

Sectional title: Sale of units prior to Township Proclamation and *Erf 441 Robertsville Property CC and Another v New Market Developments (Pty) Ltd* 2007 (2) SA 179 (W)

By Neels Engelbrecht

The question whether units in a sectional title scheme may be validly sold where the development was situated on land in respect of which a township application was lodged with the relevant local authority but was not yet proclaimed was decided in the *Robertsville* matter.

The facts

The developer of a certain sectional title development, New Market Developments (Pty) Ltd, sold several properties in a mixed development consisting of freehold stands and sectional title units. The township application in respect of the land on which the properties (freehold erven and sectional title schemes) were situated was lodged with the Johannesburg City Council but the township was not yet proclaimed.

The sale of the freehold properties were, therefore, void in terms of s 67 of the Town-planning and Township Ordinance 15 of 1986 (Transvaal) (the ordinance). Section 67 of the ordinance provides as follows:

- ‘(1) After an owner of land has taken steps to establish a township on his land, no person shall, subject to the provisions of section 70 –
- (a) enter into any contract for the sale, exchange or alienation or disposal in any other matter of an erf in the township;
 - (b) grant an option to purchase or otherwise acquire an erf in the township, until such time as the township is declared an approved township: Provided that the provisions of this subsection shall not be construed as prohibiting any person from purchasing land on which he wishes to establish a township subject to a condition that upon declaration of the township as an approved township, one or more of the erven therein will be transferred to the seller.
- (2) Any contract entered into conflict with the provisions of subsection (1) shall be of no force and effect.
- (3) Any person who contravenes or fails to comply with subsection (1) shall be guilty of an offence.
- (4) For the purpose of subsection (1) –
- (a) “steps” includes steps preceding an application in terms of section 69(1) or 96(1);
 - (b) “any contract” includes a contract which is subject to any condition, including a suspensive condition.’

It has been decided in several Appeal Court decisions that a sale entered into in contravention of s 67 of the ordinance is of no force and effect, namely, void *ab initio*.

In an application to enforce the transfer of a sectional title unit in a sectional title scheme situated on an un-proclaimed stand that was sold prior to the proclamation of the township, the question arose whether the sale is similarly void, namely, because of the application of s 67 of the ordinance.

The respondent (Newmarket) took the point that a sectional title unit is an erf or a portion of an erf as defined in the definition of 'erf' in the ordinance, and that s 67 is, therefore, applicable.

The judgment

Goldstein J in the Gauteng Local Division, Johannesburg, found that it could be argued that a unit could possibly be regarded as an erf as defined in the definition of erf, but because what was actually sold consists of a 'section' being the unit plus an undivided share in the common property in the scheme, the *merx* sold could not be an erf or a portion of an erf as defined in the ordinance and, therefore, s 67 was not applicable.

(I do not deal with the portion of the judgment in respect of the description of the *merx* as it is trite law).

Practical implication

The case is of tremendous importance for developers and the public alike in instances, as is often the case, where units (or rather 'sections') are sold in unproclaimed townships.

It is particularly important for the public as it means that pre-proclamation contracts for the sale of sectional title sections are valid and enforceable in our courts.

It often happened in the past that developers sold stands in new developments prior to proclamation (as was the case in the *Robertsville* matter), and then voided the transaction by relying on s 67 of the ordinance. The problem with s 67 is that, although it is a criminal offence to sell stands prior to proclamation, the penalty is a relatively small fine and is seldom enforced. This door has now been closed in respect of sectional title properties.

I am of the view that the legislator should review the provisions of s 67 of the ordinance, with regard to the penalties imposed.

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