



MEUMANN WHITE

A T T O R N E Y S

SALE OF REAL RIGHTS BY A DEVELOPER

Presented by Meumann White Attorneys

Sale of Real Rights by a Developer

The present Sectional Titles Act No. 95 of 1986 was assented to on the 8 September 1986 and commenced approximately a year and half later on the 1 June 1988.

And with it came the innovative section 25, the section that deals with the developers right to extend the scheme and to do phase developments, without (as some will remember) having to retain the so called "Golden Unit"; the necessity for the developer to retain at all times ownership for himself of a unit in the scheme, otherwise he lost his right to exercise his right of extension.

Briefly section 25 entitled the developer to reserve for himself, simultaneously with the opening of the register, the right to extend the scheme by the additions of sections for his own benefit in one or more phases.

In terms of the said section the right to extend can be mortgaged

Under section 25 a developer even having disposed of all units in the scheme, could sell his right to extend as the old "golden unit" adage under the former Act, no longer applied under the new Act . The disposal of the right to extend was by way of a notarial deed of cession pursuant to a sale agreement of the right to extend.

However the sale of the right to extend had to be of the whole right to extend or the whole of the balance. No portions thereof could be disposed off. This was a limiting factor.

Then in 1997 Section 25 (4) was significantly amended by Act No. 44 of 1997, and it is worth setting out the relevant section in full –

" 25 (4) A right reserved in terms of subsection (1) or vested in terms of subsection (6), and in respect of which a certificate of real right has been issued –

- (a) shall for all purposes be deemed to be a right to urban immovable property which admits of being mortgaged; and
- (b) may be transferred by the registration of a notarial deed of cession in respect of the whole, **a portion** or a share in such right: provided that in the case of a cession affecting only a portion of the land comprising the scheme only such portion shall be identified to the satisfaction of the Surveyor-General. "
(our highlighting)

This amendment now allowed the developer to sell not only the whole right to extend but also a portion or portions of his right, provided such portions are identified on a diagram which is lodged with and approved by the Surveyor General.

Thus became possible a new type of development scheme – the sale of a portion of the developer's right to extend to a purchaser (on which portion the purchaser could build) instead of the developer selling a unit built by him in a scheme.

Note the portion of the right to extend can be bonded in terms of the above section 25(4)(a)

Briefly the mechanics is that a developer still opens the sectional title register but with a minimum of two sections, takes out a certificate of right to extend in terms of section 25 (1) and at the same time lodges a plan approved by the SG depicting the real right areas which are to be sold (each area being a portion of the developer's right to extend) or which at that stage have usually been pre-sold. The plan must comply with section 25 (2) requirements.

Simultaneously with the opening of the register the developer cedes to any purchasers by way of a notarial deed the portion of their respective rights to extend which they have purchased as depicted on the above plan. If not bought for cash (including building costs) the purchaser's building bond is at the same time registered over his real right.

Note in a sale of the portion of the right to extend it is the purchaser who bears the cost of erecting the building and not the developer.

On registration of the notarial deed the developer is paid out for the land either from the deposit, if sufficient, or later from the first progress payment.

The developer through another vehicle may or may not be involved in the building contracts but doing the building construction or having an interest therein is usually where his real profits can lie.

The purchaser on transfer of the real right to him by way of the notarial deed becomes a developer (in place of the seller/developer) by virtue of the fact that he holds a portion of the right to extend under such notarial deed. The said Act No. 44 of 1997 suitably amended the definition of "Developer" of the principal act to permit this. So there can be as many developers as there are acquired portions of rights to extend.

Once the purchaser (now a developer) has built his house he is invariably obliged by his sale agreement to have a sectional plan of extension prepared by a land surveyor and to register the plan in the Deeds Office. Usually a number of purchasers get together and register the plan simultaneously to spread the costs. A certificate of registered sectional title is issued to him in respect of his unit, his building bond is endorsed over his sectional title deed, and the development right held under the notarial deed lapses.

Developer's Advantages

1. The developer finances the first two sections (usually a show house and say a gate house), the usual infrastructure of the roads and other civils, but does not have to construct any sections except the first two.
2. He gets paid out for the land on registration of the notarial deed in favour of the purchaser or on the first progress payment draw.
3. The developer does not have to get a development bond to finance the buildings. The purchasers obtain their own building bonds or build for cash.

Developer's Disadvantages

1. A relatively new concept and some banks are still cautious about getting involved or will only get involved if the risk is spread among other banks - usually a 25% stake in each phase only

2. The developer must be able to have lined up financial institutions conversant with the real right concept and willing to grant end user building bonds, otherwise the scheme is not likely to get off the ground.
3. Because of the nature of the whole transaction the sale agreement can be bulky and a somewhat formidable document which can be daunting to a prospective purchaser especially as he is being asked to grasp the ramifications and implications of a relatively new and involved concept
4. Costs for the purchaser may be higher than for a conventional sectional transfer

Example: developer registered vat vendor -

Conventional sectional transfer

R600000,00 (for land and buildings)	<u>R7069</u>
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Real Right

1. Notarial cession of real right (land-R200000)	R4960
2. Conversion costs: application for amending sectional plan of extension	R2880
3. Land surveyor's costs (depends on number of conversions)- could be between R1000 to R3000 or more per person – min	<u>R1000</u>
	<u>R8840</u>