CASES / VONNISSE

DESCRIPTION OF A SECTIONAL TITLE UNIT IN A DEED OF SALE

Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd 2007 2 SA 179 (W)

The correct description of a sectional title unit in a deed of sale has yet again received the attention of the High Court in *Erf 441 Robertsville Property CC v New Market Developments (Pty) Ltd* 2007 2 SA 179 (W). The issue has been the subject matter of litigation on a number of occasions: *Botes v Toti Development Co (Pty) Ltd* (1978 1 SA 205 (T)); *Richtown Development (Pty) Ltd v Dusterwald* (1981 3 SA 691 (W)); *Forsyth v Josi* (1982 2 SA 164 (N)); *Naude v Schutte* (1983 4 SA 74 (T)); *Kendrick v Community Development Board* (1983 4 SA 532 (W)); *Den Dunnen v Kreder* (1985 3 SA 616 (T)); and *Phone-A-Copy Worldwide (Pty) Ltd v Orkin* (1986 1 SA 729 (A)). The litigation stems from the fact that in terms of the Sectional Titles Act 95 of 1986 a sectional title unit is deemed to be land (s 3(4)), meaning that a sale agreement of a unit must comply with requirements of the Alienation of Land Act 68 of 1981. This stipulates (s 2(1)) that a sale of land is of no force or effect unless it is contained in a deed of alienation signed by the parties or their agents acting on their written authority. The Act does not require an agreement of sale of land to contain a faultless description of the property sold, coached in meticulously accurate terms (*Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 1 SA 983 (A) 989), but does demand some degree of accuracy in this regard. The test for compliance with the statute has been described as follows by Holmes JA in *Clements v Simpson* (1971 3 SA 1 (A) 7F-G):

> "The test for compliance with the statute, in regard to the *res vendita*, is whether the land sold can be identified on the ground by reference to the provisions of the contract, without recourse to evidence from the parties as to their negotiations and *consensus*."

The test was formulated with reference to the provisions of section 1(1) of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 (the predecessor to the Alienation of Land Act), but it applies equally to the latter Act: Van Rensburg and Treisman *The Practitioner's Guide to the Alienation of Land Act* 2ed (1984) 45.

The facts in *Erf 441* were straightforward. The applicants sought an order declaring that an agreement of sale of a sectional title unit, concluded

between them and the respondent on 5 November 2004, was valid and binding. The applicants were the purchasers of the property and the respondent the seller/developer. Clause 1 of the agreement described the *merx* as follows:

> "Sectional title unit 12 mini units Northlands Deco Park, measuring approximately 750 m^2 and more fully indicated on the draft diagram attached hereto."

No draft diagram was attached to the deed of sale.

The judgment states expressly that at the time of the sale the building had been erected, and that the applicants had taken occupation. What is not stated in express terms, however, is whether the sectional title register had been opened. The inference to be drawn from the reported facts is that this had not yet occurred.

The respondent contended that the deed of sale was void on the following grounds:

(a) The property sold was insufficiently described and could not be identified by reference to the deed of sale. As such, the agreement did not comply with the requirements contained in the Alienation of Land Act 68 of 1981. (The Court inadvertently referred to the Formalities in respect of Contracts of Sale of Land Act, which had been repealed by the Alienation of Land Act.)

(b) The agreement fell foul of the provisions of section 67(1)(a) of the Town Planning and Townships Ordinance 15 of 1986 (Gauteng) which provide that, after an owner of land has taken steps to establish a township on his land, "no person shall ... enter into any contract for the sale ... of an erf in the township". (The Court accepted for present purposes that the sale had occurred after steps had been taken by the owner of the land to establish a township on the land.)

It is not entirely clear from the judgment on what grounds the respondent relied for arguing that the property had been insufficiently described. Counsel for the respondent referred to the definition of "participation quota" in section 1 of the Sectional Titles Act, which is defined "in relation to a section or the owner of a section" to mean "the percentage determined in accordance with the provisions of section 32(1) or (2) in respect of that section for the purposes referred to in section 32(3), and shown on a sectional plan in accordance with the provisions of section 5(3)(g)". Section 32(1) refers to a "scheme for residential purposes only" and section 32(2) to a "scheme other than a scheme referred to in subsection (1)". In terms of section 32(2) "the participation quota of a section shall be a percentage expressed to four decimal places, as determined by the developer". It is not clear, however, exactly to what extent the respondent's argument was based on these definitions. Presumably the line of reasoning was premised on *Naude v Schutte (supra)* and *Den Dunnen v Kreder (supra)*, two cases referred to by the respondent. In *Naude* the subject-matter of the sale was described as

> "Woonstel nr 3 blok dupleks Schutte geleë aan nr 920 Pretoria-Noord in Jack Hindonstraat (net oorkant Rachel de Beerstraat)".

The building in question had been erected and was thus physically in existence. However, the sectional plan had not been registered at the time of sale, and the agreement of sale did not contain any reference to a sectional plan. The court held that the sale was void based on the following reasoning:

(a) In terms of the Sectional Titles Act 66 of 1971 (the Act applicable at the time) a "unit" is defined as a *section* together with its *undivided share* in the common property, apportioned to that section in accordance with the participation quota of the section. A unit therefore comprises two components, namely (i) a section, and (ii) that section's undivided share in the common property, apportioned to the section in terms of the section's participation quota.

(b) A section is defined as a section shown as such on a sectional plan. Given the absence of a sectional plan, the section was insufficiently described in the deed of sale.

(c) Even if the section was adequately described, there was a further problem, namely that the sale agreement contained no information in terms of which the second component of the unit could be determined, namely the undivided share in the common property apportioned to the section in accordance with the section's participation quota. Neither the common property nor the participation quota could be determined based on the information contained in the deed of sale.

In *Den Dunnen* the deed of sale referred to the fact that the purchaser purchased a unit in a complex in terms of the Sectional Titles Act. The property sold was described as follows:

> "(a) Sekere eenheid woonstel 10 wat die oppervlakte het, soos op die aangehegte deelplan aangedui, gemeet tot by die middellyn van die skeidingsmuur hierna 'die deel' genoem.
>
> (b) 'n Onverdeelde aandeel van die 'gemeenskaplike eiendom' (hierna die 'deelnemingskwota' genoem), welke aandeel in die deelplanne, wat hierby aangeheg is, genoem word, …
>
> (c) Die reg op die uitsluitlike gebruik van afdak 5 en van die gedeeltelik-ommuurde tuin …"

No sectional plan existed at the time of the sale and no plans were attached to the sale agreement. The court held that the parties had not intended a *genus* sale (where the purchaser could select the property sold from an identifiable *genus* or class) but that they had intended the sale of a *specific* property. The parties had attempted to describe the property sold precisely with reference to an existing plan. However, given the absence of the plan the description was insufficient and the sale was void.

Returning to *Erf 441*. The court rejected the respondent's arguments and found in favour of the applicants. Goldstein J expressed himself as follows:

> "At the stage when the agreement of sale was concluded, the building had been erected and, in fact, soon after its conclusion, the applicants occupied the section they had purchased. It follows that the 750 m^2 unit reflected in the

> agreement as the *merx* could be identified without recourse to evidence from the parties as to their negotiations and consensus, thus satisfying the requirements laid down in *Clements v Simpson* 1971 (3) SA 7F-G. It is important in this regard to note that the reference to a draft diagram in the agreement is introduced by the word '*and* more fully indicated' (my emphasis). These words are not essential to the description of the property sold; put otherwise: the property sold could be identified without recourse to the diagram, which was not attached, and therefore not included in the agreement of sale.
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> In regard to the participation quota s 32(2) provides that this was to be fixed by the respondent; it would do so in terms of the section without further reference to the applicants, and accordingly, the test laid down in *Clements* to which I have referred is satisfied. It is significant in this regard that the *merx* is described as a 'sectional title unit', indicating that it was to be governed by the Act bearing that name, and dealing with the law relating to a 'unit'" (181I-182C).

According to the court the cases relied on by the respondent were "distinguishable" and had to be contrasted with *Phone-A-Copy Worldwide (Pty) Ltd v Orkin* (*supra*). In that case the property sold was described in the following manner:

> "(a) Flat Nos ('the section') in the aforementioned block of flats known as Unicadia 402-403-404-405-406-407-202-203-204-205-304-305 (12 flats).
>
> (b) An undivided share in the common property, as defined in the Act and as applicable under the scheme, to be apportioned to the section in accordance with the participation quota (as defined in s 24 of the Act) of the section (the section and the said undivided share being collectively referred to as 'the unit')" (742H-I).

The preamble to the agreement stated that the seller was the owner of erf 1151 Arcadia "… whereon is erected a block of 88 flats with garages and parking spaces …" The preamble furthermore recorded that the seller was about to prepare a development scheme under the Sectional Titles Act in respect of the land, and to apply to the City Council of Pretoria for approval of the scheme, and to the Registrar of Deeds for the registration of a sectional plan and the opening of a sectional register in respect of the scheme. The Appellate Division (as it was then known) arrived at the conclusion that the property sold had been sufficiently described in respect of each of its components, namely "the section" and "undivided share in the common property". Concerning the undivided share in the common property the court acknowledged that it was true that this could not be ascertained at the date of the agreement, but would become ascertainable only when a sectional plan had been registered. However, according to the court that fact alone did not in itself render the description insufficient. In terms of the preamble, the scheme was to be prepared by the seller and registered with the Registrar of Deeds. Upon such registration, the undivided share and participation quota would be readily ascertainable without recourse to evidence from the parties as to their negotiations and consensus.

The second ground upon which the respondent relied in *Erf 441* was dealt with by the court as follows:

> "The contention for the respondents is that the *merx* in the agreement constitutes land as defined in the ordinance, that such land is an erf as

> intended by the ordinance, and is thus covered by the provisions of s 67. It seems to me that it can be correctly said of the unit purchased by the applicants that such contains a 'particular portion of land', that is, the 750 m^2 of the unit concerned. However, the agreement does not encompass that area alone, but also the participation quota which was to accompany it. The composite *merx* so purchased, including as it does an undivided share in the common property, cannot be said to constitute the 'particular portion of land' referred to in the definition of 'erf'. The ordinance was signed in Afrikaans and the relevant portion of the definition, consistent with my view, reads '*en omvat enige bepaalde gedeelte van grond*'. It follows that the agreement was not concluded in contravention of s 67 of the ordinance" (183C-D).

The judgment raises some questions. At the outset it deserves to be mentioned that a sale of a sectional title unit does not encompass the sale of the participation quota which is "to accompany" the unit. The participation quota is merely the formula that is used to calculate, *inter alia*, the size of a section's undivided share in the common property. What is sold as a unit, is a section plus that section's undivided share in the common property apportioned to the section in accordance with the participation quota of the section. Another issue, not raised in the judgment, is: what exactly did the applicants buy? Did they buy sectional title unit 12, comprising mini units in Northlands Deco Park, or did they buy 12 mini units in Northlands Deco Park? It is submitted that if the purchasers had in fact bought 12 specific mini units in a complex having more than 12 units, then the property was insufficiently described for the purposes of the Alienation of Land Act. It would have been impossible to determine with reference to the sale agreement itself what those mini units were, unless there were only 12 such units in the entire development. Those mini units could have been indicated on the draft diagram which was to be attached to the sale agreement, but no diagram was in fact attached. If there were more than 12 units in the development, then of course the parties could have contracted on the basis of a genus sale, namely that the purchasers were to select their 12 mini units from a category of clearly identified mini units. But that was not the basis on which the case was argued, and one must assume that no *genus* sale was intended. In any event the genus or category of mini units were not identified in the sale agreement, so even if a genus sale was intended it would have been void (see Van Rensburg and Treisman *The Practitioner's Guide to the Alienation of Land Act* 2ed (1984) 47).

Assuming that the purchasers had bought sectional title unit 12, comprising mini units in Northlands Deco Park, the question arises whether the property was sufficiently described in the sale agreement, having regard to the fact that a sectional title unit comprises (i) a section together with (ii) that section's undivided share in the common property. In *Phone-A-Copy* the sale agreement specifically recorded that the purchaser bought from the seller not only the section, but also the undivided share in the common property. The undivided share in the common property was described in the sale agreement (see above). In *Erf 441* this was not done: there was no statement in the deed of sale stating that the purchaser purchased an undivided share in the common property. It may be argued, however, that the *merx* was described as a "sectional title unit" and that in terms of the Sectional Titles Act a unit by necessity comprises a section together with its

undivided share in the common property; it was therefore not necessary to state in the deed of sale that the purchaser also bought an undivided share, since this is inferred from the words "sectional title unit". Taking the argument further, it can then be contended (as was done in *Phone-A-Copy*) that upon registration of the sectional plan the undivided share in the common property would be readily ascertainable. The problem, however, is that in *Erf 441* the sale agreement did not contain a preamble as in *Phone-A-Copy*, stating that the seller was to apply for approval of the scheme and registration of a sectional plan. The reasoning in *Phone-A-Copy* therefore does not apply to *Erf 441*. On this basis it can be questioned whether in fact the *merx* was sufficiently described for the purposes of compliance with the Alienation of Land Act.

Technicalities aside: can it really be said that the property sold could be "identified on the ground *by reference to the provisions of the contract*, without recourse to evidence from the parties as to their negotiations and consensus"? The facts that the building had been constructed and that the purchasers had taken occupation soon after the date of sale, do not automatically mean that the *merx* had been sufficiently described for the purposes of the Alienation of Land Act. Where in the world is Northlands Deco Park?

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