

Real Estate Law & Conveyancing

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SOUTH AFRICA

Extending your development rights:
Act before it's too late



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Extending your development rights: Act before it's too late

Section 25 of the Sectional Titles Act 95 of 1986 (STA) allows a developer to reserve a real right of extension when opening a sectional title register. This right enables the developer to develop the scheme in phases by adding buildings, units, and exclusive use areas as and when required. However, all such developments must occur within a clearly defined period specified at the time of reservation.

This raises a critical question for developers: Can the stipulated period be extended? And, if so, what are the requirements and limitations?

This article examines the statutory framework governing real rights of extension, the procedures for extending the stipulated period, and the consequences of allowing the right to lapse.

Real right of extension

Section 25(1) of the STA determines that:

"A developer may, subject to the provisions of section 4(2), in his or her application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11(2), the right to erect, complete or include from time to time, but within a period stipulated in such condition or such extended period as may be agreed upon (by unanimous resolution of the body corporate and with the consent of the bondholders existing on the date of the taking of the unanimous resolution, which resolution and consent must be obtained by the

notary and filed in his or her protocol) prior to the expiry of the stipulated period, by way of a bilateral notarial deed, for his or her personal account:

- (a) a building or buildings;*
- (b) a horizontal extension of an existing building;*
- (c) a vertical extension of an existing building,*

on a specified part of the common property, and to divide such building or buildings into a section or sections and common property and to confer the right of exclusive use over parts of such common property upon the owner or owners of one or more sections, or to delineate exclusive use areas on or in specified parts of the land and buildings in terms of section 5(3)(f) and to confer the right of exclusive use over such areas upon the owner or owners of one or more sections."

In essence, this provision allows developers to reserve the right to develop in phases, provided they do so within a specified period, which can be extended by following the prescribed procedure before the original period expires.

A developer can unilaterally reserve a real right of extension in terms of section 25(1) for a specified period in one of two ways:

- simultaneously with the opening of the sectional title register; or
- after the opening of the sectional title register, but only if the body corporate has not yet been established.



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If the body corporate has been established, the developer cannot unilaterally reserve a real right to extend after the opening of the scheme and will also not be able to unilaterally reserve a new real right if a previously reserved right has lapsed.

Should the developer wish to reserve the real right of extension, the documents required in terms of section 25(2) of the STA must be lodged, whereafter a certificate of real right of extension will be issued in favour of the developer. The real right of extension cannot be reserved for an indefinite time, and a specific time period must be clearly indicated.

The developer or its successors in title must exercise the real right of extension before the expiry of the specified period, or alternatively, ensure that the period is formally extended prior to it lapsing.

Procedure to extend the duration of the real right of extension

Should the developer, or any holder of the right, not exercise its right within the initial period which was reserved, the period of a real right of extension may be extended.

To extend the duration of a real right of extension after the body corporate has been established, the following steps must be taken:

- The extension of the duration must be contained in an agreement between the developer and the body corporate, which agreement must be in the form of a bilateral notarial agreement.

- The body corporate must be authorised to enter into the agreement by virtue of a unanimous resolution.
- All the mortgage bondholders, as at the date of taking the unanimous resolution, in respect of the sectional title property in the scheme, must consent to such agreement.
- The mortgage bond registered over the real right itself must be lodged for endorsement, although no consent from such bondholder is required.
- The notarial deed extending the period must be executed before a notary public prior to the lapsing of the real right. Note that registration in the Deeds Office prior to the expiry of the stipulated period is not a requirement in terms of the STA; execution of the notarial deed is sufficient.
- Transfer duty will be payable by the developer to the South African Revenue Service.

If the developer has ceded its real right, or a portion thereof, to a third party, each holder of a real right will be required to follow the extension process individually; the developer alone cannot extend the period on behalf of all holders. However, neither the developer nor any holder can extend the period after the lapsing of the real right.

Should the developer not extend the period prior to lapsing, the right will automatically vest in the body corporate of the scheme.



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Case law relevant to extension of period of real right

In *SP and C Catering Investments (Pty) Ltd v Body Corporate of Waterfront Mews and Others* [2010] (4) SA 104 (SCA), the developer applied to the North Gauteng High Court (court of first instance) for an order extending the period within which the developer was entitled to complete extensions to a sectional title scheme in terms of a real right of extension reserved in terms of section 25(1) of the STA. The application was opposed by 16 of the unit holders in the scheme and was dismissed on the ground that the High Court did not have jurisdiction to grant such an extension to the developer, either in terms of the STA or the Deeds Registries Act 47 of 1937.

On appeal, the developer (appellant) argued that the termination of the right to extend the scheme on the expiry of the stipulated period and the automatic vesting of such right in the body corporate amounted to a deprivation of property in violation of section 25 of the Constitution, 1996.

The developer further contended that where the circumstances have been such that the developer has been delayed, through no fault of their own, in the execution of the work, that constitutes a "*changed circumstance*" on the ground of which they are entitled to ask the court for relief in the form of an extension of the period of the reserved right in terms of section 25(13) of the STA.

Based on this interpretation, the developer contended that, where the completion of the scheme extension is delayed by circumstances beyond the developer's control, the reserved right does not lapse at the end of the stipulated period but may be extended at the court's discretion if application is made to it by an aggrieved unit holder in terms of the subsection.

The Supreme Court of Appeal rejected this argument, holding that it was flawed for the following reasons:

- The first flaw was the argument that the expiry of the right by effluxion of time amounted to a deprivation of property. The court held that the very fact that the developer himself stated the period for which his right was to exist negated any possibility of a suggestion that he was "*deprived*" of it at the end of the period.
- The second flaw was that the contention confused the developer's obligations when effecting the extension of the scheme in terms of section 25(13) with his registered entitlement to extend the scheme in terms of section 25(1).

Section 25(13) is plainly designed to enable unit owners to enforce compliance by the developer with the specifications. It only gives the developer an opportunity to justify non-compliance with their original specifications on the ground of "*changed circumstances*" and nothing more. The appeal was accordingly dismissed with costs.



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Conclusion

- **Duration:** A developer that has reserved a real right of extension for a specified period, simultaneous with the opening of the scheme may extend that period, provided the procedure set out in section 25(1) of the STA is strictly complied with before the initial period lapses.
- **Critical timing requirement:** The extension must be finalised before the original period expires. Once the right has lapsed, it cannot be revived.
- **No court intervention:** The courts have confirmed that they do not have jurisdiction to grant an extension of the period of a real right of extension after it has lapsed. The decision in SP and C Catering Investments makes this clear.
- **Automatic vesting:** If the real right lapses, it automatically vests in the body corporate of the scheme.
- **Practical advice:** Developers should diarise the expiry date of their real right of extension and initiate the extension process well in advance to avoid losing this valuable right.

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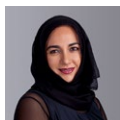
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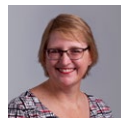
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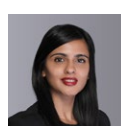
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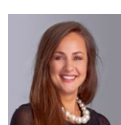
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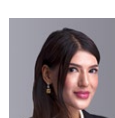
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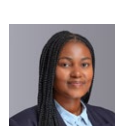
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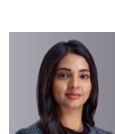
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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