

Joseph Balk v Marius and Kimberley Matthews

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 151/WC/16
Adjudicator: Adv. GPC de Kock
Date: 7 November 2017
Applicant: Joseph Maria Balk (Nienke van Schaik)
Respondent: Marius and Kimberley Matthews



ADJUDICATION ORDER

[1] This is an application for dispute resolution in terms of Section 38 of the Community Schemes Ombud Service Act No.9 of 2011 ("the CSOS Act"). The application was made in the prescribed form and lodged with the Western Cape Provincial Ombud Office.

[2] The parties listed above are acting in representative capacities, as the properties forming the basis of this application are in fact owned by a company and a close corporation respectively. The scheme, also known as a duet scheme as it consists of only two (2) units, is The Victory, 35 Camps Bay Drive, Camps Bay, Western Cape. Being a duet scheme any attempt at internal dispute resolution is futile should either one of the two members of the scheme be unwilling to agree to a proposed resolution.

[3] Unit 1 in the scheme is owned by LivinAfrica (Pty) Ltd and Unit 2 is owned by Skyscape Investments 110 CC. The Applicant, together with Ms Nienke van Schaik and Ms Zerlinda van der Merwe (attorney), and the Respondents, together with Mr Craig Delpont (attorney), duly represented the aforementioned entities. I had allowed legal representation in terms of Section 52(b) of the CSOS Act.

[4] The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the CSOS Act. The CSOS Act enables residents of community schemes including sectional title schemes to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts. The purpose of this order is to bring closure to the case brought by the applicant to the CSOS.

[5] The adjudication hearings took place on Tuesday, 15 August 2017 and Tuesday, 3 October 2017 at the CSOS offices in Cape Town. I also did an inspection at the property on Wednesday, 27 September 2017.

[6] After providing the background to this case in the CSOS Application for Dispute Resolution Form, the Applicant sought the following relief:

6.1. Rectification of the error with a new body corporate

rule reflecting exclusive use areas as they were sold and intended:

6.1.1. Garden area (GA1) and pool be an exclusive use area for Section 1;

6.1.2. Three parking bays for Section 1, five parking bays for Section 2.

6.2. Wine cellar and store rooms as per the existing rule;

6.3. Revised participation quota calculated;

6.4. New rules be registered at the Deeds Office in the Sectional Title File;

6.5. Rectification of the Title Deeds / Sectional Title Register/ Sectional Plan as required.

[7] I do not propose to repeat the content of all the documentation that has been submitted, save insofar as it may be necessary for this order.

[8] By way of summary the Applicant's case is the following;

8.1. The Applicant purchased Unit 1 in the scheme in January 2009 in the name of LivinAfrica (Pty) Ltd (initially Brashville Properties 88 (Pty) Ltd).

8.2. The Applicant believed that the garden area indicated as Section GA1 on the plan was supposed to be an exclusive use area ("EUA") for Unit 1, but this has never been registered as such nor conferred by any rule to date.

8.3. The developer, the estate agent that sold Unit 1 to the Applicant and the land surveyors responsible for the sectional title plans supported the Applicant's contention in this regard.

8.4. It is stated in the affidavit of the land surveyor that the original plan was prepared in terms of section 27A of the Sectional Titles Act (95 of 1986) ("the STA") depicting various EUAs.

[9] I am satisfied that the intention was to have Section GA1

recorded as an EUA for Unit 1, but this was never done and, as it stands, that section is part of the common property.

[10] Section 27A of the STA has been replaced by sections 10(7) and 10(8) of the Sectional Titles Schemes Management Act (8 of 2011) ("the STSMA"). These sections provide for rights of exclusive use of common property to be conferred in terms of management or conduct rules. Exclusive use areas (EUA's) are dealt with in the Sectional Title Survival Manual by Graham Paddock (8th Edition) on page 52.

[11] Mr Delport for the Respondents has raised two (2) points in limine, namely:

11.1. The first point was that in terms of section 38(3)(a) of the CSOS Act, an application must include statements setting out the relief sought by the applicant, which relief must be within the scope of one or more of the prayers for the relief contemplated in section 39.

11.2. The second point was one of *lis alibi pendens* in that there is presently an application pending in the Western Cape High Court under case number 973/2017 launched by the Respondents, in terms of which they seek an order, *inter alia*, interdicting and restraining the Applicant from carrying out certain building works on the common property of the scheme

[12] It was submitted on behalf of the Respondents that what the Applicant seeks is rectification which is the competency of the High Court. I have to agree with this submission.

[13] However, to refuse the application on this ground would just lead to a new application. The matter is before me and I indicated that I would like to resolve the issues in order to obtain some finality.

[14] In my view it is clear that the parties would never be able to agree as to whether an owner or occupier reasonably requires exclusive use rights over a certain part of the common area.

[15] In terms of Section 50(b) of the CSOS Act the adjudicator must act quickly, and with as little formality and technicality as is consistent with a proper consideration of

the application.

[16] The Respondents have not pursued the second point in limine as any order I make will have no bearing on the relief sought in the High Court.

[17] The issues regarding the parking bays and wine cellar have been resolved and, on my understanding, the only remaining issues are whether Section GA1 should be an EUA for Unit 1 and whether short-term letting should be allowed in Unit 1.

[18] The Respondents have also asked by way of a counterclaim for a part of Section GA1 to be allocated to them as an EUA and to limit letting of units to a minimum rental period of one (1) month.

[19] While GA1 was never recorded as being an EUA, section 39(6)(f) of the CSOS Act provides as follows:

"an order declaring that an owner or occupier reasonably requires exclusive use rights over a certain part of a common area, that the association has unreasonably refused to grant such rights and requiring the association to give exclusive use rights to the owner or occupier, on terms that may require a payment or periodic payments to the association, over a specified part of a common area."

[20] Mr Delport has submitted that section 39(6)(f) cannot be read in isolation and should be read conjunctively with the start of section 39(6) that reads as follows:

"In respect of works pertaining to private areas and common areas - ."

[21] I cannot agree with Mr Delport in this regard. In my view, section 39(6)(f) of the CSOS Act would make no sense if it was limited only to "works pertaining to the common area".

[22] I agree that section 39(7)(b) of the CSOS Act is not relevant in this case as there has been no directive by the chief ombud.

[23] The Respondents have also submitted that the present

application should be rejected in terms of section 42 (a) alternatively (d) of the CSOS Act for the following reasons:

23.1. The relief does not fall within the scope of section 39 and therefore CSOS lacks jurisdiction;

23.2. The relief sought is rectification arising from an alleged mistake during the transfer of ownership of property and not the “administration of an association” as envisaged by the CSOS Act;

23.3. The significant value of the properties concerned mean that any order by the adjudicator will have a far-reaching effect;

23.4. In light of the aforesaid issues the respondents submit that it would be in the interests of justice for this matter to be heard in the Western Cape High Court.

[24] While I agree with the submission regarding rectification, dealt with above, I cannot agree with the rest of these submissions as the issues around EUA's and the letting of a unit do fall within the “administration of an association”.

[25] Both sides have submitted draft and proposed conduct rules. Save insofar as my order will have an outcome on two provisions in these rules, I will not be dealing with the rest of the content of these proposed rules. The rules still need to be submitted to the CSOS chief ombud for approval.

[26] I visited the building on 27 September 2017 and I am satisfied that this building is not suitable for short-term letting. The entrance to the building is through the garage and, with Unit 2 directly above and overlooking the pool and deck outside Unit, 1 the building is not suitable for a high turnover of occupancy. I agree with the submission by the Respondents that any rental of the Units should be for a minimum of one (1) month.

[27] At the hearing on 3 October 2017 Mr Delpont handed in a set of photographs clearly depicting a lot of activity of people arriving and walking through the garage area where the Respondents' cars and motorcycles are parked. The vehicles obviously attract a lot of attention.

[28] The Applicant has also allowed Unit 1 to be used for film shoots which has led to increased activity during such use. In my view, the building is definitely not designed for this type of use.

[29] The relevant parts of prescribed management rule (PMR) 30 and 30(f) read as follows:

“The body corporate must take all reasonable steps to ensure that a member or any other occupier of a section or exclusive use area does not -

(f) subject to the provisions of section 13(1)(g) of the Act, use a section ... for a purpose other than for its intended use as -

(i) shown expressly or by implication on a registered sectional plan or an approved building plan;

(ii) can reasonably be inferred from the provisions of the applicable town planning by-laws or the rules of the body corporate; or

(iii) is obvious from its construction, layout and available amenities.”

[30] The municipal zoning for this area is general residential zone 2 (GR2). Unit 1 will therefore not be permitted to be used for short-term letting and, in any event, not without approval by the City of Cape Town (See: <http://hometimes.co.za/2017/09/airbnb-is-not-automatically-permitted-in-cape-town-apartments/> (last visited 4 November 2017)). No such approval has been provided.

[31] Mr Delpont has provided lengthy submissions regarding municipal bye-laws dealing with the use of premises, but I do not need to repeat these for the purposes of this order.

[32] Mr Delpont, for the Respondents, provided me with a proposal for the granting of an EUA as part of Section GA1 to Unit 2 (see Annexure “A” attached).

[33] In my view, and having inspected the property, Unit 2 should have an EUA as part of Section GA1, but not to the extent as proposed by Mr Delpont. What I am prepared to

grant is the portion that runs from the air conditioner units to the front of the property on Camps Bay Drive but only the section that runs in a direct line from the edge of the building to the road (see Annexure "B" attached). The new section is marked as Section GA2.

[34] The Respondents own small dogs and Section GA2 will allow them to take the dogs out to this area without having to go through the garage and onto Camps Bay Drive, especially late at night or during bad weather.

[35] While the existing spa might now be in Section GA2, the Respondents can either take it over or have it relocated.

[36] Fortunately the parties have, in the interim, appointed an Executive Managing Agent to perform the functions and exercise the powers of trustees. This will make the running of the body corporate a lot easier.

[37] Any remaining issues can be dealt with by the Executive Managing Agent and should they not be able to be resolved a new application on any of those issues will have to be launched, which I hope will not be necessary.

[38] In terms of section 54(5) of the CSOS Act the adjudicator's order may provide that the order has the effect of any type of resolution or decision provided for in the scheme governance documentation.

[39] I accordingly make the following orders with the effect of a resolution, where necessary:

- a. Unit 1 is granted exclusive use rights over the amended Section GA1 as depicted on Annexure "B" attached;
- b. Unit 2 is granted exclusive use rights over Section GA2 as depicted on Annexure "B" attached;
- c. Unit 2 is granted exclusive use rights over the patio section and pool on the second floor;
- d. The Executive Managing Agent must take all the necessary steps to comply with section 10(8) of the STSMA to provide for Section GA1 and Section GA2;
- e. The Executive Managing Agent must determine the additional contributions due in terms section 3(1)(c) of the STSMA for the rights to the exclusive use;

f. Letting of a Unit in the scheme is not permitted for a rental period of less than one (1) month and this order will come into effect as from 1 December 2017;

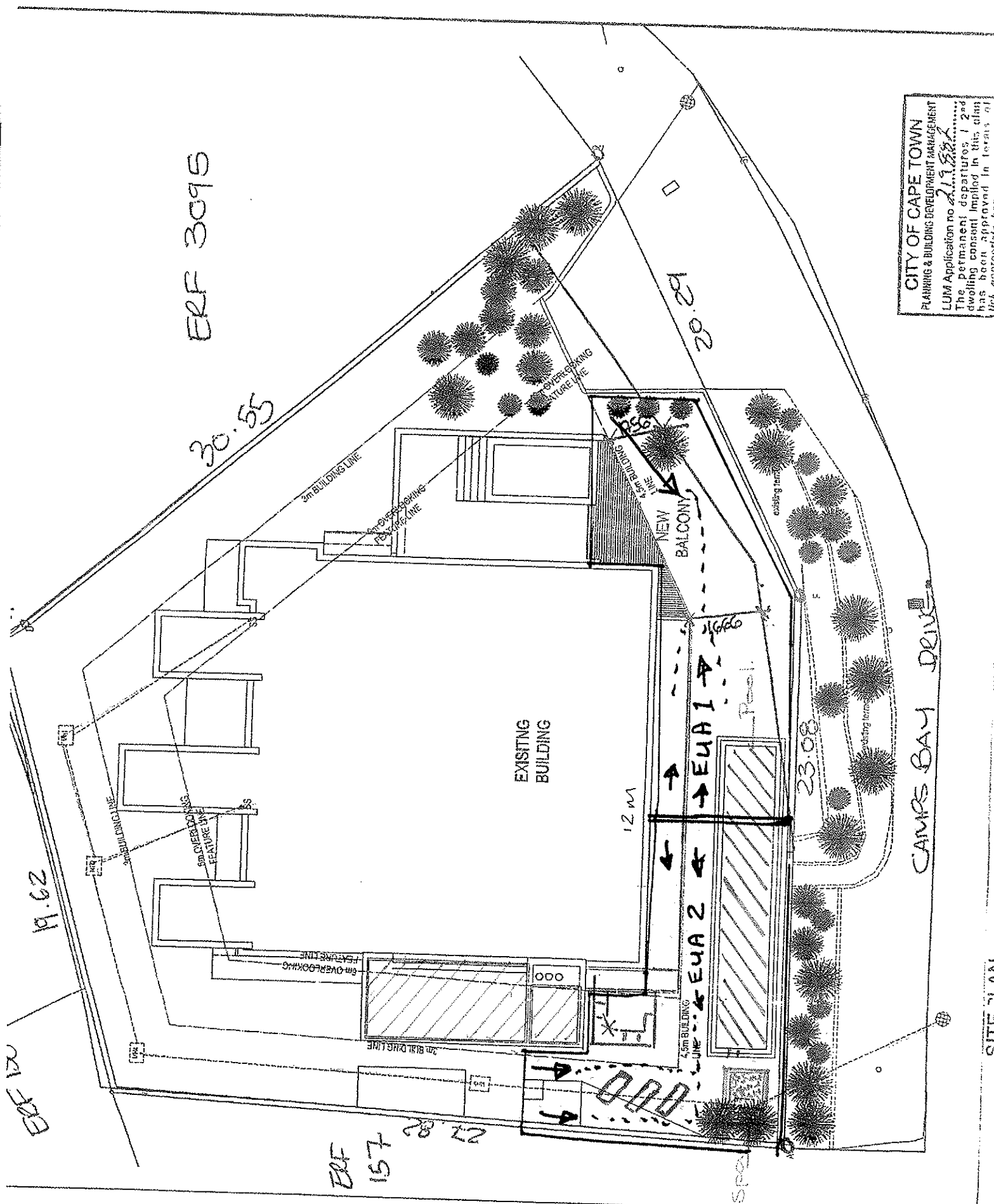
g. The Executive Managing Agent must take all the necessary steps to draft management and conduct rules and to have them approved by the chief ombud as soon as is possible;

h. I make no order as to the costs of the application or counterclaim and each party will bear their own costs in this regard.

[40] In terms of section 57 of the Community Schemes Ombud Service Act (Act 9 of 2011) a person who is dissatisfied with an adjudicator's order is entitled to appeal to the High Court, but only on a question of law. The appeal must be lodged within 30 days after delivery of the order.

Signed at Cape Town on the 7th day of November 2017.

ANN. "A".



24A-2

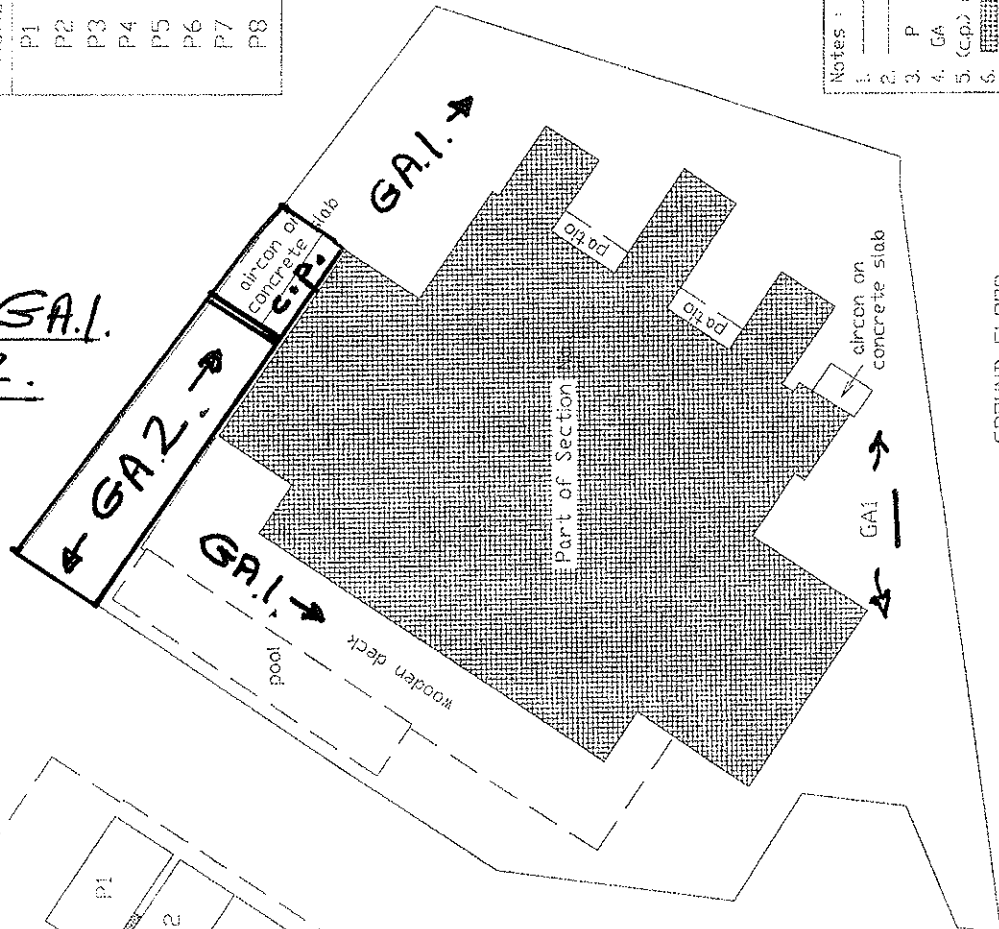
ANN. "B"

THE VICTORY

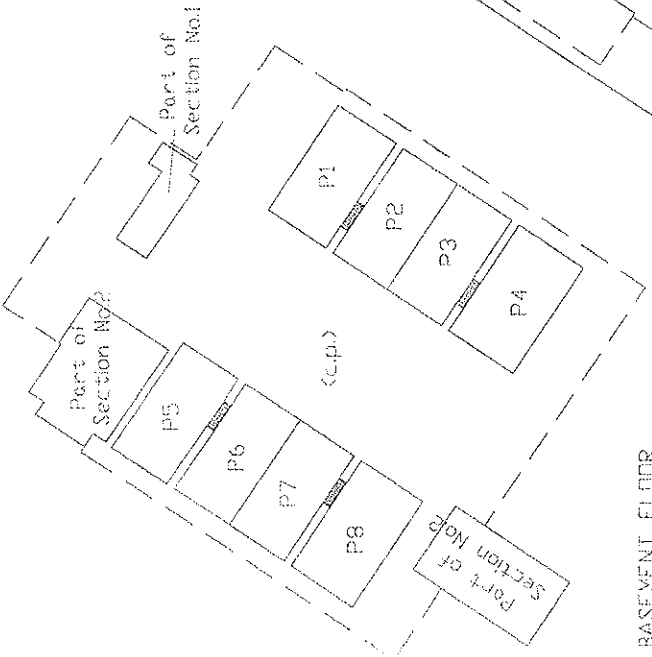
PLAN SHOWING EXCLUSIVE USE AREAS IN TERMS OF SECTION 27 (A) OF THE SECTIONAL TITLES ACT

PARKING NUMBER	SECTION NUMBER	GARDEN NUMBER	SECTION NUMBER
P1	1	GA1	1
P2	1		
P3	1		
P4	2		
P5	2		
P6	2		
P7	2		
P8	2		

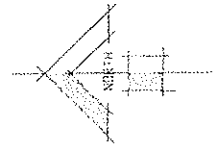
AMENDED GA.1.
NEW GA.2.



GROUND FLOOR



BASE/ELEV FLOOR



- Notes :
1. denotes parking
 2. denotes boundary line
 3. P denotes parking number
 4. GA denotes garden area
 5. (c.p.) denotes common property
 6. denotes building
 7. denotes column

Date: 16 March 2007
Scale: 1/200
Ref: L9273 (SEC27A)