NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 3311/09

In the matter between

LEON PIERRE ERASMUS N.O.	First Plaintiff
CRAIG TODD DE LANGE N.O.	Second Plaintiff
and	
ANDRE BLOM	First Defendant
SESHA HOMES PROJECT MANAGEMENT (PTY) LTD	Second Defendant
KROMME HOME OWNERS ASSOCIATION	Third Defendant

JUDGMENT

REVELAS J

[1] The plaintiffs, in their capacities as trustees of the Bachelor Family Trust ("the Trust"), instituted an action for, *inter alia*, damages in the amount of R1 200 000.00, representing the decrease in value of the Trust's property, caused by the first defendant having built his house infront of the property owned by the Trust and therefore compromising its view of the scenic Kromme River. In the alternative, the plaintiffs seek an order compelling the first defendant to demolish the house.

[2] At the onset of the proceedings an order was made

accordance with Rule 33(4) of the Rules of Court, in terms whereof the merits were separated from the question of damages, or the alternative remedy of demolition.

[3] The real issue between the parties pertains to an agreement between the first defendant and the first plaintiff as to the height of the first defendant's roof and my determination in this matter depended largely on making a finding as to what height was agreed upon before the defendant started building his house.

[4] The properties in question are situated in the Candlewood Development ("Candlewood") situated on the Kromme River. The Trust bought its property, which is not a riverfront plot for R1 150 000.00 on 10 April 2006. The first defendant bought his property which is a riverfront plot opposite the Trust's plot, for R2 000 000.00 (2 million rand) on 28 April 2007. The riverfront plots are for obvious reasons more expensive than the other plots. Both parties built houses on their respective properties, and these houses adhered to the general requirement applicable to all houses in Candlewoods, namely that their walls must be plastered and painted white and their roofs must be black.

[5] At some stage during the cross-examination of the plaintiff, an inspection in *loco* was held at Candlewoods and both houses in question were visited. The following observations were made:

[6] The first plaintiff is the main occupant of the Trust's property, which he primarily inhabits as a holiday or week-end home. In front of his house, a timber pool deck had been constructed and at substantial expense, large plants and established trees were planted around the deck. According to the first plaintiff, his instant garden was initially established as a necessity to diminish the sound of the

traffic travelling along the bridge crossing the river.

[7] The vegetation of the instant garden is planted across approximately two thirds of the deck (situated on the westerly corner of the deck from east to west). From the master bedroom and the entertainment area in the house, the first plaintiff's view of the river is obscured by the roof of the first defendant's house immediately to the north of the deck. The first plaintiff's view of the river directly in front of the pool deck is partly obscured by the thick vegetation of his instant garden. To the left (west) looking at the first defendant's house from the first plaintiff's house, if one is standing on the deck facing north, one has an unrestricted view of the river and surrounding area.

[8] The bridge is situated to the right (or east) as one faces the river looking north from the first plaintiff's pool deck. The first plaintiff testified that the dense vegetation of the instant garden was later increased around part of the deck, as it became necessary to block out his view of the first defendant's house, where it obscured his view of the river from the pool deck. The first plaintiff's timber pool deck runs from east to west along the north side of the residence. The pool is approximately 1.3 metres deep.

[9] Standing on the first plaintiff's pool deck, looking straight at the defendant's house, a very small portion of the river is visible above and behind the pitch of the roof. The first defendant's property is situated on a slope with its northern boundary lying approximately three metres from the Kromme River in a so-called green belt area.

[10] The first defendant built a two-storey house on his property. However, and this is very important, the lower level of his house is

below street level. Standing on the first plaintiff's pool deck and below on the road which separates the two properties, the first defendant's house has the outward appearance of an average single storey house.

[11] The road between the two houses is approximately 1.2 metres higher than the floor level of the first defendant's garage. The first plaintiff's house is a dormitory house, which is higher than a single storey house, but is not quite a double-storey house. The access path to the first defendant's house from where one would turn out of the road into his property is short, and also runs along a downward slope. Therefore the floor level of the first defendant's house is lower than the road.

[12] Because the first defendant's building plans for a double storey house had to be approved by the Executive Committee of the Candlewoods Home Owner's Association ("the Association") of which the two plaintiffs were members, it stands to reason that the first defendant would have had to come to an agreement especially with the first plaintiff, as to the height of his house, because it would be the latter's view that was at stake. According to the first plaintiff, he "had no problem" and was "happy" with the first defendant building a double storey as long as his view would not be impaired. Naturally, the plaintiffs ought to have appreciated that at some stage someone was going to build a house, and not a bunker, on the riverfront plot in front of them.

[13] It is common cause that the two men went through an actual physical exercise, with the first plaintiff standing on his pool deck looking at the first defendant who was holding a pole in a vertical position with the purpose of satisfying the first plaintiff as to the height of the first defendant's roof. The first plaintiff did not

concede that the pole held out by the first defendant was drawn out to its full length of five metres on the day in question, as was the case on the day the inspection *in loco* was held.

[14] It is also common cause that the two of them indeed reached an agreement as to roof height with reference to the pole. The height however is in dispute because the two individuals gave different versions as to where exactly the first defendant stood with the pole when the first plaintiff intimated his satisfaction with the roof height. That would have been the point at which the two parties reached agreement.

[15] Their agreement was unfortunately not reduced to writing, nor was the agreed height recorded on the building plans. At that stage it was an invisible spot in the sky above the river. Finding that exact spot later, after building operations on the first defendant's property had commenced and reached roof height, would depend on both parties recall of that very spot. I asked the first plaintiff why, at that early stage, did he and the first defendant not mark the spot they agreed upon with some fixture. He answered that the topography did not permit that, that and some temporary vertical structure would have been too costly.

[16] The plaintiffs contend that the first defendant breached the relevant terms of the Candlewoods Constitution and Building Regulations. These require some discussion.

[17] The standard agreement of sale between the first and second defendants in terms whereof the first defendant bought his riverfront property was attached to the plaintiffs' particulars of claim. The agreement of sale prescribes automatic and compulsory membership of the Candlewoods Home Owners' Association for each

home owner. Thus, in their capacities, as property purchasers in Candlewoods, both plaintiffs and the first defendant became members of the Association. The significance hereof was alluded to above.

[18] The process of the overall management of Candlewoods is regulated by its Constitution and the Candlewoods Building Regulations. These documents are annexures to the standard agreement of sale aforesaid, and formed part of the pleadings and evidence in this matter.

[19] The provisions of the Constitution and Building Regulations which are relevant to the litigation at hand are the following:

[20] According the Candlewoods Constitution, all building plans and the positioning of houses are to be approved by the Executive Committee (Exco) of the Association "Members having followed Building Regulations. Drawings/designs are to be submitted to the Exco for approval prior to submitting to the Kouga Municipality". Only in exceptional circumstances, with the approval of Exco obtained by a written request, may the Building Regulations be deviated from. It is common cause that the first defendant's house plans were accordingly signed off, also by the first plaintiff.

[21] Under the heading "House Positions", Clause 2.1.1 of the Building Regulations provides that the positioning of houses were subject to consultation with the Exco or its appointed architect, "[t]he purpose being to maximize the river views for all members". The first plaintiff stressed the significance of this clause to place another relevant clause of the Building Regulations in perspective with regard to their claim. This other relevant clause in the Candlewoods Building Regulations is Clause 2.2.3, which provides

that riverfront stands 1, 2, 3 and 4 (the first defendant bought stand 3) "will be subjected to **height restrictions** from the Natural Ground level to be specified at a later date. Due to the topography dormer storeys will be permitted within the roof space on these stands **notwithstanding the envisaged height restrictions**. I.e. the purchaser is not restricted to a single storey" (Emphasis added).

[22] In the terms of the Building Regulations referred to herein, the first defendant's house was subject to height restrictions because he bought a riverfront erf. He was entitled to build a dormitory or dormer house, which is virtually a double storey house. He however, by way of substantial excavations, managed to build a double-storey house which from the first plaintiff's physical point of view (from his house) has the appearance of a single storey house. The plaintiffs argued that its roof should have been lower permitting a greater view of the river above the roof.

[23] During the inspection *in loco* the first plaintiff and the first defendant pointed out two different areas on the properties as being the position where the first defendant stood when they agreed on how high his roof would be. The first defendant stood infront of his garage (floor level) holding a pole, which at that stage was drawn out so that it was five metres long. Holding it upwards with its one end on the ground (floor level), the pitch of the first defendant's roof was measured to be 4.60 metres from the floor. The first defendant alleged that he stood at the very same point when he and the first plaintiff had a site meeting and agreed upon where the highest point of his roof would be before the building plans were signed off.

[24] There is a distance of approximately 2.9 metres between the road level and the ground level of the defendant's house. The floor

level of the first defendant's house is 1.2 metres below the road level. The first plaintiff disputed that the first defendant stood at such a low point (in front of his garage) when they agreed on the height of the roof. According to him, the latter stood on the higher verge at the relevant time. In other words, the first defendant stood on the road level which is 1.2 metres higher than the floor level of his garage.

[25] During the inspection *in loco*, the first defendant stood on the verge alleged by the first plaintiff to have been the point where he stood, when they came to an agreement on the height of the roof. This time, the length of the part of the pole above the roof was measured at 1.9 metres.

[26] The first defendant argued that the plaintiffs were estopped from relying on a previous agreement by virtue of the fact that the first plaintiff and Mr Lillford, also a home owner in Candlewoods and Exco Member, affixed their signatures to the building plans in question, thus expressing their approval of the roof pitch height.

[27] On the first plaintiff's version, the roof height at present is almost two metres higher than what was agreed upon. Because the most material term (the height) of their agreement was not recorded I asked the first plaintiff, with reference to the portion of the river which was visible just above the first defendant's roof, what percentage of the river he would have liked to see. The question was posed with the understanding that it was accepted by all parties that the first defendant was not to obliged to build a house which was almost invisible from the first plaintiff pool deck. The first plaintiff indicated that when he and the first defendant came to an agreement, he could see half of the river, in other words, the middle of the river. How much of the river would be

visible above the roof would of course depend on the tides.

[28] Mr Lillford, whose house is built beyond and above the first plaintiff's house testified on behalf of the plaintiffs. He said that when the first defendant's house was in the process of being built, he visited the site and had a general conversation with the first defendant about the progress of the building. During the course of their conversation the first defendant had pointed out to him how high the roof would be on completion. He said that the roof height pointed out to him was two metres lower than its present height.

[29] Mr Lillford however, expressly stated that he had no personal interest in the height of the first defendant's roof and did not visit the site to find out how high the roof would be. He simply recalled what was pointed out to him some time ago. He made no measurements. There is no reason to reject his evidence on the basis of credibility, but Mr Lillford's *ex post facto* estimate of the height shown to him is patently not accurate.

[30] The plaintiffs' argument is simple. They maintain that the first plaintiff would not have signed the plans if he was not persuaded by the first defendant on the day of their site meeting, that the roof height would be to his satisfaction. According to him, the pole held by the first defendant on their one site meeting to indicate the height, was adapted to the height which satisfied him. He did not enquire nor was he told what the height was, but it was adjusted to the height which he was informed was the intended height of the roof and he was satisfied. In their pleadings the plaintiffs contend that the first defendant had misled the first plaintiff. On this testimony, the implied accusation is that the first defendant did not draw out the pole, also called a theodolite, to its full 5 metre capacity.

[31] The plaintiffs submitted that I should draw an adverse inference against the first defendant because he failed to call the architect who was also present at the site meeting. In addition they argued that Mr Lillford's evidence that the current roof height was 2 metres higher than pointed out to him at an earlier stage, supported the first plaintiff's version. Here it must be stressed that on the evidence presented by both parties, neither the architect, nor Mr Lillford assisted the first plaintiff and the first defendant with their measurements to reach an agreed roof height at that first and only site meeting which was scheduled with the sole purpose of establishing an agreed roof height.

[32] There was also evidence that the plans of the house were amended at some stage. This did not have any impact on the question I have to resolve and did not support the existence of the most material term in the agreement, as alleged by the first plaintiff.

[33] The plaintiffs bear the onus to prove the material term referred to in this case. The first defendant complied with all the necessary requirements before he built the house on his riverfront erf. Only if I find that the first defendant had lied about where he stood when he held the pole on that very important day, can I find for the plaintiffs. On the evidence presented, nothing emerged which could persuade me that he had lied about where he stood or that he did not draw out the theodolite to its full five metres when they had the site meeting. If the roof pitch of the house was indeed two metres lower than it is at present, it would have made living in it very difficult. The plaintiffs maintain that deeper excavation should have been carried out. There had however, been some considerable excavation been done before building commenced.

That could be seen at the back of the house during the inspection in *loco*.

[34] From the first plaintiff's pool deck the house in question lays below, and it appears to be a single storey-house of average height. The first plaintiff had also approved the building plans. The photographs that were handed in show that from the first plaintiff's view, a very small portion of the river is visible above the roof of the first defendant's house. That was the observation made during the inspection *in loco*. However, to the left of the house, the beautiful expanse of the river, its surroundings and entirely unrestricted and beautiful vista can be seen.

[35] The first defendant had also lowered the 35 degree angle of the roof pitch according to his building plans, to 30 degrees and the first plaintiff testified that this roof pitch was to him, "the crux" of the matter. In my view, the first plaintiff should have insisted on recording a specific height on the building plans. The difference between what the first plaintiff would have been satisfied with and what is presently the position, amounts to him seeing an eighth of the river as opposed to half, above the pitch of the defendant's roof from his pool deck.

[36] The first plaintiff's insistence on a right to an unrestricted view is based on somewhat tenuous grounds. In South Africa the broad consensus is that there is no natural entitlement, based solely on the ownership of land, to enjoy a view over or across an adjoining property. The only way to enforce a right against lawfully built obstructions is by way of a negative servitude (there are two types of negative servitudes applicable views across a neighbouring property, namely the servitude of unrestricted view or *servitus prospectus* and a servitude of not building higher or *servitus non*

altius tollendi), a restrictive condition or the provisions of a town planning scheme or other building legislation. The general rule against recognition of the right to a view is based on the notion held in English Common Law and Roman Dutch Law, that a view was a matter of delight and not necessity.[1]

[37] With the constant increase of humans on earth, the entitlement to a view has become a luxury. Such a right can however be enforced in certain circumstances. In a development where the view of a river would be one of the primary reasons for a person to buy a property, it is to be expected that there would be regulations and other rules in place to protect that view as was seen in this trial where the applicable rules regulating buildings in the development were of principal importance. The first defendant was not in breach of any of them.

[38] It was also common cause in this case, that when the builders of the house reached roof height the first defendant telephoned the first plaintiff who was not at his house at that stage, and invited him to come over to Candlewoods and see for himself whether the roof height of the house met his approval. Given the opaque nature of the agreement, one would have thought the first plaintiff would have gone to the trouble of driving over to Candlewoods to avoid his later disappointment. He did not deem it necessary and added that there was not much he could do at that stage. If the first plaintiff wanted to hold the first defendant to a particular roof height, he simply should have gone to more trouble in the absence of a determined height, to come to a more certain agreement like for instance an agreement to the effect that he would be able to see half of the river above the roof pitch, and record it.

1 AJ van der Walt, The Law of Neighbours (2010) 358.

[39] The plaintiffs were unable to discharge the onus that the first defendant's house was built contrary to any agreement or regulations. Consequently, their claim falls to be dismissed.

[40] Accordingly, the plaintiffs' claim is dismissed with costs.

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E REVELAS
Judge of the High Court

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