Notes

Understanding exclusive use areas in sectional title schemes

Sectional title law has many tricky components, despite the apparent simplicity of its underlying structure.

The first thing to remember is that a sectional title scheme has only two components: Sections and common property.

Sections are capable of ownership; in other words, a person can obtain ownership of a section. Common property, on the other hand, belongs in undivided shares to all the owners of sections in the scheme, in accordance with their respective participation quotas.

The second aspect to highlight is that, when walking around in a sectional title scheme, one cannot assume that a particular building is a section, nor that a parking bay, whether numbered or not, is an exclusive use area.

The third point, therefore, is how one determines what is what. There is only one answer: Check the registered sectional title plan first.

The registered plan serves as a blueprint used by the Deeds Office to record the details of the sectional title scheme. For example, if a building or part thereof is marked on the registered plan as *section 15*, one knows that apartment 15 is a section and therefore capable of being bought, sold, or mortgaged.

There may also be a brick garage building with an automated door, conveniently situated opposite the entrance to section 15, with the number “15” painted on it. The owner of section 15 may have always used that garage. It is then easy to assume that the garage is also a section, and that the owner of section 15 therefore owns garage 15. This may lead to the owner instructing the estate agent that both sections form part of the sale and must be included in the OTP.

This is where the danger creeps in. If the garage is not reflected as a section on the registered sectional title plan, then it is common property. The Deeds Office cannot effect

transfer thereof because, for its purposes, the garage does not exist as a separate section. The Deeds Office records will reflect that area as common property, in accordance with the plan submitted when the scheme was opened.

The same risk arises in relation to exclusive use areas. Exclusive use areas are parts of the common property that are *formally* reserved for the use of a particular holder. (Technically, such a person is not an "owner" but a cessionary of exclusive use rights in respect of common property.)

A garden, parking bay, patio, or similar area may appear, on the face of it, to be designed for the sole use of a particular section owner as an exclusive use area. But how does one know whether such an area is formally reserved for that owner's use? Again, by reference to the registered sectional title plan. If it is recorded thereon, it will reflect in the Deeds Office records and can be bought, sold, and mortgaged.

Otherwise, a Deeds Office printout reflecting the details of the section owner will indicate whether that owner holds only a section, or a section together with one or more exclusive use areas.

"Formally" registered

Often, due to the costs and time associated with appointing a land surveyor to survey sections and exclusive use areas for inclusion on the sectional title plan (to be registered in the Deeds Office), developers opt to establish such areas physically but instruct the land surveyor not to indicate them on the sectional title plan.

In other words, outside unit 10 there may be a garden area that appears to belong to that section, as well as a parking bay marked "10" nearby, which the owner of section 10 uses as if it were hers. However, a Deeds Office search may show that the owner of section 10 holds no *formal* rights to any exclusive use area. Clearly, these areas were not recorded on the registered sectional title plan and therefore do not exist for Deeds Office purposes.

On physical inspection, these "exclusive-use-lookalike" areas do exist, and it is beneficial for the owner of section 10 to enjoy some degree of exclusivity in respect thereof.

The owner of section 10 would understandably not appreciate it if her neighbour's teenage children were to host a loud party on "her" garden, responding with a smirk when she complains that it is common property belonging to all owners in undivided shares, and that they have as much right as anyone else to use it. Nor would it promote harmonious living within the scheme if anyone could freely use parking bay 10.

Consequently, in schemes where areas were designed by the developer and architect to be used as if they were exclusive use areas, but were not shown on the registered sectional title plan, developers often ensure that the rules of the scheme allocate rights to use specific areas to specific sections. For example, the rules may provide that the owner of section 10 has the exclusive right to use the garden area in front of that unit, as well as the corresponding numbered parking bay.

These are commonly referred to as "informal" exclusive use areas. This is not a legal term, but a practical way of distinguishing them from formally registered exclusive use areas.

Differentiating formal and informal exclusive use areas

Formal exclusive use areas

A *formal* exclusive use area is defined in section 1 of the Sectional Titles Act ("STA") as "a part or parts of the common property for the exclusive use by the owner or owners of one or more sections."

Such areas are shown on the registered sectional title plan, measured, numbered, and clearly described to scale, including their purpose, location, and extent. The allocation is reflected in an allocation schedule on the plan, indicating which exclusive use areas are allocated to which members of the body corporate.

Cape Town T: 021 406 9100
Blouberg T: 021 521 4000
Claremont T: 021 673 4700
Noordhoek T: 021 784 1580
Helderberg T: 021 850 6400
Hermanus T: 028 753 0033
Tyger Valley T: 021 943 3800
East London T: 043 721 1234
KZN T: 031 583 8060
Bedfordview T: 011 453 0577
Centurion T: 012 001 1546
Fourways T: 010 001 2632
Sandton T: 011 219 6200

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There are sound reasons for these strict requirements, including the need to preserve the integrity of the country's land recordal system. For example, a bank lending money to a purchaser must know, with certainty, the exact extent of the property serving as security for the loan in order to assess value and risk exposure.

When a formal exclusive use area changes hands, the correct terminology is a cession of rights, rather than a transfer, as the rights are not ownership rights in land. The title deed is therefore a *Notarial Deed of Cession of an Exclusive Use Area*, as opposed to a *Sectional Title Deed of Transfer*. In practice, however, people often refer to the "sale and transfer" of an exclusive use area for simplicity.

Formal exclusive use areas can be mortgaged, and banks will generally register a bond over both the section and the exclusive use area where a purchaser acquires both.

Because exclusive use areas are reserved "for the exclusive use by the owner or owners of one or more sections," only section owners in a scheme may hold such rights. An outsider cannot, for example, purchase a parking bay within a scheme. However, an owner may lease the use of such an area to an outsider, provided the scheme rules do not prohibit this.

<u>Informal exclusive use areas</u>

Where exclusive use areas are allocated to owners in terms of the scheme rules, this is done in accordance with sections 10(7) and 10(8) of the Sectional Titles Schemes Management Act.

There is no Deeds Office registration in respect of such allocation and no title deed.

These areas cannot be mortgaged.

Despite the absence of formal registration, the rights are secure because scheme rules cannot be amended without complying with strict procedural and voting requirements.

Why there is so much potential for confusion

In everyday use, the rights exercised by holders of formal exclusive use areas and those holding rights in terms of scheme rules are practically identical.

Most sectional title owners are unaware of the legal and technical distinctions between these rights.

In some cases, estate agents, trustees, and managing agents may also lack adequate training and fail to appreciate the differences.

In both cases, the holder of exclusive use rights typically pays an additional levy in respect of the area.

Highlighting another potential pitfall: A few final notes

(i) As noted earlier, a sectional title scheme consists of only two components: sections and common property. Exclusive use areas always form part of the common property, with exclusive rights acquired either by Deeds Office registration or by allocation in terms of the scheme rules.

(ii) Every section owner automatically owns an undivided share in the common property. This share is not equal but is determined by the size of the owner's section relative to others, as calculated by the land surveyor and reflected on the sectional title plan as the participation quota.
For example, the owner of section 55 (150 m²) holds a larger share in the common property than the owner of section 20 (90 m²). While this affects levies and voting weight, it does not translate into greater practical rights to use common facilities.

(iii) In the examples above, sections were described as buildings with walls and a roof, and exclusive use areas as open areas such as gardens or parking bays. However, the distinction is not that simple.

Notes

Although a building generally requires walls and a roof to qualify as a section, it is still possible for a structure with walls and a roof to be common property or an exclusive use area, depending entirely on what is reflected on the registered sectional title plan.

Accordingly, one should never assume that a built structure such as a garage or laundry is necessarily a section. Everything depends on the sectional title plan.