SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Not Reportable

CASE NO: 18282/2010

DATE: 24/08/2010

In the matter between:

CARON KATE DELPECH	Applicant
and	
MARGARET HOLLOWAY	First Respondent
HOLLOWAY INVESTMENTS CC	Second Respondent
ZULULAND CRAFT CENTRE LODGE SHARE BLOCK (PTY) LTD	Third Respondent

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J U D G M E N T

SPILG, J:

[1] The applicant purchased from the second respondent, which is a developer, Share Block No. 2 in the third respondent. The Third Respondent is the share block company. In terms of this transaction, and linked to Share

Block no 2, the applicant took cession of the second respondent's right, title and interest in and to a use and occupation agreement. The effect of the transaction was to give the Applicant exclusive title to a piece of land, or unit, on which a chalet was built and non-exclusive use of the common areas within the entire development.

[2] The first respondent is a director of the share block company and together with her husband holds the members interests in the developer. The first respondent is also the managing agent of the share block scheme operated by the third respondent.

[3] In terms of the sale agreement the second respondent undertook to construct a chalet on a specified area of land allocated for this purpose in terms of the use agreement. During October 2007 the applicant was able to take occupation of the chalet. There are in total six units, of which (at the time relevant to these proceedings) only two were developed and acquired from the developer, one by the applicant and the other by the first respondent. The balance of the development and the four remaining Share Blocks it represents remains held by developer.

The applicant paid the full purchase price for the acquisition of the share block and use agreement. In a share block scheme the developer initially holds all the "shares" in the development and divests itself of those blocks of shares allocated to a unit in the development as and when the relevant unit (in this case a chalet) is sold. In this way the person acquiring the share block obtains

effectively full rights of occupation and disposal of the chalet as if that person was the owner together with the common area use rights.

[4] A dispute arose between the applicant and the first respondent with regard to how the levies were to be split. Part of the difficulty is that amounts that may have been owed in respect of the entire share block were sought to be appropriated to the applicant and first respondent in equal shares. This did not necessarily prejudice the first respondent because she and her husband through the second respondent effectively were the developers. A second bone of contention was the attempt by the second respondent to claim, through charges raised by the third respondent and which it split between the applicant and the first respondent, legal expenses incurred in engaging attorneys to deal with the dispute it had with the applicant regarding the proper split of expenses between her and the first and second respondents. The applicant contended that these were amounts were not for her account.

[5] The issue of the basic levies and what amounts ought to be raised appears to have been resolved in terms of a meeting held and which was recorded by the first respondent in a document identified as annexure “JM5”. It reveals that certain amounts (such as for a domestic worker and for cleaning consumables) were to be divided equally between the applicant and the first respondent despite there being a total of six units whereas other amounts (for instance, in relation to garden security) were to be split on the basis of the applicant being liable for a one-sixth share. The final figure identified as a monthly levy in terms of this document is slightly different to

that in fact charged. Nonetheless this document does establish the principle that, as between the applicant, the second respondent and the third respondent, there was an acknowledgement that certain expenditure was incurred only in respect of the two completed chalets to which the applicant and the first respondent had rights whereas other expenditure was split by reference to the total area of the development and for which the applicant was only liable for a one-sixth portion.

[6] The dispute with regard to certain special levies and other amounts charged from time to time is evidence from the documents. It is apparent that these are genuine disputes between the parties and that the amount that is alleged to be outstanding relates to these disputes rather than to a failure by the applicant to make payment of levies in the ordinary course. This appears from Annexure “RA1” which basically sets out the levies paid by the applicant and compares it (in the second column) to the levies raised and invoiced by the third respondent with a final column reflecting the difference between the two amounts. The difference between the two amounts is attributed to legal costs in the main. There is also a claim for what is referred to as an accommodation bill from 14 December to 5 January of R24 960. This is supposed to reflect the continued occupation by the applicant of the unit despite what is said by the respondents to be an entitlement to preclude the applicant from occupying by reason of the alleged default. This figure is significant when considering the steps taken by the respondents (which are said to have been steps they were entitled to take) in the disposal of the applicant’s right, title and interest to her members interest in the share block.

Finally there are amounts that were simply raised by the third respondent in relation to a special levy loss of some R5 900. The applicant contends that the loss was not due or payable as there had been no resolution or meeting formalising this as between those entitled to attend.

It is significant, in relation to the accumulated loss incurred and to which the purported special levy was raised, that the respondents (and for present purposes it is unnecessary to split the identity of the respondents since effectively they had been controlled by the Holloways) split the total amount equally between the two share block owners rather than a 1/6th split in relation to the total units that comprised the share block scheme.

As a result of the alleged default by the applicant of her obligations to make payment in respect of the levy contributions and the other amounts that were raised as raised, the third respondent purported to exercise its rights under the use agreement.

Clause 11.1 of the use agreement entitles the third respondent to hold a lien over each member's share block in respect of unpaid levies and other amounts due by that member. During the latter part of 2009 the third respondent purported to cancel the use agreement and to repossess the applicant's share block. Moreover, it then purported to dispose of this interest by taking back the share block and effectively disposing of it to the Holloways for a consideration of under R250 000,00 despite the original purchase price being nearly double that amount.

Aside from claiming to have bought back the share block, it appears that the share block was then disposed of on the basis that it could only be sold to another share block member. Although a share block scheme adopts many of the provisions of the Companies Act, ordinarily it certainly does not envisage that an existing member must be given a first or even exclusive option to acquire another share block for purposes of occupation. Share blocks are sold on the open market and there is no impediment unless the memorandum and articles of association specifically limit the right of on-sale. Without such a document being produced by the respondents indicating that this is indeed the case I will assume that, on an ordinary application of share block structures, the share block could have been disposed of to any interested outsider. In my view this matter can be readily disposed of on the basis that the third respondent sought to exercise a right of *parate executi* in circumstances where a genuine and *bona fide* dispute had been raised well before the third respondent purported to exercise its alleged rights. Moreover, it is offensive for the third respondent to take in the shares and then dispose of them to its controlling mind without any attempt to offer it on the open market. The mere fact that a valuation is in existence cannot take the matter further. The potential prejudice of allowing such a process to occur far outweighs the production of a valuation. In these circumstances it is for the market to determine the amount that is fair rather than a document produced by a valuator.

[7] The leading case on *parate execute,* although it is in relation to a pledge as opposed to a lien, is *Bock and Others v Duburoro Investments*

(Pty) Ltd 2004 (2) SA 242 (SCA). While the court recognised that *parate execute* may not be unconstitutional and that a *pactum commissorium* is enforceable in the context of a pledge, what is apparent is that due legal process is required where there is a *bona fide* dispute prior to the exercise of an alleged right to dispose of property. In the present case the third respondent held no more than a lien . A lien is simply security for a debt and does not afford a right to execute. This distinguishes it from a pledge. In this regard I refer to *S A Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 at para [7] which dealt with the decision in the court *a quo* where I had indicated that since security is accessory to the main debt it follows that, until the existence of a disputed underlying obligation is resolved by a court, the security cannot be realised. In such a case the cessionary who executes *parate executi* prior to such determination takes the law into its own hands. *Bock* affirms the principle that where an amount is in dispute then, certainly in relation to a lien which is no more than security, the holder of the security cannot then execute upon it without more.

I have already indicated that the applicant had raised a *bona fide* dispute, regarding the amounts that may be levied or otherwise charged, prior to the purported exercise of the rights afforded to the third respondent under the lien. While it is correct that under the use agreement the third respondent is entitled to preclude rights of access for as long as levies remain unpaid, in the present case there are unresolved genuine disputes on the papers. At best there is a need for a formal resolution in terms of which not more than one-sixth of the loss for a particular financial year is to be borne by the applicant.

That process does not appear to have been properly implemented let alone any determination that the applicant's obligation is not limited to one-sixth of the total loss.

For this reason too the third respondent cannot at this stage enforce the entitlement under the use agreement to preclude the applicant from gaining access to the chalet. The third respondent will have to adopt the proper process. If a court rejects the applicant's defences then the third respondent would be entitled to exercise its rights. At this stage it is premature.

CONCLUSION

[8] It ought to be evident that the purported exercise of the lien, the cancellation, the ejectment and repurchase of the share block as well as the restriction of access to the applicant are all incompetent. The relief sought by the applicant was to declare that the exercise of these rights by the various respondents was not legally competent.

I accordingly grant the following prayers sought in the Notice of Motion dated 8 June 2010:

1. Directing and ordering the respondents to restore vacant possession of the chalet to the applicant.

2. Declaring the applicant to be the owner of Share Block No. 2 in the third respondent.

3. Declaring that the use and occupation agreement entered into in respect of the property has been ceded by the second respondent to the applicant and remains valid, binding and of full force and effect.

4. Preventing, restraining and interdicting the respondent from making use of the property and/or letting and hiring the property out save with the express consent of the applicant and otherwise in terms of the use and occupation agreement.

5. Ordering that the costs of this application be paid jointly and severally, the one paying the other to be absolved, by the first, second and the third respondent *save* that the third respondent may not look to the applicant for any portion of such amount for which it is liable.

I accordingly grant orders in terms of prayers 1, 2, 3, 4 and 6 as amended of the Notice of Motion of 8 June 2010.

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B SPILG
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

DATE OF JUDGMENT: 24 August 2010

FOR APPLICANT: Adv Greg Porteous

	Barry Sim Attorneys
FOR RESPONDENT:	Adv Nigel Riley
	J. Mothobi Incorporated