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

CASE NO: 2556/2016
REPORTABLE

In the *ex parte* application of:

HARBOUR TERRACE BODY CORPORATE
(SS401/1998) Applicant

and

THE MINISTER OF PUBLIC WORKS First Respondent

THE MINISTER OF FINANCE Second Respondent

THE REGISTRAR OF DEEDS, CAPE TOWN Third Respondent

Heard on: 19 February, 15 March and 25 April 2016
Delivered on: 8 July 2016

JUDGMENT

SHER, AJ:

1. This matter came before me in Motion Court on the return day of a *rule nisi*. When it was called I indicated to counsel for the applicant that although the matter was not opposed by the respondents, who abide the decision of the Court, I had a number of difficulties with the application and misgivings with the relief which was sought therein, and requested that written submissions should be made in regard thereto.

2. The central issue which arises for determination is whether this Court is entitled in terms of the provisions of s 48 of the Sectional Titles Act[1] (*"the Act"*), to make an order to the effect that a section and certain exclusive use areas within a sectional title scheme, are deemed to have been destroyed, and that the scheme may be reconstituted by excluding such section and use areas from it. In order to distinguish a section in the Act from a sectional unit in terms of the Act, the latter is referred to herein as a "*Section*".

The background circumstances

3. The applicant is the body corporate of the Harbour Terrace sectional title scheme (a sectional title scheme with registration number SS401/1998, hereinafter "*the scheme*"), which was duly established in terms of s 36 of the Act. The scheme comprises certain buildings, and the land on which such buildings are situated, within Green Point in Cape Town.

4. The applicant launched an application for an Order:

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[1] Act 95 of 1986.

4.1. declaring in terms of s 1(3A) of the Act that its members are deemed to have passed a unanimous resolution:

4.1.1. confirming the 'deemed' destruction of Section 57 of the aforesaid scheme, alternatively confirming the 'deemed' destruction of the buildings comprising the scheme itself, in terms of s 48(1)(b) of the Act; and

4.1.2. for the reinstatement of the buildings comprising the scheme *"excluding the building currently comprising Section 57"* thereof; or in the alternative an Order

4.2 declaring that in terms of ss 48(1)(c) and 48(2) of the Act, Section 57 of the aforesaid scheme, alternatively the buildings comprising the scheme itself, are 'deemed' destroyed on the grounds that it is just and equitable to do so, and to the extent necessary, the buildings comprising the scheme *"excluding the building currently comprising Section 57"* (sic) thereof are declared reinstated; and

4.3 declaring that Section 57 shall constitute an undivided share in the common property as defined in terms of the Act.

5. The scheme was established in 1998 by the developer, SD Developments Western Cape (Pty) Ltd (*"SD"*). According to the sectional plan which it originally registered there were to be 59 Sections within the scheme. Section 57 was created together with certain exclusive use areas (including a number

of parking bays and storerooms) in terms of an amended sectional plan which extended the scheme. SD was reflected on the records held by the Registrar of Deeds (being the third respondent herein) as the owner of Section 57 and certain exclusive use areas to wit storerooms 1 – 3, an open basement parking (marked "*OB2*" on the plan) and a shade-net parking ("*SP12*").

6. According to the sectional plan, Section 57 comprises 29 sqm in area, and is located within a building in the scheme. Until approximately two years ago it was utilised as a laundry (by an outside business), which served the body corporate.

7. It was the intention of the developers that once the scheme had been completed, Section 57 and the store-rooms would be transferred to the body corporate for use as part of the common property. As far as the parking bays ("OB2" and "SP12") are concerned, it was intended that the developer would cede its rights to exclusive use thereof, to the owners of certain units within the scheme; which cession, in terms of the Act, was to be effected by the registration of notarial deeds of cession.[2] However, on 4 January 2008 and before Section 57 had been transferred to the body corporate and the rights of exclusive use over the aforesaid parking areas had been ceded, SD was de-registered by the Commission for Intellectual Property and Companies ("*CIPRO*").

[2] S 27(1)(b).

8. Notwithstanding the absence of notarial deeds of cession, and prior to SD's deregistration, exclusive rights of use of the aforesaid parking areas were on-sold by SD to the owners of certain units in the scheme, who in turn purported to on-sell such rights to other persons. It is further apparent that although the developers were liable to pay levies to the body corporate in respect of Section 57 and the parking areas, they did not do so. As at 19 November 2015 there was an amount of R103 968.14 owing in lieu of arrear levies.

9. Early in 2012, the applicant engaged the services of attorneys Tertius Maree Associates (*"TMA"*) with a view to 'regularising' the Section and the exclusive use areas. On carrying out a search at the offices of CIPRO, TMA established that SD had been deregistered. A further search which was conducted at the offices of the third respondent revealed that notwithstanding such deregistration the aforesaid Section and exclusive use areas were still registered in the name of SD, together with certain other immovable property in Cape Town. It also appeared from the records that there was a sectional mortgage bond registered over Section 57, in favour of FirstRand Bank Ltd in an amount of R660 000.00.

10. With the assistance of SD's previous auditors, TMA eventually made contact with an erstwhile director of the company, one Van Niekerk. During September 2012 Van Niekerk indicated that the company had been part of a group of companies which had been taken over by FNB.

11. In December 2012, TMA wrote to Van Niekerk informing him that FNB had no records of any outstanding mortgage bond in respect of Section 57, or any

records indicating that it had taken over the company. Inasmuch as the company had not been wound up by way of liquidation proceedings, TMA enquired whether Van Niekerk as an ex-director would consider making application for its restoration to the register of companies, in order that the applicant could obtain transfer of Section 57. There was no response to this request and the matter became dormant.

12. During March 2014 the applicant instructed a new firm of attorneys, Smith Tabata Buchanan Boyes. They too addressed a letter, in similar terms, to Van Niekerk requesting him to indicate whether he was prepared to assist in the formal re-registration of SD to the register in order that Section 57 could thereafter be transferred into the name of the applicant, and the exclusive use areas 'transferred' to those current owners of units within the scheme who asserted a right to ownership thereof. In return, the applicant offered to write off its outstanding claim in respect of the arrear levies. Once again, no reply was forthcoming.

13. On 3 August 2015 the managing agents of the applicant gave notice to all owners of units within the scheme that the annual general meeting of the applicant would be held on 2 September 2015. Item 17 of the agenda reflected that at the meeting the applicant would move for a *"unanimous resolution for the deemed destruction of section 57, Harbour Terrace Body Corporate"* and the authorisation of *"a court application in terms of s 48(1)(c) and/or 1(3A) of the Sectional Titles Act in order to give effect to the aforementioned resolution"*.

14. From the minutes of the meeting it appears that a *quorum* of only 29 owners of units in the scheme, represented either in person or by proxy, was attained and as such, the resolution could not be voted upon as the requisite majority stipulated in terms of the Act for a resolution to be considered unanimous ie a minimum of 80% of the owners in value and number, was not present.

15. As a result, a further special general meeting was called for 14 October 2015. On this occasion some 44 owners were present, in person or proxy, all of whom voted in favour of the proposed resolution. However, the vote was still short inasmuch as it required the support of 48 of the 59 owners to meet the requisite 80% majority.

16. As a result the applicant resolved to approach the Court in terms of the provisions of ss 48(1)(c) and 1(3A) of the Act.

The Sectional Titles Act 95 of 1986

17. In terms of common law (and following Roman-Dutch authority in this regard) the owner of any land is also the owner of any building which is erected thereon or which accedes thereto, and sectional ownership of part of any such building was not possible until the advent of the Act.

18. The stated purpose of the Act[3] is to provide for the division of buildings and the land on which they are situated into so-called "*sections*" and "*common property*" within a 'sectional title scheme', in order to enable the acquisition of

[3] See the preamble to the Act.

separate ownership in such Sections coupled with *pro rata* joint ownership in the common property, in the form of "*sectional title units*", and to provide for the regulation and control of the legal incidents which follow upon such sectional and joint ownership (ie the transfer of sectional ownership rights and the registration of real rights and sectional mortgage bonds), and the establishment of bodies corporate to control and administer the common property.

19. The Act consequently provides that notwithstanding anything to the contrary in any law or the common law, a building or buildings may be erected as part of a sectional title scheme and such building(s) and the land on which it/they are situated may be divided into Sections (as depicted on a sectional plan) and common property, for the purposes of selling, letting or otherwise dealing therewith.[4]

20. To give effect to this a sectional plan must be prepared (by a land surveyor or an architect) which must delineate the boundaries of the land and the location of the relevant building(s) thereon,[5] together with a scale plan of each storey in the proposed building(s)[6] and the boundaries of each Section in the building(s),[7] which must show the floor area to the median line of the boundary

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[4] S 2(a) rtw the definition of *"scheme"*, *"development scheme"* and *"section"* in s 1.

[5] S 5(3)(a).

[6] S 5(3)(c).

[7] S 5(3)(d).

walls of each Section correct to the nearest square metre, and the total combined floor area of all the Sections.[8]

21. The total area of all the Sections in the buildings which comprise the scheme forms the basis for determining the so-called *"participation quota"* of a Section in relation to the whole, on the basis of a percentage which must be expressed to 4 decimal places.[9]

22. This quota determines the percentage value of the vote of the owner of a sectional unit in the scheme[10] and his/her undivided share of the common property,[11] and the owner is liable to make levy contributions for the upkeep of the scheme in such percentage,[12] and shall also be liable for the payment of any judgment debt which may be taken against the body corporate, in such percentage.[13]

23. From the date on which any person other than the developer becomes an owner of a Section in the scheme, there shall be deemed to be established for such scheme a body corporate of which the developer and such owners are

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[8] S 5(3)(e).

[9] S 32(1) rtw s 5(3)(e).

[10] S 32(3)(a).

[11] S 32(3)(b).

[12] S 32(3)(c) rtw s 37(1)(a).

[13] *Id.*

members, and every person who thereafter becomes an owner of a Section shall be a member of the body corporate, *ex lege*.[14]

24. The body corporate is a juristic person with perpetual succession capable of suing and of being sued in its corporate name in respect of any matter in connection with the land or building(s) for which the owners therein are jointly liable, any matter arising out of the exercise of any of its powers or the performance of any of its duties under the Act, any contract made by it and any damage to the common property.[15] The body corporate is required to control, manage and administer the common property for the benefit of all owners[16] and to properly maintain the common property in a state of good and serviceable repair.[17] To carry out its duties in this regard it may require the owners to pay levies to a fund sufficient for the repair, upkeep, control, management and administration of the common property, and for the payment of rates and taxes and any other local authority charges for the supply of utilities and services to the building(s) or land, as well as any insurance premiums which are applicable thereto.[18]

The provisions of section 48 of the Act

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[14] S 36(1).

[15] S 36(6)(a)-(d).

[16] S 37(1)(r).

[17] S 37(1)(j), (o) and (p).

[18] S 37(1)(a) and (b).

25. Before setting out the provisions of s 48, which are relevant to a determination of this matter, it is useful to remind oneself of the approach that must be adopted in interpreting legislation.

26. In *CA Fours CC v Village Freezer t/a Ashmal Spar*,[19] the Supreme Court of Appeal pointed out that statutory interpretation *"is an objective process by which the words of the statute are given a meaning by having regard to their language, the context in which they are used and the purpose for which they are directed. The subjective circumstances of the parties, their state of minds, or the facts of the particular case have no bearing on this analysis"*.[20]

27. In the general layout of the various sections in the Act, s 48 must be read together with ss 49 and 50 which, in their headings, all make reference to *"destruction"*. S 48 refers to *"destruction of or damage to buildings"* within a sectional title scheme. On a purely literal interpretation thereof ie having regard for the ordinary grammatical meaning of the words used *"destruction"* means *"the action or process of causing so much damage to something that it no longer exists or cannot be repaired".*[21] The word is derived from the old French word *"destruire,"* which is the opposite of *"struere",* which means *"to build"*.[22] To *"destroy"* thus means to put *"an end to the existence of something*

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[19] 2013 (6) SA 549 (SCA).

[20] Per Cachalia JA at para [18], referring to *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[21] *Concise Oxford Dictionary* (10th ed).

[22] *Id.*

by damaging or attacking it"[23] and *"damage"* in turn means *"physical harm impairing the value, usefulness or normal function of something"*.[24]

28. With that introduction as a background, it is apposite to set out the provisions of sub-section (1), on which the applicant seeks to rely:

> *"48. Destruction of or damage to buildings*
>
> *1. The building or buildings comprised in a scheme shall, for the purposes of this Act, be deemed to be destroyed –*
>
> *(a) upon the physical destruction of the building or buildings;*
>
> *(b) when the owners by unanimous resolution so determine and all holders of registered sectional mortgage bonds and the persons with registered real rights concerned, agree thereto in writing; or*
>
> *(c) when the court is satisfied that, having regard to all the circumstances, it is just and equitable that the building or buildings shall be deemed to have been destroyed, and makes an order to that effect"*.

29. Notwithstanding the wording of the heading, from a reading of the body of the sub-section it is apparent that damage alone will not suffice, and what is required for the section to be applicable is destruction. In this regard it covers both actual as well as notional 'deemed' destruction, which may be effected either by the members of a scheme acting unanimously, or by a court on application to it.

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[23] *Id*.

[24] *Id.*

30. Insofar as s 48(1) provides that a building or buildings within a scheme, which are physically (and thus actually) destroyed, shall also be *"deemed"* to be destroyed, the wording appears to be tautologous.

31. Be that as it may, it is evident that apart from the situation where a building or buildings in a scheme is/are physically destroyed, the section also envisages that notional or hypothetical destruction may occur when either the owners by unanimous resolution so determine[25] (subject to certain conditions in this regard)[26] or when a court is satisfied that, having regard to all the circumstances, it is just and equitable that the building or buildings in a scheme shall be deemed to have been destroyed, and it makes an order to that effect.

32. Prof CG Van der Merwe, in his work *Sectional Titles, Shareblocks and Timesharing*,[27] aptly comments that it is difficult to summarise the provisions of ss 48 and 49, as they are *"very confusing"*. In his view, the provisions are intended to apply both to the actual destruction of the buildings in a scheme (whether partial or total) as well as to the notional destruction thereof due to obsolescence ie where a building in a scheme becomes unsuitable for its original purpose *"not only through the physical deterioration of the structure but also because of functional obsolescence, namely the loss of its competitive positions vis-à-vis other projects in view of technological advances and*

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[25] S 48(1)(b).

[26] Namely, that all holders of registered sectional mortgage bonds and persons with registered real rights agree thereto in writing.

[27] Vol 1 *Sectional Titles* at 16-5.

evolving concepts in building design and materials",[28] or for *"any other sound economic reason, for example where the cost of major replacements and renovations would be excessive, where the land is not fully or suitably developed, where the value of the land has become disproportionately large in relation to the value of the buildings thereon, or where it would be more viable economically to replace a residential project in the particular area with commercial or industrial buildings or offices or to permit the extensive modernisation of a commercial project"*.[29]

33. In seeking to give meaning to the provisions in question it is important not to consider the sub-section in isolation, but in the context of the section as a whole, as well as in the context of the related sections (ie ss 49 and 50), and the Act as a whole, including the definitions set out therein.[30]

34. S 48(3)(a) provides that where a building or buildings are *"damaged"* or *"destroyed within the meaning of sub-section (1)"* ie either by actual physical destruction or notional destruction (by way of unanimous resolution of the owners or by order of court), the owners[31] or the court may authorise the *"rebuilding and reinstatement in whole or in part"* of the building or buildings,[32]

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[28] *Id* at 16-7.

[29] *Id* at 16-8.

[30] In s 1.

[31] By "*unanimous resolution*".

[32] S 48(3)(a)(i).

and the (subsequent) transfer of the interests of owners of Sections which have been *"wholly or partially destroyed"*, to other owners.[33]

35. In exercising their powers the owners and the Court may further pass such resolution or make such Order as they may deem necessary or expedient to give effect to the scheme, including a resolution or Order pertaining to the application of insurance monies received by the body corporate in respect of damage or destruction to the building(s),[34] the payment of money by or to the body corporate or the owner(s),[35] an amendment of the sectional plan so as to include in the common property any addition thereto or subtraction therefrom,[36] and a variation of the participation quota of any Section.[37]

36. It is to be noted that the primary sub-section of s 48 (ie sub-section (1)) which contains the *"destructive"* deeming provision,[38] makes reference to a *"building"* or *"buildings",* and not to a *"Section"* within a building or scheme. This is an important distinction and indicator, of what the legislature intended. In like vein, subsection (3)(a)(i) speaks of the "*rebuilding and reinstatement"* of buildings which have been destroyed, and not of *Sections* therein.

37. A *"building"* is defined in the Act to mean *"a structure of a permanent nature erected or to be erected and which is shown on a sectional plan as part of a*

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[33] S 48(3)(a)(ii).

[34] S 48(3)b)(i).

[35] S 48(3)(b)(ii).

[36] S 48(3)(b)(iii).

[37] S 48(3)(b)(iv).

[38] S 48(1).

scheme".[39] A *"Section"* means a portion of the scheme as partitioned or divided on a sectional plan, which constitutes a defined portion of a building or buildings within a scheme.[40]

38. On the face of it therefore, the provisions of s 48(1) are not capable of being utilised either by the owners in a sectional title scheme or by a court, to declare a Section therein to be deemed to be destroyed, and it is only a *building* or *buildings* within a scheme that is/are capable of so being declared. That such an interpretation is what was intended, is fortified by the reference in the later sub-section[41] to the *"rebuilding and reinstatement"* in whole or in part, of the *"building"* or *"buildings"*.

39. Although sub-section (3) does provide[42] for the transfer of the interests of owners of Sections which have been 'wholly or partially destroyed', to other owners, this was intended to follow by way of a *consequential* resolution by the owners or Order of Court, authorising such transfer, subsequent to the initial (actual) destruction of the buildings, or an initial owners' resolution or declaration by a court of a notional (deemed) destruction of such buildings. In my view, it could never have been intended that these provisions could be used by owners in a scheme or by a Court, to declare a Section to be notionally destroyed. The reference to Sections "*which have been wholly or partially destroyed*" must be read to refer to Sections which have suffered destruction

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[39] S 1.

[40] See the definition of *"section"* and *"sectional plan"* in s 1 rtw ss 5(3)(d) and 5(4).

[41] S 48(3)(a)(i).

[42] In s 48(3)(a)(ii).

as a *consequence* of the actual or the notional deemed destruction of the building(s) in the scheme, by owners' resolution or a Court acting in terms of s 48(1), and the sub-section does not constitute an enabling provision which can be used by owners, or by a Court, to declare Sections to be deemed 'destroyed'.

40. As I read subsection 48(3), it provides consequential mechanisms for the rebuilding and reinstatement of buildings in a scheme where such building work and reinstatement is required, and for the transfer of the interests of owners in certain Sections if necessary; so that the scheme as a whole and the arrangement of sectional ownership therein, may be reconstituted. In my view, the provisions of subsection (3)(a)(ii) were thus also not intended to be used as a selfstanding mechanism to effect the 'deemed' destruction of a Section within a building which is part of a scheme, thereby bypassing the provisions of subsection (1). To interpret these provisions in a manner as to allow owners to declare a Section to be deemed to be destroyed, as opposed to the building(s) in which such Section is contained, would expose individual owners who fall out of favour, to the tyranny of the majority.

41. S 49, which is headed "*Disposal on destruction of buildings*", similarly provides that when the *"building"* or *"buildings"* in a scheme *"is or are deemed to be destroyed in terms of s 48"* (ie when such building(s) are either actually or notionally destroyed by owners' resolution or order of court), and the owners have by unanimous resolution resolved not to *"rebuild"* such building(s), the body corporate shall lodge with the Registrar of Deeds a notification to such

effect, whereupon the Registrar shall endorse the relevant sectional title register to reflect that the land on which such building(s) is/are situate, shall revert to the land register[43] and the owners shall cease to be separate owners of Sections in the scheme, and shall become co-owners of the land in undivided shares proportionate to the quotas of the respective Sections previously owned by them.[44] Once again, there is a clear indication from the language of these provisions that they were intended to deal with the destruction of *buildings* (within a scheme), and not with individual *Sections* within such buildings.

42. S 48(6)(a) contains a provision that the Court may, on the application of the body corporate or any member thereof (or any holder of a registered real right in the scheme as well as any judgment creditor), make an Order for the winding-up of the affairs of the body corporate. The appearance of such a provision in the section must similarly be read and understood in the context of the destruction (actual or notional) of the *building(s)* in the scheme itself (and not of Sections therein), and a concomitant failure by the sectional owners to resolve to authorise the *"rebuilding and reinstatement"* of the building(s) comprising the scheme.[45]

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[43] S 49(3)(c).

[44] S 49(3)(a). The owners are then required to surrender the sectional title deeds of such units to the Registrar for cancellation – s 49(3)(d) and in place thereof, the Registrar of Deeds shall issue to each of the owners, a certificate of registered title for his/her undivided share in the land (s 49(4)(b).

[45] In terms of s 48(3)(a)(i).

43. In my view, read as a whole, s 48 thus exists in order to deal with the situation where the underyling substratum of a sectional title scheme can no longer be sustained in its current form, either because of actual physical damage so serious that it amounts to a destruction of the buildings, or because the buildings can no longer serve the interests of the owners and the purpose for which the scheme was brought into being because of changed circumstances, as a result of which the buildings (actual or virtual as per the sectional plan) have become obsolete (eg they can no longer be occupied on a residential basis because the area has become an industrial hub, or a slum, or they are located next door to a nuclear power station which is to be built, or must give way pursuant to a rezoning of the area for different purposes).

44. In essence therefore, what s 48 seeks to do is to provide a mechanism whereby the majority of sectional owners faced with a situation where the scheme to which they belong can no longer continue in its current form, may in certain circumstances reconstitute the scheme (either by agreement or by order of court), and where such a reconstitution is not possible, for whatever reason, the body corporate may be wound up and the scheme thereby dissolved.

45. In contrast to the reference to the destruction of buildings in ss 48 and 49, s 50 refers to the destruction of an unencumbered *Section* in a scheme. It provides that where the State or a local authority is the owner of a Section in a building, which Section has been "*destroyed"* to give effect to a project or scheme for the benefit of the public, the State or local authority may apply to the Registrar for

the cancellation of the sectional title deed pertaining thereto, whereupon the undivided share in the common property that was held under that sectional title deed shall vest in the owners of the remaining Sections proportionate to their respective participation quotas.[46] Once again, the way I read this section in the context of the Act as a whole, and ss 48 and 49 in particular, is that it was not intended to constitute a means for owners to resolve, or for a Court to declare, a *Section* to be deemed to have been destroyed. As in the case of the sub-sections in s 48 that were previously referred to,[47] in my view these provisions only find application consequent upon an earlier actual destruction or a resolution or declaration of notional deemed destruction of the building(s) in the scheme, in terms of s 48(1).[48]

46. In the circumstances, given the provisions of s 48 read as a whole, and in context, they cannot in my view be construed as affording a body corporate a right to resolve (whether by unanimous resolution or otherwise) or a Court a power, to declare a Section within a building to be deemed to be destroyed.

47. However, even if I am wrong in this regard and the provisions of s 48 can be construed as being of application not only in respect of the deemed destruction of building(s) comprising a scheme, but Sections within such building(s), in my view the applicant body corporate still cannot, in the circumstances of this matter, avail itself thereof in order to circumvent the difficulties it faces in respect of Section 57 and the exclusive use areas in question.

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[46] S 50(1) rtw 50(3).

[47] Ss 48(3)(a)(i) and (ii).

[48] In terms of s 48(1).

48. In this regard, in the absence of actual physical destruction of the aforesaid Section and the relevant exclusive use areas, the body corporate seeks to rely on a notional destruction either in terms of s 48(1)(b) ie by unanimous resolution of the owners, alternatively in terms of s 48(1)(c) by Order of this Court. In either case, provided the other requirements of the sub-sections concerned and which I have not yet touched upon, were met, Section 57 and the relevant exclusive use areas within the scheme, can be *"deemed"* to have been destroyed.

49. In *CA Fours CC*[49] Cachalia JA pointed out[50] that the use of the word *"deemed"* is often *"not a very happy one, because that term may be employed to denote merely that the person or things to which it relates are to be considered to be what really they are not"*.

50. In *Mouton v Boland Bank Ltd*,[51] the Supreme Court of Appeal cautioned[52] that *"the intention of a deeming provision in laying down a hypothesis, is that the hypothesis shall be carried as far as* (is) *necessary to achieve the legislative purpose but no further"*, and there is *"no need to extend the bounds of an imaginary state of affairs"* further than is necessary in order to give effect to a statute's legislative purpose.[53]

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[49] Note19 at para [9].

[50] Citing Innes J in *Chatobhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 (AD) 13 at 33.

[51] 2001 (3) SA 877 (SCA).

[52] At para [13], 882I quoting from Bennion *Statutory Interpretation* (3rd ed).

[53] At para [14].

51. In *Mouton*, the Court was required to interpret certain sections of the Close Corporations Act,[54] in respect of a close corporation which had been de-registered at a time when it owed money on overdraft to Boland Bank. Subsequent to such deregistration, the bank instituted action against the member of the corporation (one Mouton) personally. To this end, it relied on the provisions of s 26(5) of the Act which provided that if a corporation was deregistered while having outstanding liabilities, the member(s) at the time of such deregistration would be liable, jointly and severally, therefor. While the action against him was still pending, and with a view to circumventing s 26(5) Mouton applied to the Registrar of Close Corporations for the re-registration of the CC, which was duly granted. Thereafter, he proceeded to amend his plea, by alleging therein that he was discharged from liability in terms of s 26(7) of the Act, which provides that from the date the Registrar has given notice of the restoration of the registration of a corporation in the *Gazette*, the corporation shall continue to exist, and be *"deemed"* to have continued in existence as from the date of its deregistration, as if it had not been deregistered.

52. The Court *a quo* was of the view that these deeming provisions did not serve to extinguish the liability which had been imposed on Mouton, as erstwhile member of the CC, under s 26(5), during the period when the corporation was deregistered, and it consequently held that Mouton's liability as former member was not extinguished on the CC's re-registration.

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[54] 69 of 1984.

53. The Supreme Court of Appeal upheld this finding and further held that although the provisions of s 26(7) created a *"statutory fiction"* that the CC had never ceased to exist when in fact it did, when interpreting its provisions the Court was not to *"attribute to the legislature a belief that it can actually recall time passed",*[55] particularly as there was no indication of any legislative intent in terms of such provisions, to relieve the sole member of the CC from liability in circumstances where he had been *"responsible for presenting creditors with a vacuum in place of a corporation"* by deregistering it.[56]

Deregistration, expropriation and re-registration

54. In my view, the deeming provisions of s 48(1) should similarly not be interpreted in such a manner as to ignore the passage of time and the legal consequences which ensued on the deregistration of SD.

55. In this regard it is trite that as a matter of law, as soon as a corporation or company is deregistered and thereby ceases to exist, any moveable or immovable property which it owns becomes *bona vacantia* and vests in the

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[55] Para [12], 882G.

[56] Para [14], 883B.

State.[57] The transfer and vesting of such ownership occurs automatically and without any need for delivery, or any order of court.[58]

56. In the circumstances, and even though Section 57 and the rights of exclusive use over certain areas (to wit storerooms 1 – 3 and open basement and shade net parking areas OB2 and SP12) of the Harbour Terrace sectional title scheme are still registered in the name of SD as far as third respondent's records are concerned, as a matter of law they became the property of the State with effect from 4 January 2008 ie the date of the deregistration of SD.

57. At the time when 44 owners of units within the scheme thus purported to vote (at the special general meeting which was held on 14 October 2015) in favour of a resolution deeming Section 57 and the exclusive use areas to have been destroyed in terms of s 48(1)(b) of the Act, they sought to ignore the passage of time and the transfer of ownership to the State. What such owners purported to do in terms of the resolution which they passed, and for which they now seek the Court's *imprimatur*, was to deprive the State of its rights of ownership in the aforesaid Section and the exclusive use rights it held within the scheme. In effect, this amounts to nothing more than an attempted expropriation.

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[57] *Ex parte Sprawson: In re: Hebron Diamond Mining Syndicate Ltd* 1914 (TPD) 458 at 461; *Ex parte The Government* 1914 (TPD) 596; *Sanlam v Rainbow Diamonds (Edms) Bpk* 1982 (4) SA 633 (C) as confirmed on appeal *Rainbow Diamonds (Edms) Bpk v Sanlam* 1984 (3) SA 1 (A); *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA) at para [15] 42H-I.

[58] *Rainbow Diamonds* n 57*; Newlands Surgical Clinic* n 57.

58. The provisions of s 48(1), properly interpreted, are not, in my view, capable of being utilised to expropriate an owner from his/her rights of ownership of a Section within a sectional title scheme by utilising the hypothesis of notional destruction, under the guise of the deeming provision concerned. In my view, to give effect to the resolution which the aforesaid owners took on 14 October 2015 in terms of the Order which is sought herein, would effectively constitute an expropriation contrary to the provisions of s 25 of the Constitution, and would be impermissible and unlawful.

59. Even if I am wrong in finding that a declaration of deemed destruction by the Court in terms of s 48(1)(c) would offend the provisions of s 25 of the Constitution, the provisions of s 48(1)(b) read together with the definition of *"unanimous resolution"*, [59] cannot, in my view, be relied upon by the applicant. I say this for the following reasons.

60. Firstly, in terms of s 36(1), every person who becomes an owner of a unit in a sectional title scheme (ie the owner of a Section in such scheme and its undivided share of the common property proportionate thereto), becomes *ex lege*, a member of the body corporate. As such, the State was a member of the scheme with effect from January 2008, and it had a right to be given notice of the general meetings which were called in order to give effect to the purported resolution which was to be taken in terms of s 48(1), and to vote thereon. It is common cause that no such notice was ever given to it and it was

[59] In terms of s 1 rtw with s 1(3) of the Act.

not represented at any of the aforesaid general meetings and did not vote on the resolutions in question by proxy, or by a representative, or otherwise.

61. Secondly, whereas the definition of a *"unanimous resolution"*[60] only requires that 80% of the members of a body corporate (reckoned in both value and number) need to vote (by proxy or by a representative) in favour of a resolution at a properly constituted general meeting of a body corporate in order for it to be considered as being *"unanimous"*, and whereas any member present at such a meeting (through a proxy or a representative) who abstains from voting on the resolution in question shall be regarded as having voted in favour thereof, the Act expressly provides that, nonetheless, where the resolution in question adversely affects the *"proprietary rights or powers*" of any member *qua* owner, it shall not be regarded as having been passed unless such member expressly consented thereto in writing.[61] No such written consent was ever obtained from the State.

62. Although the Act provides[62] that if a body corporate is unable to obtain a *"unanimous resolution"* as so defined, it may approach a Court for appropriate "*relief*"[63] in my view this cannot be used to sanction a resolution which has been passed not only without the requisite 80% majority but also without the written consent of the owner whose proprietary rights were adversely affected

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[60] In terms of s 1(a).

[61] S 1(3)(c).

[62] In s 1(3A).

[63] *Id*.

thereby, to the point of depriving or expropriating him/her of his rights of ownership contrary to the provisions of s 25 of the Constitution.

63. But even if the provisions of s 1(3A) read together with the definition of *"unanimous resolution"*[64] were to have been met, this in itself would still not be sufficient for the purposes of a notional deemed destruction by the owners in terms of the provisions of s 48(1)(b). In this regard the sub-section requires not only a *"unanimous resolution"* as defined, by the owners, but also written agreement to such deemed destruction by all holders of registered sectional mortgage bonds and persons with registered real rights, in the scheme. There is no evidence on the papers before me that any attempt was made to comply with this condition, and there is in fact no indication whatsoever of who the holders of sectional mortgage bonds and persons with registered real rights in the scheme might be, or that any attempt was made to obtain their consent for the resolution, or the application for deemed destruction.

64. In the circumstances, although it was submitted that it would not be necessary for the Court to make a declaration of deemed destruction (in terms of s 48(1)(c)) and that it would suffice if the Court simply were to declare that the resolution passed by those owners who were present at the general meeting which was held on 14 October 2015 constituted a *"unanimous resolution"* within the meaning of the sub-section in question, and all that the Court consequently needed to do was to authorise a reconstitution and reinstatement of the scheme, and the transfer of the interests of the owner of Section 57 to the other

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[64] In terms of s 1 and s 1(3).

owners,[65] given the applicant's failure to comply in numerous respects with the provisions of s 48(1)(b) and the requirements set out therein, in my view, such a declaration and Order by the Court is similarly not permissible, and would not be just and equitable.[66]

65. In the United Kingdom, the Companies Act 2006 also provides that when a company is dissolved, all property and rights which vested in, or were held on trust for it, at the time of its dissolution,[67] are deemed to be *bona vacantia* and accordingly fall to the Crown.[68]

66. However, unlike our Companies Act, there is a further provision therein whereby the Crown may disclaim title to any such property, by formal notice given within three (3) years after the date on which the property so vested in it.[69]

67. Where any such notice of disclaimer is executed in respect of any such property, it is deemed not to have vested in the Crown[70], and notice of such disclaimer will terminate, with effect from the date thereof, any rights, interests and/or liabilities of the company in respect of the property disclaimed,[71] but will

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[65] In terms of s 48(3)(a)(i) and (11).

[66] In terms of s 48(1)(c).

[67] Including leasehold property.

[68] Or to the Duchy of Lancaster or the Duke of Cornwall, s 1012(1).

[69] S 1013(1) and 1013(3).

[70] S 1014(1).

[71] S 1015(1).

not affect the rights or liabilities of any other person.[72] In addition the UK Companies Act provides that a Court may (on application by any person who claims an interest in any disclaimed property or who is 'under a liability' in respect thereof which will not be discharged by the disclaimer), make an Order that the disclaimed property should vest in or be delivered to any other person who may be entitled to it, or to his/her trustee.[73]

68. The process of disclaiming title to property which falls to the State on de-registration of a corporate entity, in terms of UK law, provides an expedient and effective remedy for persons in regard to reclaiming property which vested in such entity at the time of its deregistration, without the selfsame perils and difficulties associated with the remedy available in South African law pursuant to deregistration ie an application for the restoration of the company or corporation to the register.

69. In *R Miller v Nafcoc Investment Holdings Co Ltd*,[74] the Supreme Court of Appeal pointed out that inasmuch as deregistration puts an end to the existence of a company, its corporate personality *"ends in the same way that a natural person ceases to exist on death"*.[75] Fortunately, however, unlike natural persons a corporate person is *"amenable to resurrection"*.[76] Ordinarily, the effect of the restoration of a company to the register in our law, is that it is

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[72] S 1015(2).

[73] S 1017(1) and (2).

[74] [2010] 4 All SA 44 (SCA).

[75] At para [11].

[76] Per Binns-Ward J in *Peninsula Eye Clinic v Newlands Surgical Clinic* 2012 (4) SA 484 (WCC) at paras [5] and [26].

deemed not to have been deregistered at all, at least insofar as its previous assets are concerned. This means that all parties who by deregistration, or thereafter, acquired assets which the company owned as at the date of its deregistration, will lose their rights thereto, as the assets revert to the company. This will include assets that became *bona vacantia* and accrued to the State.[77] However any liabilities of the company are not extinguished by its deregistration and merely become unenforceable whilst the deregistration subsists.[78]

70. In *Ex Parte Sengol*,[79] it was pointed out that debtors and creditors of the company at the time of its deregistration, may thus find that on its restoration their obligations or rights are resuscitated, and as such the restoration of a company to the register has a "*wide-ranging*" effect,[80] and should not be entertained lightly.

71. In the result, although the restoration of SD to the register will restore its rights of ownership and exclusive use in regard to Section 57 and the areas referred to, it could also cause severe prejudice to third parties.[81] Perhaps it is because of these dangers that SD's erstwhile director was not prepared to make application for its restoration to the register.

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[77] *Ex parte Sengol Investments* 1982 (3) SA 474 (T) 477C-F.

[78] *Barclays National Bank Ltd v Kalk* 1981 (4) SA 291 (W) 295; *Kalk v Barclays National Bank Ltd* 1983 (3) SA 691 (A) 633-634.

[79] Note 76.

[80] At 477F.

[81] *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA) 475E-H.

72. In the United Kingdom the Registrar can only restore a company to the register if it was carrying on business or was operational at the time of its removal,[82] and, in addition, where any property or rights accrued to the Crown as *bona vacantia*, the Crown must provide written consent to such restoration.[83] There are no such limitations to the restoration process, in our law. In addition, in terms of the UK Companies Act the applicant must deliver to the Registrar all such documents relating to the company's affairs as may be necessary to bring the records of the Registrar up to date, and must pay any penalties that may be due for the company's failure to deliver any financial statements that were outstanding at the time of its dissolution or striking off.[84]

73. In the circumstances, in the absence of any sale or donation of Section 57 and the exclusive use rights to the applicant, and the concomitant re-transfer of such rights into the applicant's name by third respondent, the only other avenue open to the applicant would appear be to make application for the restoration of SD to the register of companies, and provided such application were to be successful, to thereafter negotiate the transfer of Section 57 and the exclusive use rights to it.

74. Recently, this Court held in *ABSA Bank Ltd v CIPRO*,[85] that an application for restoration to the register of any close corporation or company incorporated

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[82] S 1025(2).

[83] Ss 1025(3)-(4) .

[84] S 1025(5).

[85] 2013 (4) SA 194 (WCC).

and deregistered under the old Close Corporations Act[86] or the previous Companies Act,[87] must be made in terms of the new Companies Act.[88] In this regard, the new Act provides that any interested person may apply in the prescribed manner and form to CIPRO, for the reinstatement of the registration of any company,[89] or alternatively any person who has an interest may apply to a Court for an Order that is just and equitable in respect of any company that has been dissolved or removed from the register.[90]

Conclusion

75. In the circumstances, and for the reasons set out above, the application must fail. In the result, I make the following Order:

(1) The *rule nisi* and provisional Order granted on 15 March 2016 is discharged, and the application is dismissed.

(2) There shall be no Order as to costs.

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SHER, AJ

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[86] 69 of 1984.

[87] 61 of 1973.

[88] Act 71 of 2008.

[89] In terms of s 82(4).

[90] S 83(4), *ABSA Bank Ltd v CIPRO* n85.

Appearances:

For Applicant: Adv AD Brown

Instructed by: Smith Tabata Buchanan Boyes (M Bey)

For Respondents: None