided for in annexure "C" to the Management Rules. Despite the wording of the rule I am prepared to accept that the cession had to be in writing, substantially containing the information reflected on annexure "C";
- e. The Trustees (or managing agent on their behalf) would issue to each sectional owner who had acquired the rights of the developer to a parking bay in the manner aforesaid, prescribed by rule 52.2.1, a certificate detailing such ownership.
- f. The rule further provides that an owner shall be obliged to transfer the rights of exclusive use to the parking bay acquired by him to the transferee of his section;
- g. The transfer of rights from owner to owner would be by way of written cession substantially in compliance with annexure C to the Management Rules.

[17] It, accordingly, appears that those of the opposing respondents who had received certificates pursuant to rule 52 would be the holders of rights of exclusive use over the parking bays allocated to them.

[18] Conceding this, the first applicant, in paragraph 48 of the founding affidavit stated that:

“Having regard to the failure by the Third to Eighteenth Respondents to provide certificates certifying and thus proving their right to exclusive use of the open parking bays over which each of them currently exercise exclusive use, it must be assumed that none of these Respondents have been issued with the required certificates.”

[19] The applicants, therefore, although they later sought to shift position in respect of the admission contained in, inter alia, paragraph 48 of the founding affidavit, clearly acknowledged and accepted the provision of a certificate, issued pursuant to the

provisions of rule 52, as proof of the existence of the right of exclusive use in respect of the parking bays. This was the case the opposing respondents were required to meet.

The Nineteenth and Fourteenth Respondents

[20] The nineteenth respondent had provided such a certificate in respect of parking bay 5 prior to the launch of this application, with the result that the applicants did not proceed against him.

[21] So too did the fourteenth respondent provide a certificate in respect of parking bay 6.

[22] There is therefore no doubt that, in terms of section 60(3) of the 1986 Act, the fourteenth and nineteenth respondents are entitled to the transfer of their exclusive use rights to the parking bays that were allocated to them.

The Fourth, Seventh, and Eighteenth Respondents

[23] The fourth, seventh and eighteenth respondents have all owned their respective units since prior to the issue of the certificates produced by the fourteenth and nineteenth respondents, both of which appeared to have been issued on 13 April 1989.

[24] The fourth respondent, who is the deponent to the substantive affidavits on behalf of the opposing respondents[8] stated that she and her husband were also issued with the same certificate issued to the fourteenth and nineteenth respondents

during April 1989, but that it had since been lost with other documents due to water ingress at their home in Johannesburg.

[25] Given that the fourteenth and nineteenth respondents were both issued with certificates on the same day, and given that the position of the fourth respondent with regard to the exclusive use of the parking bay allocated to her unit is the same as that of the fourteenth and nineteenth respondents I have no reason to doubt that she and her husband had indeed been issued with such a certificate at the time the fourteenth and nineteenth respondents had received their certificates.

[26] I, accordingly, find that the fourth respondent is the holder of an exclusive use right in respect of parking bay number 9, and that she is both entitled to a replacement certificate and to transfer this right in terms of section 60(3) of the 1986 Act.

[27] On the same basis I find it probable that the seventh and eighteenth respondents were issued with certificates confirming their rights of exclusive use in respect of parking bays 4 and 13 respectively (although the seventh respondent appear to have been grouped with those respondents who had never been issued with a certificate)[9]. The finding follows that the seventh and eighteenth respondents are both entitled to replacement certificates and, in terms of section 60(3) of the 1986 Act, to transfer of their rights of exclusive use to them.

The Remaining Opposing Respondents

[28] The position of the remaining opposing respondents differs from that of the fourth, seventh, fourteenth, eighteenth, and nineteenth

respondents in that they did not own their units as at 13 April 1989 and there is no evidence to suggest that they were ever issued with certificates recognising their rights of exclusive use to the parking bays allocated to them.

[29] As is evident from the above analysis of management rule 52, exclusive use rights in respect of the parking bays are to be transferred by way of written cession in substantially the form provided for in annexure “C” to the management rules. Once transferred the certificate in the form of annexure D to the management rules is issued to the person or entity acquiring the right.

[30] Therefore, while on the papers that served before me, I was prepared to accept that the holder of such a certificate was the holder of the right of exclusive use in respect of the parking bay allocated to him or her[10], the position in the case where there is no proof that a written cession of the right of exclusive use has taken place between the seller of a unit and the purchaser thereof, requires further analysis.

[31] Whether in terms of the 1971 Act[11], the 1986 Act[12], or the Sectional Titles Management Act, No 8 of 2011[13], owners of units in a sectional title scheme are bound by the management rules of the scheme; and therefore, as part of the present

enquiry, by Shoreham management rule 52.

[32] As has been set out above rule 52 prescribes the procedure to be followed when transferring rights of exclusive use from the transferor to the transferee; i.e. by written cession substantially in the form of annexure C to the Shoreham management rules.

[33] Annexure C reads as follows:

“*C E S S I O N*

SHOREHAM BODY CORPORATE

NO. 94/1984

CARPORTS AND PARKING BAYS

("Parking Bays")

(For Fuller details refer to Plan Annexure "A" to amended Schedule 1 Rules of the Body Corporate).

C E S S I O N

We, THE SHORE TRUST do hereby with effect from
Cede, transfer and make over to and in favour of

.....

All of our rights in and to Parking Bay Number
for value
received.

THUS DONE AND SIGNED AT

THIS DAY OF

198 .

I/We,

Do hereby accept the foregoing cession with effect from the foregoing date and agree and undertake to be bound by the provisions of Rule 52 of the amended Schedule 1 Rules of the Shoreham Body Corporate.

198."

- [34] The wording of rule 52, coupled with the specific reference to annexure C to in the Shoreham management rules, and the wording of annexure C recorded above, make it clear that there has to be a written deed of cession in order for the cession to be valid. This accords with the principle that, while no formalities are in general prescribed for the act of cession, or the antecedent obligatory agreement, formal requirements may be imposed on the validity thereof, for example by either by agreement[14] or by law.
- [35] Whether the nature of the management rules of a sectional scheme are defined as being contractual, have the character of delegated legislation, or flow from the legislative power of an autonomous sectional title community[15], they are binding on the body corporate, the owners of units, and the occupiers of units[16].

- [36] In respect of the remaining opposing respondents the procedure envisaged by rule 52 was not followed, and no formal written deeds of cession were concluded.
- [37] The deeds of sale annexed to the opposing papers contain the antecedent obligatory agreements in respect of the transfer of the exclusive use rights in question. On a reading of these agreements none of them, in themselves, however constitute real cession agreements whereby rights are ceded[17].
- [38] While the opposing respondents' contentions regarding the production of the certificates are valid in respect the fourth, seventh, fourteenth, eighteenth, and nineteenth respondents, on the case the applicants presented, the same does not hold true for the remaining opposing respondents. The remaining opposing respondents clearly were not issued with certificates confirming their rights of exclusive use, with the result that the applicants would succeed in their opposition to the counterapplication in respect of the remaining opposing respondents if it appears that these respondents are not the holders of exclusive use rights in respect of the parking bays allocated to them.
- [39] Insofar as agreements, not recorded in the Shoreham Management Rules could have existed while the 1971 Act was still in force, which on the papers appear not to have been the case, the such an agreements would have been between the developer and the original owners of the units, which agreements would have been superseded by the Shoreham Management Rules; especially where the remaining opposing respondents are concerned, none of whom are original owners, and all of whom acquired their units after the 1986 Act came into operation, and after the certificates were issued to the owners in 1989.
- [40] From the analysis in respect of the remaining opposing respondents it follows that these rights were not transferred to them; with the result that they are not the holders of the relevant rights and not entitled to be issued with certificates confirming their rights of exclusive use.

The Effect of the Rights not having been Transferred to the Remaining Opposing Respondents

- [41] Having established that the remaining opposing respondents are not the holders of the exclusive use rights in respect of the parking bays allocated to them, it needs to be established where such rights currently reside.
- [42] Section 27(4)(b) of the 1986 Act provides as follows:
- "If an owner ceases to be a member of the body corporate in terms of section 2(3) of the Sectional Titles Schemes Management Act, any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond."*
- [43] Section 2(3) of the Sectional Titles Management Act states that:
- "Any other member of the body corporate ceases to be a member thereof when such member ceases to be the owner of a unit in the scheme in question."*

“Any other member” refers to any member other than the developer.

- [44] Applied to the predecessors in title of the remaining respondents, none of the remaining opposing respondents’ predecessors in title have remained members of the first respondent.
- [45] As set out in *McKersie v SDD Developments*[18] the result is that, in terms of section 27(4)(b) of the 1986 Act, the exclusive use rights of the remaining opposing respondents vest in the first respondent, free from any mortgage obligation.
- [46] Considering the provisions of section 27(4)(c)(i) (which provides that if a right of exclusive vests in the body corporate in terms of subsection 27(4)(b) the body corporate shall, in the prescribed form apply to the registrar for the issuing of a certificate or certificates of real rights of exclusive use in its favour), the application of section 27(4)(b) does not mean that the right of exclusive use loses its character as such.
- [47] In respect of the obligations resting on the first respondent once vested with the rights of exclusive use in terms of section 27(4)(b) of the 1986 Act, although I express no final view on this, three possibilities appear to present themselves.
- [48] Prof CG van der Merwe[19] argues that, once the body corporate becomes vested with the exclusive use right in terms of section 27(4)(b) of the 1986 Act, it is obliged to deal therewith in accordance with the provisions of section 27(3) of the same Act in the manner in which the body corporate is obliged to deal with a right of exclusive use created in terms of section 27(2).
- [49] However, the structure of the relevant provisions of the 1986 Act, read with the relevant provisions of the Sectional Titles Management Act, seems to militate against this argument, by virtue of the following:
- a. Section 27(3) of the 1986 Act provides that:

“A right to the exclusive use of a part or parts of the common property delineated on the sectional plan in terms of subsection (2) shall be transferred to the owner or owners on whom such right has been conferred by the body corporate by the registration of a notarial deed entered into by the parties and in which the body corporate shall represent the owners of all the sections as transferor.”
 - b. Section 27(2) of the 1986 Act states that:

“A body corporate may, subject to the provisions of section 5 (1) of this Act and section 5 (1)(d) of the Sectional Titles Schemes Management Act, request an architect or land surveyor to apply to the Surveyor-General for the delineation on a sectional plan in the manner prescribed of a part or parts of the common property in terms of section 5 (3)(f) for the exclusive use by the owner or owners of one or more sections: Provided that no such delineation shall be made on the sectional plan in terms of this subsection if such delineation will encroach upon a prior delineation on the sectional plan of a part of the common property for the exclusive use by one or more of the owners.”
 - c. Section 5(1)(e) of the Sectional Titles Schemes Management Act states that a body corporate:

“may, upon unanimous resolution by the owners, request the delineation and cession of exclusive use rights to particular owners in terms of section 27 (2) of the Sectional Titles Act;”

In my view, therefore, it would appear that section 27(3) of the 1986 Act applies to exclusive use areas delineated in terms of section 27(2) of the 1986 Act, and not to exclusive use rights acquired in terms of section 27(4)(b).

- [50] The second possibility is that, as postulated by Rogers AJ (as he then was) at paragraph [41] of McKersie, in respect of rights acquired in terms of section 27(1)(c) of the 1986 Act[20], that the rights may have vested in the first respondent subject to the personal obligation owed to the opposing respondent's predecessors in title to have transferred the rights of exclusive use to the new owners of the units acquired, who would then ultimately be obliged to transfer the said rights to the remaining opposing respondents. Support for this approach may further be found in Shoreham management rule 52.5.2 in terms of which an owner of a unit is “obliged to dispose of his rights in and to his parking bay to the transferee of his section”.
- [51] The third possibility is that a purposive interpretation of Shoreham management rule 52.3 will vest the first respondent with the right to lease the relevant parking bays to its members or alternatively dispose of them.
- [52] In light of the fact that the exclusive use rights that vest in a body corporate in terms of section 27(4)(b) of the 1986 Act do not become common property for use in the manner contemplated by the application, the application must also fail to the extent that the applicants seek that it be declared that the parking bays allocated to the further opposing respondents form part of the common property vesting in the first respondent for the use and benefit of all the unit owners[21].

COSTS

Main Application

- [53] The ordinary rule in respect of costs is that costs follow the result. In light of the findings above, the applicants have failed to obtain the relief sought in the main application; with the result that they ought to pay the respondents costs in respect of the main application.

The Counterapplication.

- [54] The fourth, seventh, fourteenth and eighteenth respondents have succeeded in obtaining the relief sought in terms of the counterapplication.

In the result, applying the ordinary rule in relation to costs, they are entitled to their costs in respect of the counterapplication.

- [55] By the same token the third, fifth, sixth, and ninth to seventeenth respondents were unsuccessful in respect of the counterapplication; with the result that the applicants ought to be entitled to their costs in relation to their opposition of the counterapplication insofar

as it relates to these respondents. In awarding these costs I find that the matter is of sufficient complexity to have warranted the employment of two counsel. The costs awarded to the applicants are, therefore, to include the costs occasioned by the employment of two counsel.

Urgent Application

[56] The urgent application brought under case number 15382/16 culminated in an order by Henney J on 8 October 2016 in terms of which it was ordered that:

“1. The Applicants are directed to commence appropriate High Court proceedings within 30 days of the grant of this order declaring that parking bay numbers 1,2,3,4,6,7,8,9,10,11,12,13,14,and15 (“the parking bays”) are declared to be common property owned by the owners of sections jointly in undivided shares proportionate to the quotas of their respective sections as specified in the sectional plan (“the declaratory proceedings”)

2. Pending the determination of the declaratory proceedings:

2.1. the First Respondent is interdicted and Restrained from taking any steps to formally register the parking bays as exclusive use areas in the Deeds Office;

2.2. the status quo regarding the current use of the parking bays shall remain;

3 The first respondent shall make a contribution toward the legal costs of the applicants.”

[57] From the founding affidavit it appears that this order was granted pursuant to discussions held between the representatives of the first respondent and those of the applicant.

[58] The relief envisaged by the above order of Henney J differs markedly from the relief envisaged by the order granted by Desai J on 30 August 2016. In terms of this order a rule nisi was issued in terms of which the first respondent was called to show cause why it should not be interdicted and restrained from taking any steps to formally register the parking bays as exclusive use areas pending either an arbitration review proceedings in terms of which the applicants would seek:

- a. an order setting aside a decision taken by the first respondent on or about 16 August 2016, that all parking bays currently used by certain unit owners would be formally registered as an exclusive use area with the second respondent;
- b. directory relief in relation to the amendment in respect of the rules and management of the Shoreham body corporate in terms of section 35(5) of the 1986 Act;
- c. that the first respondent obtain a layout plan in terms of section 27A of the 1986 Act which was to be attached to the amended rules and filed with the second respondent;
- d. that the relevant parking bays be allocated in terms of the amended rules.

[59] In light of the findings in this application in relation to the declaratory relief the applicant sought, seen against the background of the nature of the relief envisaged by the order granted by Henney J, which in turn is to be compared to the relief initially sought as contained in the order of Desai J, the applicants, in my view, are to pay the costs of the urgent application. This finding is not to impact on existing costs orders granted, and specifically not on the order contained in paragraph 3 of the order granted by Henney J, as referred to above, which costs orders (for the sake of clarity) any award of costs in respect of the urgent application will exclude.

ORDER

[60] In the premises I make the following order:

- a. The application is dismissed, with costs.
- b. The fourth, seventh, fourteenth and eighteenth respondents are declared to be the holders of rights of exclusive use to the parking bays allocated to them.
- c. The fourteenth respondent is declared to be the holder of a valid certificate recording his rights of exclusive use of the parking bay allocated to him, being parking bay number 6.
- d. The first respondent is directed to issue replacement certificates to the fourth, seventh, and eighteenth respondents indicating their rights of exclusive use of the parking bays allocated to them.
- e. The counterapplication in respect of the relief sought by the third, fifth, sixth, and ninth to seventeenth respondents, is dismissed.
- f. The applicants shall pay the costs of the counterapplication in respect of the fourth, seventh, fourteenth and eighteenth respondents.
- g. The third, fifth, sixth, and ninth to seventeenth respondents shall pay the applicants' costs in respect of the opposition to the counterapplication insofar as it relates to the relief sought by these respondents, such costs to include the costs occasioned by the employment of two counsel.
- h. The applicants are ordered pay the costs of the urgent application brought under case number 15382/2016.

JH LOOTS

Acting Judge of the High Court

For the Applicants: Adv GW Woodland SC, with him Adv AA Brink (instructed by Frank Biccari Attorneys)

For the Defendant: Adv J Butler SC (instructed by Maurice Phillips Wisenberg)

[1] The fourteenth respondent has since passed away. However, inasmuch as the relief may impact his estate, the counterapplication

in respect of the fourteenth respondent will still be considered.

[2] While there is a dispute as to the exact nature of this transfer the dispute is not of much moment for the purpose of deciding the case.

[3] Under Case Number 15382/16.

[4] Act 95 of 1986.

[5] See the definition of common property in both section 1 of the 1971 Act and section 1 of the 1986 Act. Although not relevant to the present dispute the definition in the 1986 Act includes land acquired in terms of section 26 of that Act.

[6] 2010 (6) SA 599 (KZD) at paragraphs [12] to [18].

[7] Until 1 June 1988.

[8] The remaining opposing respondents filed confirmatory affidavits to the affidavits deposed to by the fourth respondent.

[9] In paragraphs 50 to 56 of the Answering Affidavit and Affidavit in Relation to Counter Application, however the case is made out that the seventh respondent would have been issued with a certificate on the same basis as inter alia the fourteenth and eighteenth respondents.

[10] This includes those persons who I was satisfied would have been issued with the relevant certificate as set out in the section of the judgment dealing with the position of the fourth, seventh, fourteenth, eighteenth and nineteenth respondents.

[11] Section 27.

[12] Section 35.

[13] Section 10.

[14] *Brayton Carlswald (Pty) Ltd and Another v Brews* 2017 (5) SA 498 (SCA) at par [9], where it is reaffirmed that the parties may agree that a written deed of cession is a requirement for its validity.

[15] See Van de Merwe, *Sectional Titles, Share Blocks and Time Sharing*, Vol.1, par 13 11, regarding the nature of the rules.

[16] Currently in terms of Section 10(4) of Act 8 of 2011. Previously in terms of section 35(4) of the 1986 Act and section

27(5) of the 1971 Act.

- [17] Brayton Carlswald – supra at par [15]. The underlying obligatory agreement and the real agreement of cession are separate juristic acts, which may or may not be embodied in the same document.
- [18] 2013 (5) SA 471 (WCC) at par [18].
- [19] Sectional Titles, Share Blocks and Time Sharing, Vol.1, at par 10.5.3.2.
- [20] Which may be directly applicable depending on a final finding in respect of the nature of the transfer to the initial eight trusts
- referred to in paragraph [4] above.
- [21] In this regard cognisance must also be taken of the application paragraph 1 of the order by Henney J on 8 October 2017.
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