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Issues to Consider when Buying into a Sectional Title Scheme

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Introduction

This article will look at issues that any buyer in a Sectional Title Scheme should consider *before purchasing*. Once you have signed your sale contract, you might find yourself unhappy with the decision to purchase on the terms contained therein if you were not aware of these issues.

In discussing this topic, we will consider the Sectional Titles Act 95 of 1986 (“the STA”), the Sectional Title Schemes Management Act 8 of 2011 (“the STSMA”), Exclusive Use Areas (“EUA’s”) as defined in the STSMA and situations in which a developer reserves a right to extend a scheme as defined in section 25 of the STA.

Ownership v Use in Sectional Titles

The concepts of “use” “ownership” are entirely different in law and should not be confused when dealing with sectional title schemes. When you buy a unit in a scheme, you are purchasing your home (referred to as the section) together

with an undivided share in the common property in the rest of the scheme. Together, your section plus your undivided share in the common property make up your ‘unit’. In the Deeds Office your unit will be registered in your name and you will be regarded as the owner of your unit.

However, when purchasing a home with a garage, balcony, patio, porch, garden or the like, do not automatically assume that these areas form part of the section that you are buying and that you will acquire ownership over these areas when you buy your section. The types of areas might form part of your section or they might be common property owned by the Body Corporate (and not you), and additionally they might be allocated to you for your personal use. Just because the garden, storeroom, parking bay etc is situated right next to your section, or even if its marked with a unique number that indicates that it is ‘matched to’ or ‘belongs to’ the section (for example, section 1 might have parking bay



1, and section 2 might have parking bay 2) this does not necessarily make it part of the section itself. If it is not part of the section, it means it must be purchased and the right to use it acquired separately.

As a potential purchaser you may need to examine the sectional titles plans and/or the rules of the scheme in order to determine what kind of area you are buying and what rights you will have in relation to that area.

If a garage, balcony, patio, porches, or garden does not form part of a section these areas will either form part of the common property or be registered as EUA's (which are also common property but are exclusively reserved for the use of one particular owner).

Exclusive Use Areas (EUA's)

An EUA is defined in section 1(c) of the STSMA as "*part or parts of the common property for the exclusive use by the owner or owners of one or more sections.*"

From this definition it is evident that an EUA is an area that forms part of the common property, but which is reserved exclusively for the use of a certain owner.

When a section is transferred, the EUAs is not necessarily automatically transferred with the section. There are two types of EUA's - the first

is registered in the Deeds Office by way of notarial deed of cession, and must be separately registered in your name - and the second is created by way of the rules of the scheme and the rights to this area are automatically transferred to the owner of the section entitled to those rights upon registration of the ownership of the section in that owner's name.

The first type of EUA is created by section 27(3) of the STA. It needs to be separately transferred into your name by virtue of a notarial deed of transfer (whereas your section is transferred to you by way of title deed).

Section 27(3) of the STA provides that:

"The body corporate, duly authorized thereto by a unanimous resolution of its members, shall transfer the right to the exclusive use of a part or parts of the common property delineated on the sectional plan in terms of subsection (2) to the owner or owners on whom such right has been conferred by the body corporate, by the registration of a notarial deed entered into by the parties and in which the body corporate shall represent the owners of all the sections as transferor."

Normally sections and EUAs' are sold together in the same deed of sale and transferred simultaneously (one by title deed and one by notarial deed). However, the two are not automatically linked and are capable of being



transferred separately. An owner even may choose to keep their section and transfer only their registered EUA to another owner.

Because the risk exists that you might pay for an EUA thinking that it is part of your section (when it is not), or that you might purchase it and never received transfer of it because it was mistakenly assumed to be part of the section and never separately transferred to you, it is critical to check the status of the areas that you are looking at before you sign the offer to purchase/deed of transfer.

The second type of EUA that might exist is an EUA created in terms of the rules of the Body Corporate. Body corporate rules may confer exclusive use rights on the owner of a section to use a part of the common property exclusively. Again, there are two types of these kinds of EUA's. They might be created either in favour of a specific person (ie Mr Smith), or they might be created in favour of the owner of a unit (ie the owner of unit 1).

In most cases they are created in favour of the owner of the section, and not a specific person. In cases like these, the registration of the unit into the name of the purchaser results in an automatic transfer of the exclusive use rights associated therewith to the purchaser of the unit.

However, when the EUA is created in favour of a specific person (ie Mr Smith), then difficulties arise when it comes to transferring the rights to that EUA to the purchaser of the section that Mr Smith is selling. If the rules specifically state that when Mr Smith sells his unit and leaves the scheme, his rights to the EUA will pass to new owner, the transfer of rights happens automatically when the new owner takes ownership of the section.

However, where rules name a person entitled to exclusive use rights but *do not cater for transfer of these rights*, problems ensue. The only way to reflect a transfer of these rights then is to amend the rules. In terms of sections 10(7) and (8) of the STSMA, only an amendment of the rules can change an allocation of exclusive use rights created in this manner.

Section 27(4)(b) of the STSMA provides as follows:

“If an owner ceases to be a member of the body corporate in terms of section 2(3) of the Sectional Titles Schemes Management Act, any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond.”

It is thus critical to understand how the EUA is created in law and to make sure that the necessary steps are taken in order to procure that the purchaser is given the rights to that EUA



along with the ownership of the section purchased.

The Developer's Reserved Right / Right of Extension Clause (section 25 of the STA)

Section 25 of the STA deals with the right of a developer to extend a scheme ("the right of extension") and states as follows:

"A developer may, subject to the provisions of section 4 (2), in his application for the registration of a sectional plan, reserve, in a condition imposed in terms of section 11 (2), the right to erect and complete from time to time, but within a period stipulated in such condition for his personal account;

(a) further building or buildings;

(b) horizontal extension of an existing building;

(c) vertical extension of an existing building,

(d) After notice by any such purchaser to the seller that he annuls the alienation, the alienation shall be void, and thereupon the provisions of section 9 (3) shall apply mutatis mutandis. "

In other words, a right of extension exists when a developer of a sectional title scheme reserves a right to build more sections at a later stage of development within the scheme itself. This may affect potential purchasers and owners living in a scheme as extending the scheme by adding units to the scheme may lead to pre-existing units' views being blocked by new units, higher

levels of noise pollution may occur, green belts or open spaces that give the scheme a certain character may cease to exist if they are developed further and the voting rights and participation quota of an owner in a scheme may be diluted when further owners buy into the scheme at the stage of later development. It is thus critical to understand whether the scheme that you are buying into is a "final product" or might still change in the future.

If a developer has a section 25 right of extension, the developer is obliged to make a potential purchaser aware of this right and same should be stated in the agreement of sale. Voidable if not disclosed, sue etc

Conduct Rules and Management Rules in a Sectional Title Scheme

Be well advised to read and familiarise yourself with a scheme's conduct and management rules before purchasing a unit within a scheme. The rules relating to sectional title schemes are *quasi* contractual in nature due to the members' prior agreement with the rules at the time of purchase.

Management Rules are defined in section 25(2) of the STSMA act as follows:

"Management rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, to the extent prescribed by



regulation, and which rules may be substituted, added to, amended or repealed from time to time by unanimous resolution of the body corporate as prescribed by regulation.”

Conduct Rules are defined in section 25(2) of the STSMA as follows:

“conduct rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, and which rules may be substituted, added to, amended or repealed from time to time by special resolution of the body corporate: Provided that any conduct rule substituted, added to or amended by the developer, or any substitution, addition to or amendment of the conduct rules by the body corporate, may not be irreconcilable with any prescribed management rule contemplated in paragraph (a).”

In particular we deal with some of the more important issues to look out for in the rules.

Pets

The sectional title scheme may not allow animals or may only allow animals of a certain type/size or upon certain conditions having been met or approvals having been obtained. Sometimes even the height or weight of the pet is limited.

Refuse Disposal

Some schemes also have specific procedures to follow when disposing of refuse. This can be for

recycling purposes and the scheme rules may even state a specific day on which refuse will be collected.

Short Term Letting

A schemes' rules often prohibit short term letting. This means that you will not be permitted to run an Airbnb or hotel or rental pool scheme from your unit.

Alterations to units/sections

A scheme's rules often contain procedures to follow prior to embarking on any alterations to a unit. Be well advised to follow the scheme's procedures and to obtain the necessary approval prior to making any alterations. Failure to follow the appropriate procedures may result in the body corporate instructing you to remove the alterations or a claim for damages.

Use of Unit for Business Purposes

There is an emerging world trend for people to work from home and run their own business rather than subscribe to traditional 9 - 5 jobs. This can be unobtrusive in many cases, but it can also cause noise nuisance, health hazards, parking and other infrastructural issues and can also contravene the unit's zoning or permitted uses. If you plan to work from home, familiarize yourself with the scheme's rules before purchasing, lest you discover that you are prohibited from earning an income from your major asset.



Conclusion

One should exercise a level of caution before buying into a sectional title scheme and do a proper due diligence as to what you are purchasing, and as to the rights that will accrue to you from that purchase. To do this one might need to peruse the scheme's Conduct and Management rules, the sectional plans or even notarial deeds of cession of EUA's. You are also advised to read your sale agreement thoroughly to determine if a developer has a right to extend the scheme before you sign on the dotted line. If you have any doubts, appoint a property law attorney to assist you with a due diligence before you sign.



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