

**IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION**

REPORTABLE

In the matter between:
4542/02

Case No:

**THE BODY CORPORATE OF THE SHAFTESBURY
SECTIONAL TITLE SCHEME**
Applicant

And

THE ESTATE OF THE LATE WILHELM RIPPERT
Respondent

First

ANNE ELIZABETH RIPPERT N.O.
Respondent

Second

ANNE ELIZABETH RIPPERT
Respondent

Third

ALL PERSONS HOLDING TITLE
Respondent(s)
Under First or Second or Third
Respondents to Flat No 16,
Shaftesbury Flats, Tramway Road
Sea Point

Fourth

ALL PERSONS OCCUPYING
Respondent(s)
Flat No 16, Shaftesbury Flats
Tramway Road, Sea Point

Fifth

THE MASTER OF THE HIGH COURT
Respondent

Sixth

JUDGMENT DELIVERED ON THIS 24TH DAY OF MARCH 2002

WILLE, AJ:

One of the main issues to be determined in this opposed application is whether this court is entitled to issue out an ejectment order against a person or persons who continually contravene the "conduct rules" imposed by a Body Corporate established in terms of the Sectional Titles Act, No. 95 of 1986 (hereinafter referred to as the "Act").

In this connection the Applicant sought a final interdict against the Respondents and in the event of non-compliance therewith an order for the temporary ejectment of the Respondents, pending compliance with the terms of the interdict. In the alternative, Applicant sought a prohibitory interdict against the Respondents and in the event of non-compliance therewith, leave to apply for an order holding Second, Third, Fourth and Fifth Respondents in "contempt of court" and authorizing warrants for their arrest and committal to imprisonment for a period, or periods, to be determined by court.

Applicant is the body corporate of the sectional title scheme and is responsible, inter alia, for the enforcement of the Applicant's conduct rules. First Respondent is the estate of the late Wilhelm Ludwig Rippert, the registered owner of the sectional title flat known as Flat No 16, Shaftesbury Flats, Tramway Road, Sea Point (hereinafter referred to as the "flat"). Second Respondent is Anne Elizabeth Rippert N.O., cited in her representative capacity as the executrix of the First

Respondent. Third Respondent is Anne Elizabeth Rippert cited in her personal capacity. Fourth Respondent is “all persons holding title under or through” the First, Second or Third Respondent in and to the flat. Fifth Respondent is “all persons occupying” the flat , under or through the First, Second, Third or Fourth Respondent. Sixth Respondent is the Master of the High Court.

First, Second and Third Respondent were not represented and did not oppose the relief sought by the Applicant. The Fourth and Fifth Respondent opposed the relief sought and requested an order dismissing the application together with the appropriate order as to costs. The Applicant was represented by Mr. Hack and the Fourth and Fifth Respondents were represented by Mr Taylor.

A careful analysis of the Applicant’s founding papers revealed a chronological and meticulous record of a series of contraventions of the conduct rules by the occupants of the flat, during the period November 1998 up to and including the 28th January 2002. These contraventions included allegations of unlawful activities not limited to drug dealing and prostitution.

The Fourth Respondent in his answering affidavit identified himself as Isa Johaar, and averred that a sale agreement had been concluded with the Third Respondent on the 22nd March 2002. The salient terms of the sale agreement (herein after referred to as the second sale agreement) provide for the sale of the flat to Mr Johaar for the purchase consideration of R100 000,00 payable on registration of transfer. Possession and vacant occupation of and in flat was tendered with effect from the 1st April 2002.

The Fifth Respondent filed opposing affidavits conceding that they were all employed as "escorts" and they identified themselves as Shireen Khan, Tyrone Jacobs and Nazeema Lee. They all alleged that they commenced renting the flat from the Fourth Respondent, with effect from the 1st April 2002 and denied that they had contravened the conduct rules in any manner or at all.

The Applicant in reply filed a similar sale agreement to the "sale agreement" filed by the Fourth Respondent (herein after referred to as the "first sale agreement"). The first sale agreement was ostensibly concluded on the 4th December 2000. Coincidentally the seller was the Third Respondent and the purchaser was S Fortune. The sale price was reflected as R100 000,00 payable on registration of transfer. Possession and vacant occupation was tendered on registration of transfer.

Further affidavits were filed in reply confirming that transfer had not been registered into the name of S Fortune. Further transfer had not been registered into the name of the Fourth Respondent. No levy clearance certificates had been applied for in anticipation of registration of transfer. These latter affidavits were filed in response to an unsigned affidavit filed on behalf of the conveyancing attorney acting on behalf of the Fourth Respondent suggesting that registration of transfer in connection with the "second sale agreement" was anticipated during the latter part of July 2002.

The chairperson of the Applicant further confirmed in reply, supplemented by an affidavit from one of the residents of a nearby flat, that the unlawful behaviour and flouting of the body corporate rules by the occupants of the flat had steadily increased since the 1st April 2002. The occupants of the flat were suspected of being involved in prostitution and dealing in narcotic drugs.

Section 35(2)(b) of the Act provides that:

“The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property, and shall comprise conduct rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, and which rules may be substituted, added to, amended or repealed from time to time by special resolution of the body corporate.....”

Furthermore, in terms of Section 35(4) of the Act:

“The rules referred to in subsection (2) shall as from the date of establishment of the body corporate be in force in respect of

the building or buildings and land concerned, and shall bind the body corporate and the owners of the sections and any person occupying a section.”

Section 38(j), provides furthermore, that:

“ The body corporate may exercise the powers conferred upon it by or under this Act or the rules, and such powers shall include the power to do all things reasonably necessary for the enforcement of the rules and for the control, management and administration of the common property.”

In addition, Section 39(i) of the Act provides that:

“The functions and powers of the body corporate shall, subject to the provisions of this Act, the rules and any restriction imposed or direction given at a general meeting of the owners of section, be performed and exercised by the trustees of the body corporate holding office in terms of the rules”.

The main “probe” by Mr Taylor on behalf of the Fourth and Fifth Respondents was focused on the apparent lack of locus standi of the Applicant, coupled with the submission that there was no contractual nexus between the Applicant and the Fourth and Fifth Respondents respectively in so far as the Applicant's conduct rules were concerned. This contention was also linked with the suggestion that the Applicant

had not made out a proper case for any relief as against the Fourth and Fifth Respondents in its founding papers. It was contended that any case which Applicant may have made out against Fourth and Fifth Respondents only surfaced in reply.

The Applicant adopted a resolution prior to launching the application authorizing the deponent to depose to the founding affidavit in support of the application. It was submitted on behalf of the Fourth and Fifth Respondents that this resolution bears scrutiny. In this connection it was contended that the necessary quorum was not present when the resolution was passed by the Applicant.

In my view there is no merit in this submission as the minutes of the meeting at which the resolution was adopted showed the contrary. Further, in reply, an affidavit was tendered which cured the purported defects to which the Fourth and Fifth Respondents alluded.

Mr Taylor further submitted that there was no contractual nexus between the Applicant and the Fourth and Fifth Respondents respectively and accordingly the conduct rules did not apply to the Fourth and Fifth Respondents. It was submitted in the alternative and in any event that the Applicant had failed in its founding papers to refer to any contraventions of the conduct rules by the Fourth and Fifth Respondents after the 1st April 2002.

The contraventions of the conduct rules (numerous as they were) after

the 1st April 2002, were to be found in the Applicant's replying papers. Elaborating on this submission, Mr Taylor argued that the court was not entitled to examine and take into consideration averments made by the Applicant in its reply as against the Fourth and Fifth Respondents.

Mr Hack on behalf of the Applicant submitted that no new case had been made out against the Fourth and Fifth Respondents in reply and the replying affidavits were filed for the specific purpose of dealing with the averments by the Fourth and Fifth Respondents in their answering affidavits.

The appropriate test to be applied was clearly illustrated by Nestadt, J in ***Shephard v Tuckers Land and Development Corporation (Pty) Ltd 1978 (1) SA 173 (W)*** at page 177 as follows:

“It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits or the courts will not allow an applicant to

make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out.”.....

.....

.....

“This is not however an absolute rule. It is not the law of the Medes

and Persians. The court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits.”

Coetzee, J in ***Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere 1984 (2) SA 261 at 269*** illustrates the principle in this way:

“Dit is een ding om slegs ekstra feite ter ondersteuning van ‘n bepaalde

oorsaak van aksie, Úf vir die eerste keer aan te haal in ‘n repliserende verklaring. Dis ‘n ander ding om geheel en al bollemakiesie te slaan ten opsigte van gedingsoorsaak wat die gedingvoering in ‘n totaal verskillende rigting stuur.” (My underlining)

Applying these principles, it seems to me that the present Applicant filed replying affidavits which dealt essentially with the averments made by the Fourth and Fifth Respondents in their answering affidavits.

No application to “strike out” any of the averments made in reply was launched by the Fourth and Fifth Respondents and no substantive

condonation application was launched for leave to file a fourth set of affidavits. Mr Taylor merely made a verbal request from the bar at a very late stage in the proceedings for leave to file further papers. Although, therefore, it is in some respects correct that the Applicant did expand upon its reasons and introduced some new matter in its replying affidavits, in my view, it was quite entitled to do so.

The defences by the Fourth and Fifth Respondents are so improbable that they can safely be rejected. The occupants of the flat admitted that they were employed as escorts. The security register at the entrance to the block of flats showed a constant stream of visitors to the flat during all hours of the day and night. The Applicant was never notified of any changes in respect of the occupants of the flat and the situation grew steadily worse after the 1st of April 2002. The terms of the first sale agreement were in direct conflict with the terms of the second sale agreement. Neither transfer had been registered. The affidavit tendered by the conveyancer was not signed. No levy clearance certificates had been requested.

An open tender was made by Mr Taylor on behalf of the Fourth and Fifth Respondents not to participate in any unlawful conduct, but no tender was made to abide by the conduct rules. In the main the Applicant sought a final interdict and in the event of non compliance an order for the temporary ejectment of the Respondents, pending compliance with the provisions of the interdict. This ejectment prayer requires special attention by this court.

The Spanish legal system has an interesting development in this regard. When one purchases property in Spain, one often purchases into some common elements in the apartment block or the urbanization of the block where one's property is situated. A purchaser invariably becomes a member of a "community of owners". A community of owners in Spain is regulated by a law called "Ley de Propiedad Horizontal" (The Law of Horizontal Property). The main objective of the law is to regulate the administration and maintenance of the common elements which the private owners possess jointly.

Section 7 of the Horizontal Property Act (Act 49 of 1960), as amended, provides in certain instances after strict compliance of certain procedural steps, for a mechanism whereby a court may issue out a decree depriving the owner or occupier of the right to reside in or use the of a flat, for a period not exceeding three years in instances where there have been constant and continued contraventions of the community owners rules. This is regarded by many to be one of Spain's most far-reaching legal reforms.

In my view there is a pressing "social need" in South Africa to enable "sectional title" owners and their controlling bodies to enforce compliance with their conduct rules and in so doing if necessary, deprive the owner and/or occupier of the right to reside in or use of a unit in circumstances where there is a constant and deliberate contravention of the conduct rules, including the non-payment of legitimate levies imposed.

I can find no authority for this court to grant an order for ejectment in the present circumstances. Even if I am wrong in this regard,

procedurally

the Applicant has not laid the proper foundation for such an order and the conduct rules of the Applicant do not provide for ejectment under these circumstances.

In the result the following order is made:

1. Second, Third, Fourth and Fifth Respondents are to forthwith abide by any and all of the Applicant's conduct rules in respect of the premises known as Flat No 16, Shaftesbury Flats, Tramway Road, Sea Point.
2. In the event of non-compliance with the conduct rules as mentioned above, the Applicant is granted leave on the same papers (supplemented in so far as may be necessary) to apply for an order holding Second, Third Fourth and Fifth Respondents in "contempt of court", and authorising warrants of arrest and committal to imprisonment for a period or periods to be determined by court.
3. Second Respondent is to pay the costs of and incidental to this application, on the scale as between attorney and client. Such costs to rank jointly and severally with the cost orders as against Fourth and Fifth Respondents, the one paying the others to be absolved.
4. Fourth and Fifth Respondents are to pay the costs of and incidental to this application, on the scale as between party and party. Such costs to rank jointly and severally with the cost order as against the Second Respondent, the one paying the others to be absolved.

WILLE A J