

**FILING SHEET FOR EASTERN CAPE JUDGMENTS**

ECJ NO: **189**

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION)**

**PARTIES: THE BODY CORPORATE OF ALGOA HOF  
AND 13 OTHERS**

**Appellants**

And

**ESTELL MANDY SCHEEPERS**

**Respondent**

REFERENCE NUMBERS -

- Registrar: **CA 303/2006**

DATE HEARD:           **24 AUGUST 2007**

DATE DELIVERED:   **17 SEPTEMBER 2007**

JUDGE(S):       **SANDI J  
DAWOOD AJ**

LEGAL REPRESENTATIVES -

*Appearances:*

- for the Appellant:    Adv. **Mullins**
- for the Respondent:   No appearance

*Instructing attorneys:*

- Appellant:       **Netteltons**
- Respondent:     **Pierrie Kitchins Attorneys**

**SUMMARY:** Sectional title scheme – established for residential purposes only – conversion of sectional title unit from residential to business – consent of all the owners not obtained in order to convert unit as required by section 44 (1)(g) of the Sectional Titles Act 95 of 1986 – an application to the magistrate to convert the residential unit to business was granted - on appeal the magistrate’s decision was reversed.

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION**

**CASE NO: CA 303/2006**

In the matter between:

<b>MR. BONTHUYS</b>	1 <sup>ST</sup> Appellant
<b>MS. U KOCK</b>	2 <sup>ND</sup> Appellant
<b>MR. W. DU PREEZ</b>	3 <sup>RD</sup> Appellant
<b>MR. C. MINNAAR</b>	4 <sup>TH</sup> Appellant
<b>MR. J. VAN JAARVELD</b>	5 <sup>TH</sup> Appellant
<b>MR. C. ALBERTS</b>	6 <sup>TH</sup> Appellant
<b>MRS. M. JANSE VAN RANSBURG</b>	7 <sup>TH</sup> Appellant
<b>MR. &amp; MRS. JONCK</b>	8 <sup>TH</sup> Appellant
<b>MR. N. C VAN NIEKERK</b>	9 <sup>TH</sup> Appellant
<b>MS. L. REILLY</b>	10 <sup>TH</sup> Appellant
<b>MR. J. SMITH</b>	11 <sup>TH</sup> Appellant
<b>MS. Z. K. MTULU</b>	12 <sup>TH</sup> Appellant
<b>MS. K. BENICE</b>	13 <sup>TH</sup> Appellant
<b>THE BODY CORPORATE OF ALGOA HOF C/O TRAFALGAR</b>	14 <sup>TH</sup> Appellant

And

<b>ESTELLE MANDY SCHEEPERS</b>	Respondent
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**JUDGMENT**

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**SANDI J:**

- [1] This is an appeal against the judgment and order of the magistrate of Port Elizabeth in which he granted the respondent an order in terms of the provisions of section 44 (2)(b) of the Sectional Titles Act 95 of 1986. The magistrate's order permitted the respondent to run a hairdressing salon in her residential unit. In terms of the magistrate's order the applicants were also ordered to pay the costs of the application. It is against this order that the appeal lies.
- [2] Though the respondent has given notice of her intention to oppose the appeal, she subsequently filed a notice advising that she will abide the decision of this court.
- [3] The respondent is the owner of sectional title unit number 4 situated at Algoa Hof, Port Elizabeth. The said unit is part of a sectional title scheme ('the scheme) comprised of 33 units which are used for residential purposes only.
- [4] The appellants are the remainder of the owners of the units situated on the scheme ('the scheme), who have refused to give the respondent consent to run her hairdressing salon ("the business") in her residential unit.
- [5] Initially the respondent was employed by a hairdressing salon which was situated outside of the scheme. That hairdressing salon experienced financial difficulties which resulted in the respondent

losing her job. In consequence thereof she experienced financial difficulties; she could not pay her mortgage bond in relation to her unit and other charges levied by the body corporate of the scheme, and she struggled to maintain her 4-year-old child.

[6] Intending to run her business in her residential unit she solicited the consent of the chairperson of the body corporate who advised her that he and the other trustees of the body corporate had no objection to her running her business as part of her unit.

[7] Thereafter the respondent renovated the braai area of her unit to a salon; she created an entrance separate to the main entrance used by other unit owners. Such entrance was created by her for use by her patrons. She also installed a separate water meter for her unit. She said that her business would not impact on the other units. According to her patrons would park their vehicles in the street and proceed to enter her unit through the separate entrance she created.

[8] She then ran her business from her unit as described above.

[9] In early November 2005 the body corporate informed her to discontinue her business. Thereafter she sought the consent of all the individual unit owners to continue to run her business. Out of 33 unit owners only 18 of them gave their consent to her. As a result of the

objections received she launched an application in the magistrate's court and was granted the relief which is the subject of this appeal.

[10] It is common cause that the residential units of the sectional title scheme were designed and intended for residential purposes only, and that the consent of all the unit owners was not sought and obtained by the respondent before she undertook the renovations and before she started to run her business.

[11] Section 44 of the Act provides that:

"(1) An owner shall –  
(g) When the purpose for which a section is intended to be used is shown expressly or by implication on or by a registered sectional plan, not use nor permit such section to be used for any purpose: Provided that with the written consent of all the owners such section may be used for another purpose."

[12] Such consent as is required by section 44 (1)(g) of the Act was not obtained before the respondent established her hairdressing salon. When such consent was sought the respondent was already running her business.

[13] For this reason alone the application brought before the magistrate should have failed. She changed the use of her unit to something other than that for which the scheme was established without the consent of all the owners of the units in the said scheme.

- [14] In granting the order sought by the respondent the magistrate exercised his discretion as set out in s 44 (2)(b) of the Act and came to the conclusion that the refusal in question was “unfairly prejudicial, unjust or inequitable” to the respondent.
- [15] In *Cujê- Jakoby and Another v Kaschub and another 2007 (3) SA 345 (C) at para 10* Traverso DJP held that “the word unfairly ... should be taken to mean unreasonably.” I agree with the interpretation of Traverso DJP in this regard. The prejudice suffered by the other owners far outweighs the prejudice that may be suffered by the respondent in this case. There is a good reason why the present scheme was established for residential purposes only. The unit owners acquired the units with this in mind. They were satisfied that the units would afford them the peace and tranquility associated with a scheme of this nature. The body corporate is in control of the main entrance to the premises but not that created by the respondent. The security of the unit owners is of paramount importance and, among other things, the scheme was established for that purpose in mind. The separate entrance created by the respondent compromises the security of the owners. It impacts on the other unit owners and there is no evidence at least to show that the respondent’s business will add value to the other units. On the contrary, the evidence suggests that the other unit owners will be affected adversely by the respondent’s business.

[16] The respondent's personal circumstances do not justify a departure from the established scheme.

[17] In my view the magistrate misdirected himself by attaching too much weight to the personal circumstances of the respondent to the exclusion of the interests of the unit owners who acquired their units for residential purposes only.

[18] In these circumstances I am satisfied that the appeal should succeed. On the question of costs, the appellants were obliged to approach this court to seek an order setting aside the magistrate's judgment and order. Though the respondent abides the decision of the court, she has not withdrawn her opposition to the appeal. S 86 of the Magistrates' Court Act 32 of 1944 makes provision for the abandonment of a judgment. The respondent has not done so. In my view the costs of the appeal should follow the result.

[19] In the result I make the following order:

- (a) The appeal is allowed with costs.
- (b) The magistrate's order is set aside and replaced with the following:

"The application is dismissed with costs."

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**B. SANDI**  
**JUDGE OF THE HIGH COURT**

I agree.

**DAWOOD J**

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**F. DAWOOD**  
**ACTING JUDGE OF THE HIGH COURT**