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Real Estate Law
ALERT

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Transferring sectional title property from a developer: The potential pitfalls

Purchasing sectional title property directly from a developer can be tax efficient and, combined with a developer who is experiencing financial difficulty, can make the deal a difficult one to refuse. However, in such circumstances, proper due diligence is important to safeguard both parties to the transaction.

An important aspect to consider in the context of sectional title property is whether the parties have correctly recorded if there are any exclusive use rights to parts of the common property to be transferred to the purchaser. Failure to do so, in the instance where the transaction will result in the developer ceasing to be a member of the body corporate by ceasing to have a share in the common property, can result in the body corporate instead of the intended purchaser, acquiring the exclusive use rights in terms of section 27(1)(c) of the Sectional Titles Act 95 of 1986 (STA).

The Western Cape High Court (Court) case of *Diaz Hotel and Resort (Proprietary) Limited v Body Corporate of the Visa Bonita Sectional Tiles Scheme* [2021] 4 All SA 786 (WCC), is a good illustration of how this dilemma can potentially arise.

Diaz Hotel

The dispute in *Diaz Hotel* arose from the developer entering into a sale agreement with Diaz Hotel and Resort (Proprietary) Limited (Applicant) for the sale of all the rights and assets of a business owned by the developer, who was in liquidation. As part of the sale, section 73 and three exclusive use areas, namely parking bays P73, P74 and P64 were sold in the sectional title scheme where the *Body Corporate of the Visa Bonita Sectional Tiles Scheme* (Respondent) was the body corporate.

The transaction was initially rejected at the Deeds Office as the three exclusive use areas were not expressly cited in the sale agreement. The parties subsequently concluded an addendum, and a special power of attorney was granted to the attorneys to sign and execute the notarial deed of cession for the exclusive use areas.

The transaction was then re-lodged at the Deeds Office and section 73 was successfully registered in the Applicant's name. The three exclusive use areas were, however, not transferred from the developer to the Applicant by the Deeds Office.

The Applicant subsequently filed an application requesting the Court to direct the Deeds Office to rectify the error and register the transfer

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of the exclusive use areas into its name. The Respondent, however, challenged the application, claiming entitlement to the exclusive use areas on the basis that the exclusive use areas registered in the name of the developer automatically vested in the body corporate in accordance with section 27(1)(c) of the STA when the developer ceased to be a member of the body corporate.

The issue

The question before the Court was therefore whether the exclusive use areas, registered in the name of the developer, vested in the body corporate in accordance with section 27(1)(c) of the STA when the developer ceased to be a member of the body corporate. If not, the Court had to determine whether these exclusive use areas could still be transferred to the Applicant and, if they could be transferred to the Applicant, the Court had to consider whether section 33(1) of the Deeds Registries Act 47 of 1937 (DRA) could be used to rectify this error.

A developer ceasing to be a member of the body corporate

In addressing the first issue, and as its starting point, the Court examined section 27(1)(c) of the STA. The Court emphasised that this section deals with the rights of exclusive use of parts of the common property and states that the body corporate acquires these rights if the developer ceases to be a member of the body corporate as outlined in section 2(2) of the Sectional Title Schemes Management Act 8 of 2011 (STSMA).

A developer ceases to be a member of the body corporate as per section 2(2) of the STSMA when they no longer hold a share in the common property. This occurs, as stipulated in section 34(2) of the STA, when ownership of each section in the sectional title scheme is held by someone other than the developer. However, if the developer retains the right to extend the scheme by adding sections and exclusive use areas under section 25(1) of the STA, they may still be a member of the body corporate. If the developer has not reserved this right to extend, and ownership of every section in the scheme is held by someone other than the developer, the developer ceases to be a member of the body corporate, and the exclusive use areas become the property of the body corporate, free from any registered mortgage bond.

In such instance, the body corporate is entitled to apply to the Registrar of Deeds for the issuance of a certificate of real rights in its favour.

In applying the above principles, the Court found, on the facts at hand, that the conclusion of the addendum to the sale agreement, which was to ensure the transfer of rights to the exclusive use areas, resulted in the Applicant acquiring personal rights for the transfer of the exclusive use rights of the parking bays in question. The Court further found that the failure to transfer the exclusive use area rights was an error that needed rectification to reflect the correct legal position.

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Rectification: Personal and ownership rights

As to the question of whether section 33(1) of the DRA could be used to rectify this error, the Court was clear that it had already determined that the Applicant was only entitled to the transfer of the exclusive use rights to the parking bays, which are registrable personal rights, but not ownership of the parking bays themselves. Consequently, as section 33(1) of the DRA specifically deals with the transfer of ownership rights, the section could not be relied upon to rectify this error.

The potential pitfalls

The case of *Diaz Hotel* is therefore a valuable reminder of the important distinction drawn in our law between personal rights and ownership rights, a distinction which can often be overlooked when one is dealing with personal rights which relate to immovable property and that are registrable at the Deeds Office.

The case is also a good illustration of the potential pitfalls that may arise in transferring sectional title property directly from a developer where proper due diligence and maintaining accurate documentation has not been adhered to. This is a failure which can have severe financial implications for both parties to the transaction, as the body corporate instead of the intended purchaser can potentially end up acquiring the property if the omission is not timeously rectified. The property would in such an instance also be transferred to the body corporate free from any registered mortgage bond, which the developer would still be obligated to settle with their respective credit provider.

Lulama Lobola

Navigating the compliance and regulatory requirements of going solar: Have you got it all covered?

As the frustration of loadshedding grows, so does the interest in alternate means of keeping the lights on. From convenience and lower long-term costs to tax incentives, there are a multitude of factors encouraging South Africans to consider alternative means of keeping the lights on.

Rooftop solar photovoltaic (solar PV) systems are a form of small-scale embedded generation (SSEG) systems with growing popularity amongst South African homeowners, facilitating the conversion of energy from the sun to electricity. While this natural resource certainly provides plenty of incentive to convert to solar, the process of installing and implementing the systems necessary to take advantage of the sun's energy, are not without a myriad of legal and regulatory hoops to jump through.

Within the Western Cape, and specifically areas supplied with electricity from the City of Cape Town (the City), as opposed to Eskom, written permission from the relevant department at the City council is required prior to the installation of a solar PV system. Further requirements become relevant for property owners who wish to take advantage of a grid-tied feed-in system (whereby excess electricity generated may be sold back to the City). The permissions and authorisations required for the lawful installation of a solar PV system differ when dealing with areas supplied with electricity directly by Eskom or other municipal councils. Property owners should familiarise themselves with the nuances of applicable municipal by-laws or regulations that may apply in their area.

Over and above the authorisations and permissions required prior to installation, there are essential safety and compliance considerations not to be forgotten when considering going solar. The Electrical Installation Regulations, 2009 (Regulations), published in terms of section 43 of the Occupational Health and Safety Act 85 of 1993, place a hefty responsibility on property owners (and lessors) to ensure the safety, safe use and maintenance of all electrical installations on their property. As solar PV systems, on their proper installation, will form a part of the electrical installation in your home, such installation will be included in this responsibility.

Essential requirements

Essential requirements relevant to the lawful installation and maintenance of a solar PV system include:

- All electrical installations must be installed by an electrical contractor, registered as such in terms of the Regulations. It is therefore essential to ensure that you check the qualifications of a contractor before engaging their services.
- A certificate of compliance (CoC) must be issued for every electrical installation, in the prescribed form, together with the required test report. Where there is a change to an existing system (which is usually the case upon the installation of a solar PV system), the same will apply, and a supplementary CoC must be issued. Your original CoC should be kept as a record of the compliant installation of your system and for the issuing of supplementary certificates, as necessary.

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- Make sure to familiarise yourself with the relevant warranty and maintenance requirements of your solar PV system. This is important not only in respect of your ongoing responsibility to maintain the safety of all electrical installations but will also hold relevance for your homeowner's insurance cover, which should be updated to include these valuable installations.

The benefits of going solar are certainly glowing but should be carefully considered taking into consideration the pre-installation, installation, and post-installation (maintenance) safety and regulatory requirements, each of which are not without their own cost.

If you are planning to finance your new solar PV system with a bond, it is wise to note that banks, for purposes of the bond finance approval process, will only accept an electrical CoC that is not older than two years (sometimes one year), as part of their requirements for the approval and registration of a bond over immovable property. Should you have updated your electrical system to include a solar PV system within those periods, a supplementary CoC which covers the changes made to the system, will also be required. Should you not have an existing valid electrical CoC for your property, the issue of a new certificate may be necessary, for the entirety of your electrical system.

Post installation considerations

In the event of your property being sold, it's important to bear in mind when entering into the sale agreement, that a purchaser might insist that new CoC's be issued, despite them having been issued within the previous two years, or, their own bank, for their bond finance, may require the re-issuing of these certificates.

While not currently dealt with separately, as a system apart from the rest of a property's electrical system, solar installations will undoubtedly start to feature more prominently on the mandatory immovable property condition report required in terms of section 67 of the Property Practitioners Act 22 of 2019, in respect of both the sale and lease of immovable property, in the near future.

Noting the presence of a solar system, the size of the kilowatt (kW) inverter, and how many panels are installed on your property in your sale agreement is sure to add to the appeal and value of your property. Property owners should therefore be sure to remind the suitably qualified electrician completing the supplementary electrical CoC (or new CoC for your whole electrical system, as the case may be) on completion of their solar installation, to include the relevant details of your solar installation.

Whether you are a first-time installer, preparing your property to be sold, or looking to purchase a property which has pre-existing solar installations, familiarising yourself with the legal requirements of installing and maintaining a solar PV system will ensure that you are well equipped to navigate and manage your system, legally and safely.

Bridget Witts-Hewinson

OUR TEAM

For more information about our Real Estate Law practice and services in South Africa and Kenya, please contact:

Muhammad Gattoo
Practice Head & Director:
Real Estate Law
T +27 (0)11 562 1174
E muhammad.gattoo@cdhlegal.com

Sammy Ndolo
Managing Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E sammy.ndolo@cdhlegal.com

Bronwyn Brown
Director:
Real Estate Law
T +27 (0)11 562 1235
E bronwyn.brown@cdhlegal.com

Mike Collins
Director:
Real Estate Law
T +27 (0)21 481 6401
E mike.collins@cdhlegal.com

Simone Franks
Director:
Real Estate Law
T +27 (0)21 670 7462
E simone.franks@cdhlegal.com

Fatima Gattoo
Director:
Real Estate Law
T +27 (0)11 562 1236
E fatima.gattoo@cdhlegal.com

Simone Immelman
Director:
Real Estate Law
T +27 (0)21 405 6078
E simone.immelman@cdhlegal.com

Muriel Serfontein
Director:
Real Estate Law
T +27 (0)11 562 1237
E muriel.serfontein@cdhlegal.com

John Webber
Director:
Real Estate Law
T +27 (0)11 562 1444
E john.webber@cdhlegal.com

Alex de Wet
Director:
Real Estate Law
T +27 (0)11 562 1771
E alex.dewet@cdhlegal.com

Natasha Fletcher
Counsel:
Real Estate Law
T +27 (0)11 562 1263
E natasha.fletcher@cdhlegal.com

Samantha Kelly
Counsel:
Real Estate Law
T +27 (0)11 562 1160
E samantha.kelly@cdhlegal.com

OUR TEAM

For more information about our Real Estate Law practice and services in South Africa and Kenya, please contact:

Robert Kaniu Gitonga
Senior Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E robert.gitonga@cdhlegal.com

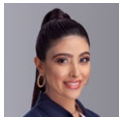
Bridget Witts-Hewinson
Senior Associate:
Real Estate Law
T +27 (0)21 481 6447
E bridget.witts-hewinson@cdhlegal.com

Lutfiyya Kara
Senior Associate:
Real Estate Law
T +27 (0)11 562 1859
E lutfiyya.kara@cdhlegal.com

Sune Kruger
Senior Associate:
Real Estate Law
T +27 (0)11 562 1540
E sune.kruger@cdhlegal.com

Lulama Lobola
Senior Associate:
Real Estate Law
T +27 (0)21 481 6443
E lulama.lobola@cdhlegal.com

Ceciley Oates
Senior Associate:
Real Estate Law
T +27 (0)11 562 1239
E ceciley.oates@cdhlegal.com



Fatima Essa
Associate:
Real Estate Law
T +27 (0)11 562 1754
E fatima.essa@cdhlegal.com

Zahra Karolia
Associate:
Real Estate Law
T +27 (0)11 562 1701
E zahra.karolia@cdhlegal.com

Ebun Taigbenu
Associate:
Real Estate Law
T +27 (0)11 562 1049
E ebun.taigbenu@cdhlegal.com

Muneerah Hercules
Associate Designate:
Real Estate Law
T +27 (0)11 562 1579
E muneerah.hercules@chdlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR | cliffedekkerhofmeyr.com

CDH
CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA