An agreement of sale which described the merx as “SECTIONAL TITLE UNIT 12 MINI UNITS NORTHLANDS DECO PARK, measuring approximately 750m² and more fully indicated on the draft diagram attached hereto”, held to be valid where no draft diagram was attached, since the building concerned existed at the time and the unit was identifiable without recourse to the parties’ negotiations and consensus. The word *and* in the description indicated that the diagram constituted an extra description which could be dispensed with.

Naude vs Schutte 1983 (4) SA 74 (T) and *Den Dunnen vs Kreder* 1985 (3) SA 166 (T) distinguished.

The participation quota of the unit would in terms of section 32 (2) of Act 95 of 1986 be determined by the seller without recourse to the buyer, and would therefore be determined without recourse to the parties’ negotiations and consensus; accordingly agreement valid.

The unit and participation quota together did not amount to an “erf” for the purposes of section 67 (1) (a) of the Town – Planning and Township Ordinance 15 of 1986 (Gauteng).

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

CASE N0: 06/9104

In the matter between:

ERF 441 ROBERTSVILLE PROPERTY CC	First Applicant
TEITGE, ANN	Second Applicant

and

NEW MARKET DEVELOPMENTS (PTY) LIMITED	Respondent

JUDGMENT

GOLDSTEIN J:

[1] The applicants apply for a declaration that the agreement of sale concluded between them and the respondent on 5 November 2004 is valid and binding. Clause 1 of that agreement describes the merx as follows:

"SECTIONAL TITLE UNIT 12 MINI UNITS NORTHLANDS DECO PARK, measuring approximately 750m² and more fully indicated on the draft diagram attached hereto".

No draft diagram was attached to the deed of sale.

[2] Mr Den Hartog, who appeared for the respondent, contended that the contract of sale relied upon was void because of non–compliance with section 1(1) of Act 71 of 1969, since the description of the property sold failed to comply with the provisions of that section requiring the contract I am concerned with to be in writing. Counsel also argued that the agreement falls foul of the provisions of section 67(1)(a) of the Town–Planning and Townships Ordinance 15 of 1986 (Gauteng) ("the Ordinance"), which provides that, after an owner of land has taken steps to establish a township on his land, "no person shall… enter into any contract for the sale ... of an erf in the township …" I accept that the present sale occurred after steps had been taken by the owner of the land to establish a township on the land.

[3] In regard to the first point taken by the respondent, Mr Den Hartog referred me to the Sectional Titles Act 95 of 1986 (as amended) ("the Act"), and especially to the definition of "participation quota" in section 1. The term is defined "in relation to a section or the owner of a section" to mean "the percentage determined in accordance with the provisions of section 32 (1) or (2) in respect of that section for the purposes referred to in section 32 (3), and shown on a sectional plan in accordance with the provisions of section 5 (3)g". Section 32 (1) refers to "a scheme for residential purposes only…", and section 32 (2) provides for "a scheme other than a scheme referred to in subsection (1)". In such a case section

32 (2) provides that “the participation quota of a section shall be a percentage expressed to four decimal places, as determined by the developer …” There are a number of provisos which need not detain me. Section 32 (3) (b) provides that the quota of a section determines “the undivided share in the common property of the owner of the section..” “Common property” is defined in section 1 to mean “the land included in the scheme”, “such parts of the building as are not included in a section” and certain other land which does not concern this matter. The developer referred to in section 32 (2) is the seller in *casu,* which is, of course, the respondent.

[4] At the stage when the agreement of sale was concluded the building had been erected and, in fact soon after its conclusion, the applicants occupied the section they had purchased. It follows that the 750m² unit reflected in the agreement as the merx could be identified without recourse to evidence from the parties as to their negotiations and consensus, thus satisfying the requirements laid down in *Clements vs Simpson* 1971 (3) SA 1 (A) at 7F–G. It is important in this regard to note that the reference to a draft diagram in the agreement is introduced by the word “*and* more fully indicated” (my emphasis). These words are not essential to the description of the property sold; put otherwise: the property sold could be identified without recourse to the diagram, which was not attached, and therefore not included in the agreement of sale.

[5] In regard to the participation quota, section 32 (2) provides that this was to be fixed by the respondent; it would do so in terms of the section without further reference to the applicants, and accordingly, the test laid down in *Clements* to which I have referred is satisfied. It is significant in this regard that the merx is described as a "sectional title unit", indicating that it was to be governed by the Act bearing that name, and dealing with the law relating to a "unit".

[6] The cases relied on by Mr den Hartog of *Naude vs Schutte* 1983 (4) SA 74 (T) and *Den Dunnen vs Kreder* 1985 (3) SA 166 (T) are distinguishable. In *Naude* the merx was simply described as "Woonstel nr 3 blok dupleks Schutte geleë aan nr 920 Pretoria–Noord in Jack Hindon straat (net oorkant Rachel de Beerstraat)". There appears no mention at all of the act then applicable to sectional title. Grosskopf J (as he then was) said at 78A that it did not appear from the deed of sale that it was the intention of the parties that either the purchaser or the seller would have the right to determine the purchaser's undivided share in the common property as a component of the *res vendita; in casu* such result occurs by the operation of the Act. In *Den Dunnen* the deed of sale referred simply to a unit described on attached plans, which were not attached, and which were not in existence at the date of the sale. These cases must be contrasted with *Phone–A–Copy Worldwide (Pty) Ltd vs Orkin* 1986 (1) SA 729 (A), where the then Appellate Division found valid an agreement of sale of sections of a block of flats giving the flat numbers, together with

"(a)n undivided share in the common property, as defined in the Act (the Sectional Titles Act 66 of 1971) … to be apportioned to the section in accordance with the participation quota (as defined in s24 of the Act) of the section …" since the participation quota would be ascertainable without recourse to evidence of the parties as to their negotiations and consensus – 745C. It follows that the first point made by the respondent must be rejected.

[7] The second point argued on behalf of the respondent depends on the meaning of the word "erf" in section 67 of the Ordinance. This word is said in section 1 to mean "land in an approved township registered in a deeds registry as an erf, plot or stand or as a portion or the remainder of any erf, plot, or stand or land indicated as such on the general plan of an approved township, and it includes any particular portion of land laid out as a township which is not intended for a public place, whether or not such township has been recognized, approved or established as such in terms of this Ordinance or any repealed law.." And in section 1 it is said that "land" "includes any improvement on land and any interest in land …" The term "unit" is defined in the Act to mean "a section together with its undivided share in common property apportioned to that section in accordance with the quota of the section". The term "quota" is stated to mean "in relation to a section or the owner of a section, … the participation quota of the section". And "section" is defined as "a section shown as such on a sectional plan".

[8] The contention for the respondents is that the merx in the agreement constitutes land as defined in the Ordinance, that such land is an erf as intended by the Ordinance, and is thus covered by the provisions of section 67. It seems to me that it can be correctly said of the unit purchased by the applicants that such contains a “particular portion of land”, that is, the 750m² of the unit concerned. However, the agreement does not encompass that area alone, but also the participation quota which was to accompany it. The composite merx so purchased, including as it does an undivided share in the common property, cannot be said to constitute the “particular portion of land” referred to in the definition of “erf”. The Ordinance was signed in Afrikaans and the relevant portion of the definition, consistent with my view, reads “en omvat enige bepaalde gedeelte van grond..” It follows that the agreement was not concluded in contravention of section 67 of the Ordinance.

[9] The applicant asked for costs on the attorney and client scale. The papers reveal that the applicants have paid an amount in access of R600 000 in occupational interest since they took occupation on 1 December 2004, that the respondent is quite prepared to contract afresh with them at a considerably increased purchase price, and that it is accordingly seeking to use its alleged own contravention of the Ordinance, which incidentally, if it occurred, would constitute an offence in terms of section 67(3), for financial gain. In the light of this conduct, it seems to me that the applicants are entitled to a punitive costs order.

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

1. The agreement concluded between the parties on 5 November 2004 is declared valid and binding;
2. The respondent is ordered to pay the applicant's costs on the scale as between attorney and client.

_____

E L GOLDSTEIN

JUDGE OF THE HIGH COURT

For the application:	M van Nieuwenhuizen
Instructed by:	Neels Engelbrecht and Partners
For the respondent:	A P den Hartog
Instructed by:	Jacobs Robbertse Inc
Dates of Hearing:	24, 25 August, 11 September 2006
Date of Judgment:	21 September 2006