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IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
BEFORE THE HONOURABLE MR JUSTICE NUKU
CAPE TOWN: MONDAY, 29 MAY 2017

Case number: 3273/2017

In the matter between:

HARTENBOS WOONWAPARK CC

Applicant

and

REGISTRAR OF DEEDS, CAPE TOWN

First Respondent

SURVEYOR-GENERAL: WESTERN CAPE

Second Respondent

THE BODY CORPORATE OF
HARTENSEE SECTIONAL TITLE SCHEME

Third Respondent

MOSSEL BAY MUNICIPALITY

Fourth Respondent

BURGER LE ROUX

Fifth Respondent

BUSINESS PARTNERS LTD

Sixth Respondent

(DRAFT) ORDER

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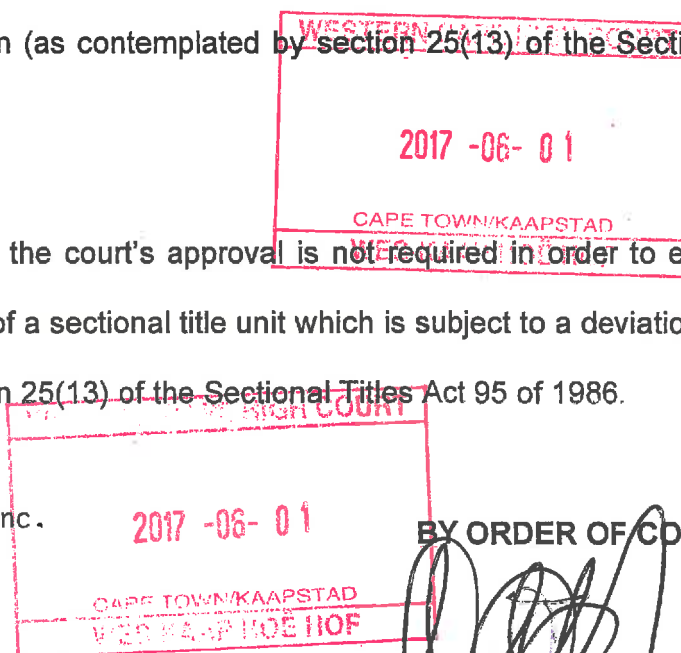
Having read the papers and having heard counsel for the Applicant;

IT IS ORDERED:

1. That the First Respondent is authorised and directed to register transfer of unit 216 of the Sectional Title Scheme Hartensee (SS231/2008) in favour of the Fifth Respondent in terms of registration documentation annexed hereto as **Annexure "F9"**.
2. That the First Respondent's refusal to allow transfer of sectional title units, on the basis that the amended sectional title development plan deviates from the original sectional title plan or the right of extension (as contemplated by section 25(13) of the Sectional Titles Act 95 of 1986), is reviewed and set aside.
3. That it is declared that the First Respondent has no power to refuse registration of transfer of a sectional title unit on the basis that the amended sectional title development plan deviates from the original sectional title plan or the right of extension (as contemplated by section 25(13) of the Sectional Titles Act 95 of 1986).
4. That it is declared that the court's approval is not required in order to effect registration of transfer of a sectional title unit which is subject to a deviation as contemplated by section 25(13) of the Sectional Titles Act 95 of 1986.

27 De Klerk & Van Gend Inc.
CAPE TOWN

/avz



BY ORDER OF COURT

COURT

REGISTRAR OF THE COURT



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

CASE NO: 3273/2017

In the matter between:

HARTENBOS WOONWAPARK CC

Applicant

and

THE REGISTRAR OF DEEDS, CAPE TOWN

1st Respondent

SURVEYOR-GENERAL: WESTERN CAPE

2nd Respondent

**THE BODY CORPORATE OF HARTENSEE
SECTIONAL TITLE SCHEME**

3rd Respondent

MOSSEL BAY MUNICIPALITY

4th Respondent

BURGER LE ROUX

5th Respondent

BUSINESS PARTNERS LIMITED

6th Respondent

REASONS : 12 JUNE 2017

NUKU, J

**[1] The applicant brought this application seeking an order in the following terms,
namely :**

- 1.1 That the first respondent be authorised and directed to register transfer of unit 216 of the Sectional Title Scheme Hartensee (SS231/2008) in favour of the fifth respondent in terms of the registration documentation annexed to the founding papers as Annexure "F9";
- 1.2 That the first respondent's refusal to allow transfer of sectional title units, on the basis that the amended sectional title development plan deviates from the original sectional title plan or the right of extension (as contemplated by section 25(13) of the Sectional Titles Act 95 of 1986), is reviewed and set aside;
- 1.3 That it be declared that the first respondent has no power to refuse registration of transfer of a sectional title unit on the basis that the amended sectional title development plan deviates from the original sectional title plan or the right of extension (as contemplated by section 25(13) of the Sectional Titles Act 95 of 1986); and
- 1.4 That it be declared that the Court's approval is not required in order to effect registration of transfer of a sectional title unit which is subject to a deviation as contemplated by section 25(13) of the Sectional Titles Act 95 of 1986.

[2] The application was not opposed and it was initially set down for hearing in third division on 8 March 2017 when it was postponed for hearing on the semi urgent roll on 29 May 2017 and the applicant was directed to file its heads of argument on or before 15 May 2017. On 29 May 2017, the Court granted the order as prayed for and these are the reasons for the said order.

[3] The applicant conducts its business as a property developer. During April 2008, the applicant registered the area of land known as ERF 6019 HARTENBOS as a sectional title scheme known as the Hartensee Sectional Title Scheme (*the scheme*). With the registration of the scheme the applicant reserved to itself a right to extend the scheme as contemplated in section 25 (2) (a) of the Sectional Titles Act 95 of 1986 (*the Act*).

[4] An application for the reservation of the right of extension must be accompanied by a site development plan indicating the nature of the units to be built in extending the scheme. The initial units that comprised the scheme were small in size, and the applicant anticipated extending the scheme by building units similar to the initial units comprising the scheme. As a result of this, the applicant submitted a site development plan which indicated that the scheme would be extended by building units which would be small in size.

[5] After sometime it became clear to the applicant that the market conditions had changed as the demand for small units slowed down. Confronted with this and after having reassessed the situation, the applicant came to the conclusion that the market required units of bigger sizes situated on the ground floor with parking bays and garages. As a result of this and during 2013, the applicant caused a site development plan to be amended by including units of bigger sizes with parking bays and garages.

[6] The amended site development plan was approved by the third respondent on 24 February 2014. I pause to mention that all owners of the units in the scheme are

members of the third respondent. The amended site development plan was further approved by the second and fourth respondents. The applicant proceeded with the construction and sale of the units as depicted in the amended site development plan.

[7] On 30 April 2015, the fifth respondent purchased unit 216, which is the subject matter of these proceedings. When the conveyancers appointed by the applicant attempted to register the transfer of unit 216 to the fifth respondent, the first respondent refused to register the transfer. In refusing to register the transfer, the first respondent cited a letter by the second respondent dated 26 October 2016 which indicated that, although the amended plan has been approved, it "*deviates completely*" from the original plan and "*the development has proceeded in a manner which is completely different from that shown on the plan of reservation of rights, and that this office is not aware of any new rights which may have been ceded to the developer by the body corporate*". The second respondent's letter further recorded that the extension encroaches onto common property. The first respondent's refusal to register the transfer was communicated verbally to the applicant's conveyancers and was never confirmed in writing.

[8] As a result of the first respondent's refusal to register the transfer of unit 216 from the applicant to the fifth respondent, the applicant approached this court for the relief set out in paragraph 1 above.

[9] The first respondent elected not to oppose the application. The first respondent has also elected not to provide this court with the reasons for refusing to register the transfer of the unit despite this application having been served on the first

respondent. The report filed by the first respondent does not set out the reasons for the first respondent's refusal to register the transfer.

[10] The first respondent's refusal to register the transfer is an administrative action as defined in section 1 of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA") and as such is subject to judicial review in terms of section 6 of PAJA. In proceedings for judicial review it is presumed that the administrative action was taken without a good reason where the administrator fails to give reasons for the administrative action. (See section 5(3) of PAJA.)

[11] The applicant submitted that the first respondent's refusal to register the transfer appears to be based on the fact that the amended site development plan deviates from the original site development plan which was filed when the right of extension was registered. The applicant further submitted, correctly in my view, that the matter concerns the interpretation and application of section 25 (13) of the Act, which reads as follows:

"(13) A developer or his or her 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 and to delineate areas of the common property subject to rights of exclusive use 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 or her 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."

[12] The said subsection, in simple terms, means that a developer must strictly comply with the original sectional title plans, save in situations where there has been "*changed circumstances*". Whilst there is no debate in our law that the court is empowered to disallow a developer to deviate from the original sectional title plan upon an objection received by one of the owners, there are two conflicting judgments as to whether it is necessary for a court to approve it, in the absence of any objection by an owner, before the Registrar of Deeds may effect a registration in terms of the amended sectional title plans.

[13] In the unreported judgment of *Dolphin Whisper Trading 10 (Pty) Ltd v The Registrar of Deeds* (case no: 20645/2008, Western Cape Division), the court takes the position that:

"The onus is on a developer pleading "changed circumstances" to set out fully facts indicating the nature and extent of the "changed circumstances" relied upon and how they came about."

[14] The *Dolphin Whisper* case has been understood to suggest that it is incumbent upon a developer to approach the court so as to ratify each and every transfer of a unit pursuant to a change in the sectional title plans.

[15] In *PCL Trust en Andere v Registreur Van Aktes* 2011 (3) SA 342 (FB), the court took a different view and expressed some doubt as to the correctness of the *Dolphin Whisper* judgment. The reasoning in the *PCL Trust* case can be paraphrased as follows:

- 15.1 The Act does not provide that the court is to approve each and every amended site development plan.
- 15.2 The Act places no duty on the Registrar of Deeds to approve or disapprove the amended site development plans.
- 15.3 Contrary to the Registrar of Deeds' policy, it is not for the Registrar to investigate or to adjudicate on the lawfulness of the underlying transaction that led to the transaction. It is for the unit owner to approach the court should they feel their rights are being infringed upon.
- 15.4 Should it be expected of a developer to approach a court in each instance, even in the event of a minor deviation from the original plan, then it would lead to the court being inundated with applications of this nature.

[16] The applicant submitted that the court ought to follow *PCL Trust over Dolphin Whisper*, in that the court in the *Dolphin Whisper* case failed to consider that section 25(13) only relates to situations where a unit owner takes issue with a deviation and approaches the court as contemplated in section 25 (13). It was further submitted that it is only owners of the units in a scheme that may be adversely affected by a deviation and that in the absence of any objection, it is not for the Registrar of Deeds to second guess the wishes of the owners. It was further submitted that if this court were to follow the *Dolphin Whisper* case, then that would mean that the courts would be inundated with applications for the court to approve the deviations and that this would result in the courts playing a *quasi-administrative*

role so as to ratify transfers in the context where there is no dispute between the interested parties.

[17] Turning to the facts of the present matter, the amended site development plan which deviated from the original site development plan was approved by the third respondent. The third respondent represents the owners of all the units in the scheme. The owners of the units in the scheme have not complained of any prejudice arising from the deviation from the original site development plan.

[18] The first respondent has not provided reasons for his refusal to register the transfer and as such he has failed to rebut the presumption that his refusal to register the transfer was without good reason. On this basis alone the first respondent's refusal to register the transfer falls to be reviewed and set aside.

[19] Although the first respondent did not expressly state that his refusal to register the transfer was due to the applicant's deviation from the original site development plan, it became necessary to deal with the following two questions, namely: (a) whether section 25(13) empowers the first respondent to refuse registration of transfer where there is a deviation from the original site development plan, and (b) whether the court's approval is required in order to effect registration of transfer of a sectional title unit which is subject to a deviation as contemplated in section 25(13) of the Act. This is because the applicant has amended the site development plan and the units that must still be registered will deviate from the original site development plan.

[20] In the *Dolphin Whisper* case, the court was of the view that the developer's inability to divide the sections strictly according to the site development plan due to changed circumstances, amounts to non-compliance with the Act which may be condoned by the court upon application by the developer. The court went on to suggest that in those proceedings the *onus* would be on the developer pleading the "changed circumstances" to set out fully the nature and extent of "changed circumstances" relied upon and how they came about.

[21] I cannot agree that the developer's failure to divide the sections strictly according to the site development plan due to the changed circumstances amounts to non-compliance with the provisions of the Act. Although the Act requires the sections to be divided according to the site development plan, the Act does envisage that there may be situations where it is not possible to divide the sections strictly according to the site development plan due to "changed circumstances". The Act, in those instances, provides remedies to the owners of the units who may be affected by the deviation to approach the court.

[22] I agree with the applicant's submission that section 25(13) of the Act relates to situations where an owner of a unit in a scheme takes issue with a deviation, and approaches the court for an order obliging the developer to properly comply with the terms of the reservation or any other relief which the court may deem fit, including an award for damages. It is clear from the reading of section 25(13) of the Act that this section is not concerned with the power of the Registrar of Deeds to refuse to register the transfer nor the court's approval of the transfer of a unit which is subject

to a deviation as contemplated in section 25(13) of the Act. This is the aspect which appears to have escaped the court in the *Dolphin Whisper* case.

[23] For the reasons set out above, the court granted the order dated 29 May 2017.

NUKU, 