CASE NO.A 308/96

IN THE HIGH COURT OF NAMIBIA

In the matter between

CONTROLLING BODY OF

THE ACACIA CLOSE BUILDING NO. 58/1993 APPLICANT

versus

BASIL BLOCH FIRST RESPONDENT

JOAN NAOMI BLOCH SECOND RESPONDENT

CORAM: FRANK, J.

Heard on: 1996.12.06

Delivered on: 1996.12.13

JUDGMENT

FRANK, J. : The applicant in this matter is the controlling body of a sectional title scheme. The deponent on behalf of the controlling body, a Mr Bester, is the chairman of its trustees. First respondent is a legal practitioner of this Court and second respondent is his wife who is an owner of one of the sectional titles units in the scheme and thus also owner of an undivided share in the common property pursuant to the provisions of the Sectional Titles Act, 66 of 1971 (the Act).

The applicant launched the application seeking certain relief against the respondents which are no longer relevant to this matter as the application was withdrawn. The respondents however did not only resist the original application but also

launched a counter-application which is the application that now falls to be determined.

In the counter-application an order is sought directing applicants to remove a pergola from the front of a unit within the scheme which belongs to its chairman. Counsel for the applicant informed me from the bar that although the chairman was not joined in his capacity as owner of the relevant unit he was instructed not to take the point of non-joinder and that the chairman undertook to abide by the decision of the Court. With this undertaking given I was prepared to hear the matter.

Mr Bester sought permission at a meeting of trustees to erect a pergola similar to other pergolas already in existence in front of the garage to his unit. Permission was granted and the pergola was erected. Photographs showing the other pergolas as well as the one under consideration formed part of the papers before Court. From these photographs it is clear that Bester's pergola is constructed in the same fashion as the others. Indeed this is also stated by the respondents in so many words. "..... this illegal pergola has been erected in the same form as the other (but legal) pergolas on the premises." The pergolas consist of two vertical iron poles situated some distance from the garage doors. Wooden beams affixed to the outside walls of the units stretch from the garage doors over the top of these iron poles to which the beams are also attached. On top of this structure further wooden beams are horizontally placed at regular intervals to complete the pergolas. From the photographs it is clear that the length of these pergolas are such as to cover a sedan motor vehicle.

From the affidavit of the first respondent the following appears in relation to the pergola erected by Mr Bester:

(i) "..... without the unanimous consent of all unit holders of the premises, Bester, , erected a pergola in front of and adjoining his unit."

(ii) "..... the 'Bester pergola' has been erected on the common use area of the premises ....."

(iii) "By so erecting the pergola on the common use area without the unanimous consent of the other unit holders Bester has created the position of having a further exclusive area attached to his unit."

(iv) "..... no consideration by way of purchase price or rental has even been offered or paid for the said privilege."

(v) "By having so 'acquired' and 'attaching' this area of land to his unit Bester has likewise increased the value of his unit with the corresponding decrease in value of the other units by virtue of the reduction in area of the common use area."

(vi) by so erecting the pergola and as such

'acquiring' the common use area on which it is situated Bester has obtained full title to the said area free of any consideration."

In terms of the original plan for the section title scheme as a whole three distinctive areas were provided for, namely; buildings, common use areas and exclusive use areas. As I understand this the buildings represent the individual units over which the registered owners acquired genuine individual ownership. The exclusive use areas are part of the common property to which only certain unit holders have unqualified access. On the original plan of the scheme these were what was intended as gardens attached to each unit as well as the original pergolas. The remaining area is the common use area. It must be borne in mind that the term "exclusive use area" is not a legal term but just a term to describe a factual situation. (The legal term used in later South African legislation is not applicable to Namibia.) Thus the exclusive use areas of the present sectional titles scheme are part of the common property that have been set aside for exclusive use by certain unit owners. These owners are not the sole owners of these areas but own only an undivided share in these areas together with the other unit owners.

The complaints against the erection of the pergola can be placed into two categories and that is also how the first respondent approached the matter in argument, namely; the requisite consent was not obtained to erect this pergola on common property and

alternatively as the erection of the pergola amounted to an extension of the unit of Bester the requisite consent for this was also not obtained.

In terms of section 32(d) of the Act an owner in a sectional title scheme must "use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners ....." In my view this provision is relevant to the present proceedings because of the locality of the pergola in question. It is situated directly in front of the garage of Bester. Thus no one else can park there in the normal course of events as this will prevent Bester from gaining access by car to and from his garage. This area is in fact an exclusive use area despite not being officially demarcated as such on the plan of the original scheme. The extremely slight interference, if any, with pedestrian traffic seeing that the pergola itself has no wall on the one side and no door to its "entrance" is probably of such a nature that the maxim de minimus non curat lex is applicable. Thus what happened was that the trustees were asked permission to demarcate an area which was in fact an exclusive use area in a similar fashion as the other exclusive use areas.

The question which now arises is if the trustees could consent to this or whether the consent of the other unit holders were necessary. First respondent maintained that the consent of the other owners were necessary as the erection of the pergola was not part of the control, management and administration of the common areas which are the duties of the trustees.

Section 27 of the Act makes provision for rules to govern the control and management of sectional title developments. Section 27(2) insofar as it is relevant to the present matter reads as follows:

> " (a) The rules shall provide for the control, management, administration, use and enjoyment of . the common property, and shall include -
>
> (i) the rules contained in Schedule 1 which shall not be added to, amended or repeated except by unanimous resolution of the members of the body corporate;
>
> (ii) the rules contained in Schedule 2 which may be added to, amended or repeated by special resolution of the members of the body corporate;
>
> (b) Until such times as special rules are made for the control and management , the rules set forth in Schedules 1 and 2 shall, ... be in force ....."

In terms of section 29 of the Act the body corporate is charged with the duties assigned to it under the Act or the rules including the duty to "control, manage and administer the common property for the benefit of all owners." (Section 29 (j)). It is common cause that Schedule 1 and 2 of the Act are the rules applicable in the present matter. Rule 3 of Schedule 2 reads as follows:

> "No duty shall be placed on any owner in regard to the provision of any improvement on or to the common property unless a proposal to make such improvement has been approved by a special resolution at a general meeting of owners of sections."

By the workings of the provisions of section 32 (d) of the Act the area involved was a de facto exclusive use area.

Thus the further "use and enjoyment" (section 27(a)) of this common property could be decided on by the trustees subject to Rule 3 of Schedule 2 which is what they did and adhered to. No duty was placed on any other owner by this improvement (erection of the pergola) to the common property. No special procedure or unanimous consent is required by the Act for a decision of this nature and the trustees were thus entitled to take such a decision (section 31). In short the decision of the trustees did not change the nature of the property or its use and neither did it effect that rights or duties of any other unit holder detrimentally and thus fell within the trustee's powers. The use was not in issue and the trustees in their power to control, manage and administer this use was entitled to permit Bester to erect a pergola which did nothing but demarcate the area which use did not change or was affected at all.

The next question to decide is if the erection of the pergola amounted to an extension of Bester's unit. If this is the case it is clear that the necessary consent was not obtained. Extensions are dealt with in section 18 of the Act. In terms of this section if a building "is to be extended in such a manner that an existing section is to be added to" the written consent of all the other owners as well as all the holders of sectional mortgage bonds and registered real rights must be obtained.

In my view the building belonging to Bester was not extended at all. A structure in the nature of a lean-to was affixed to the existing building. The existing building was not extended at all. Not all additions amount to extensions. (Control Body of Lelane Building NO 23 of 1976 v Van Heerden, 1992(4) SA 585 (SECLD). Section 18 stipulates from whom consent is required. These are all

persons whose existing rights may be prejudiced by extensions to existing units. This also indicates the nature of additions that will amount to an extension of an existing building. Where the alteration or addition is such as not to affect the rights of the persons mentioned in section 18 it is not likely to be an extension as provided for in that section. (Lelane case, supra, at 590 D - H).

I now briefly deal with the objections raised in first respondent's affidavit and enumerated above and in the same order:

(i) Bester did not obtain the unanimous consent of all the unit holders but did obtain the permission of the trustees to erect the pergola which was sufficient;

(ii) the pergola was erected on an area specified as "common use area" in the plan indicating the lay-out of the scheme. This was in fact however not "common use" area due to the workings of section 32(d) of the Act but an exclusive use area which still forms part of the common property as does all the other areas described as "exclusive use areas" on the plan.

(iii) Bester did not create a further "exclusive use area", he just demarcated an existing one. Here it must again be kept in mind that terminology and concepts from the South African legislation seems to be used by first respondent which is not applicable in Namibia.

(iv) Bester did not pay a purchase price or rental for the area as he did not purchase it and as he was entitled

to use it in any event I cannot see how rental is of any relevance. In any event the approval by the trustees did not require any payment from him.

(v) Whereas the so-called "common use area" indicated on the plan was reduced the common property was not, nor was the use, nor is there any factual basis for the averment in the papers that the values of any of the units were detrimentally affected.

(vi) Full title to the area covered by the pergola can only be obtained if the necessary documentation in the Deeds Registry is altered. This was not done and the allegation made in this regard is absurd.

The question of costs remain. The initial application related to the question of security for the whole complex and whether a certain type of security fence or spikes could be placed on walls surrounding the walls of second respondent's unit. The only legal question was what kind of authority the trustees needed to affect this and whether they had the necessary authority. Not content with limiting himself to this aspect the first respondent chose to vilify the chairman of the trustees with vexatious attacks on his character. Thus he accused Bester of being a racialist and anti-Semite. First respondent apparently was exceptionally distressed by this because:

> "I went into exile for 22 years to help the black people and when I come back after independence I find that apartheid is as strong as ever."

As already stated whether Bester was or is indeed a racialist or anti-semite and whether first respondent did go into exile to help black people had nothing to do with the matter at hand and first respondent's holier-than-thou cant in this regard was totally uncalled for. To make matters worse this is repeated in the replying affidavit. When he is not satisfied by rulings made by Bester as chairman of the trustees he writes arrogant letters sarcastically referring to Bester as "Judge Bester."

In fact the picture that emerges of first respondent is not a very attractive one but one of an unreasonable holier-than-thou whining mother Grumpy. As second respondent associates herself with first respondent she cannot escape the consequences of first respondent's behaviour. In my view this is a proper case for a special order as to costs. Indeed I indicated to first respondent at the hearing of this application that I would consider not granting him an order for costs even if I found in his favour. On a rereading of the papers I am convinced that first respondent's behaviour in this matter was nothing less than a nightmare come true for the trustees of applicant and totally unworthy of a senior practitioner of this Court and that as a mark of disapproval the respondents should be ordered to pay the costs of this application on a legal practitioner and client scale.

FRANK, JUDGE

In the result the counter-application by first and second respondents are dismissed with costs on a legal practitioner and client scale.

ON BEHALF OF THE APPLICANT: ADV. G COETZEE

Instructed by: WEDER, KRUGER & HARTMANN

ON BEHALF OF THE RESPONDENTS: MR B BLOCH

Instructed by: B BLOCH & CO