CHANGE OF USE: A TEST FOR THE SECTIONAL TITLE SCHEMES MANAGEMENT ACT

Mineur v Baydunes Body Corporate and Others (11020/2018) [2019] ZAWCHC 59; [2019] 3 All SA 611 (WCC) (24 May 2019)

In this matter, the body corporate of a sectional title scheme tried to legalise the historical renovations (change of use) that various owners had made to their sections. A special resolution was passed at a general meeting, but this was challenged by an owner who claimed that a unanimous resolution was required, even if, as was the case here, the change of use relates only to part of a section. What is the position?

The Judgment can be viewed here.

FACTS

The Baydunes sectional title scheme is situated in Hartenbos. It was initially conceived as a housing scheme built for Mossgas, but was converted into a sectional title scheme in 1993.

It consists of a number of physically separate buildings or terraced houses within the greater complex. The sectional plan depicts each section as comprising of two separate subsections which, in the present matter, were living quarters and a garage, linked by a small exclusive use area.

Over the years, a number of owners made alterations, improvements or extensions to their sections without any formal approval from the body corporate and/or the local authority. This included certain owners converting their garages into living quarters (bedrooms, living rooms, etc). The alterations, improvements and extensions made by the owners concerned were unlawful as no permission was obtained.

By December 2016 it was recognised that steps had to be taken to regularise (or 'legalise') these unlawful conversions. This came after the local authority (the Mossel Bay Municipality) demanded that the owners of the units concerned provide it with building plans, approved by the trustees of the body corporate by a certain date, failing which they would be required to reinstate their garages and units to the position they were prior to the conversion. In addition, each owner was required to submit proof to the Municipality that he or she had the use of two parking bays for his or her section.

In order to address this problem, certain resolutions were passed at the scheme's annual general meeting in December 2017, including a special resolution to approve the conversion of garages in the Scheme to living quarters. This was done ostensibly in terms of Management Rule 29(2) (issued in terms of the Sectional Titles Schemes Management Act ('the Management Act')), which permits a body corporate to make alterations or improvements to common property that are 'reasonably necessary' subject to compliance with certain requirements.

Ms Mineur, an owner in the scheme, disputed that these resolutions were lawfully passed, *arguing, amongst other things, that section 13(1)(g) of the Management Act applied in respect of the conversion of garages to living quarters in the scheme and that a unanimous resolution was required*. She therefore approached the Ombud for an order directing what the correct procedure would be for approval of the conversions. The adjudicator found in favour of the body corporate and Ms Mineur then appealed to the High Court.

The law:

Section 13(1)(g) of the Management Act provides as follows:

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'13 Duties of owners

(1) An owner must - …

(g) when the purpose for which a section or exclusive use area is intended to be used is shown expressly or by implication on or by a registered sectional plan, not use nor permit such section or exclusive use area to be used for any other purpose: Provided that with the written consent of all owners such section or exclusive use area may be used for that purpose as consented to.'

Section 13 must be read with Management Rule 30 which imposes an obligation upon a body corporate to take all reasonable steps to ensure that a member or other occupier of a section or exclusive use area does not, inter alia:

'(f) subject to the provisions of section 13(1)(g)… use a section or exclusive use area for a purpose other than for its intended use as –

(i) shown expressly or by implication on a registered sectional title plan or an approved building plan;

(ii) can reasonably be inferred from the provisions of the applicable town planning by-laws or the rules of the body corporate; or

(iii) is obvious from its construction, layout and available amenities…'

The argument

The body corporate of Baydunes ('Baydunes') argued that section 13 (1)(g) refers to the change of use of an entire section and not just a part of one and that a unanimous resolution was therefore not necessary in this instance. Had the legislature intended that different parts of a section could be "classified" according to their use, it would have made specific provision therefor. This interpretation, so the argument proceeded, was supported by the provisions of Management Rule 2, as well as Management Rule 27(2)(c) which makes it incumbent upon a body corporate to keep proper records of, amongst others, sections on a sectional plan, indicating in each instance whether it is a primary section (designed to be used for human occupation) or utility section (a section which, in terms of local municipality by-laws, is designed to be used as an accessory to a primary section, such as a bathroom, toilet, storeroom, workshop, shed, servant's quarters, parking garage, parking bay or other utility area).

This interpretation is also, so the argument went, fortified by the use of the word 'section' throughout Management Rule 30, which imposes an obligation upon a body corporate to take all reasonable steps to ensure that a member or other occupier of a section or exclusive use area does not use a section or exclusive use area for a purpose other than for its intended use. As such, in the absence of any provision in the Management Act itself that each and every separate room or part of a section must be classified as primary or utility, section 13(1)(g) must be interpreted to mean that only when the intended purpose (or use) of an entire section is to be changed must the consent of all owners be obtained; since to interpret it otherwise would lead to absurdity, for example requiring unanimous resolution for: (a) using a spare bedroom for storage purposes; (b) moving a large storage cupboard in a kitchen to another area of the kitchen or other room; and (c) building an *en suite* bathroom in a corner of a bedroom.

HELD

- The sectional plan pertaining to the Baydunes scheme depicts each section as comprising of two separate subsections being (i) living quarters and (ii) a garage, linked by a small exclusive use area.

- The Management Act defines 'section' as meaning 'a section shown as such on a sectional plan.' Clearly the legislature intended that a section, for purposes of the Management Act, is not a broad, generic term but is determined by the specific sectional plan in each instance.

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- In respect of the Baydunes Scheme, each individual section was depicted as consisting of two subsections, one for living quarters and the other for parking. This was not only shown – as stipulated in management rule 30 – on the plan, but could also be reasonably inferred from the provisions of the applicable town planning by-laws which require two parking bays per dwelling unit. Moreover, it is obvious from the construction, layout and available amenities of the Scheme itself that this was the case. Management rule 30(f) is in turn expressly subject to the provisions of section 13(1)(g).

- Further, the classification of use of a section into "primary" or "utility" in the management rules does not assist Baydunes. This classification appears to envisage the possibility of two subsections of one composite section in a sectional title scheme. They are given separate and distinct meanings, and merely because a utility section is defined as being designed to be used as an accessory to a primary section, does not mean that its separate and distinct purpose is subsumed into or under the purpose of the primary section which, in the present case, is living quarters. Both are 'designed to be used' for different purposes. In fact, turning Baydunes' argument around, had the legislature intended to mean that section 13(1)(g) would only apply to an entire section, no purpose would have been served by the classification of use in the management rules as primary or utility.

- Another consideration was the fact that, in terms of the Mossel Bay Municipality Integrated Zoning Scheme By-Law, each section in the scheme was required to have two off-street parking bays available to it. The absence of any alternative designated parking bays in the scheme supported Ms Mineur's contention that the garages of sections must be used for their intended purpose, i.e. as parking for vehicles.

- And importantly, it was evident that one of the purposes of section 13(1)(g) is to restrict owners from effecting changes to the use of their sections where such change of use might have a negative impact on other owners, hence the requirement of unanimous written consent before such a change may be implemented. Changing a section's garage into living quarters has the effect of depriving that unit of a parking area for the occupants' vehicle(s), requiring the occupants to find parking elsewhere – in this case on the common property. This directly impacts negatively upon other owners in the Scheme because they are deprived of the free use and enjoyment of part of the common property, and it is likely to increase congestion in the scheme – particularly where all owners are to be permitted to convert their garages to living quarters. This is clearly the type of scenario that section 13(1)(g) envisaged would require consent from all the owners before it can be implemented.

- The type of changes of use cited by Baydunes as examples are not those that should be affected by section 13(1)(g) as read with management rule 30(f). The reason for this was self-evident: they do not affect any of the other owners. Rather, the appropriate test is whether or not the relevant change of use envisaged materially affects the other owners in the Scheme. Operating a business would be such an example. Granting permission for the conversion of all the garages in the scheme to living quarters is clearly another. It is precisely for this reason that the consent of all owners should be required.

- The aforegoing shows that section 13(1)(g) was applicable and a unanimous resolution was required.

(The remainder of the judgment dealt with a further incorrect procedure followed when a special resolution was passed to approve the granting of additional exclusive use rights in the scheme to owners of sections. The adoption of the new rule: (i) did not comply with section 10(8)(a)(ii) of the Management Act in that the layout plan did not clearly indicate the purpose for which such parts of the common property may be used; and (ii) the manner in which the new exclusive use areas had been allocated resulted in certain sections being deprived of any off-street parking (other than its single vehicle garage), rendering the allocation of the exclusive use areas in contravention of the applicable by-law, which requires that each section be allocated at least two off-street parking bays; and thus contravened Management Rule 30(c) which prohibits the use of sections and common property which contravene the provision of any law or by-law).

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CONCLUSION

The appeal succeeded.

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