

FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO : 029/2005

PARTIES: **JEAN SYLVIA HILL & 3 OTHERS vs DEON NEVILLE TROLLIP & 4 OTHERS**

REFERENCE NUMBERS -

Registrar: 1632/04

DATE HEARD: 24/02/2005

DATE DELIVERED: 19/04/2005

JUDGE(S): Froneman J

LEGAL REPRESENTATIVES -

Appearances:

- for the State/Applicant(s)/Appellant(s): DH De la Harpe
- for the accused/respondent(s): RWN Brooks

Instructing attorneys:

- Applicant(s)/Appellant(s): Whitesides
- Respondent(s): Netteltons

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION

Case No 1632/04

In the matter between:

| | |
|---|--------------------------|
| JEAN SYLVIA HILL | First Applicant |
| ROSEMARY MURIEL VICTOR | Second Applicant |
| GLEN NAVAR SHARE BLOCK (PTY) LTD | Third Applicant |
| GLEN NAVAR HOME OWNERS ASSOCIATION | Fourth Applicant |
| and | |
| DEON NEVILLE TROLLIP | First Respondent |
| GERALDINE LOVELYN TROLLIP | Second Respondent |
| DEON NEVILLE TROLLIP NO (trustee of Trollip Family Trust) | Third Respondent |
| GERALDINE LOVELYN TROLLIP NO (trustee of Trollip Family Trust) | Fourth Respondent |
| DEON NEVILLE TROLLIP NO (trustee of No.4 Castina Trust) | Fifth Respondent |

JUDGMENT

Froneman J.

[1] The applicants seek the eviction of the respondents from certain property ('the disputed property') in the East London district. Their standing to do so is not

challenged¹. The respondents² oppose the application, relying in the main on the fact that extensive improvements have been made to the disputed property for which they have received no compensation as yet, and that they are accordingly entitled to retain possession of the disputed property until such compensation is paid.

[2] On 14 February 2000 the first and second applicants concluded a deed of sale with the first respondent, representing the fifth respondent, in terms of which they purported to sell the disputed property to the fifth respondent for R150000,00. The sale was subject to a condition precedent “in favour of the Purchaser that the Amatola District Council gives its consent to the use of Erf 68 for the purpose of operating a Guest House. Failure to gain such consent before 1st May 2000 will make this agreement null and void”. The consent was never obtained.

[3] Acting on the expectation that the condition precedent would be met the respondents³ proceeded with plans to subdivide and consolidate the disputed property. They also erected a restaurant and other buildings on the property, from which they conducted business on. The buildings were erected without compliance with the National Building Regulations and Building Standards Act 103 of 1997, and the use of the disputed property for the purpose of a business is not in accordance with the Land Use Planning Ordinance 15 of 1985.

¹ The first and second applicants are entitled to transfer of the disputed property from the third applicant, the present registered owner of land being developed under a share block scheme in terms of the Share Block Control Act 59 of 1980.

² Although the notice of opposition was filed on behalf of all five the respondents, only the first and second respondents filed affidavits, representing themselves, and as trustees of the Trollip Family Trust (third and fourth respondents). The first respondent indicated that he was no longer a trustee of the No.4 Villa Castina Trust (the fifth respondent), but no point of misjoinder was raised, nor did he indicate who the present trustees are. As will be seen, he relied on the provisions of the deed of sale entered into by the first and second applicants with him, as representative of the fifth respondent, in opposing the application.

³ For the sake of convenience I refer to all the respondents, although the first respondent stated that the Trollip Family Trust was not involved in the subdivision and consolidation.

[4] The first and second applicants apparently asked for payment of the purchase price in advance and an amount of R155700,00 was paid to a Mr. Graham Victor, representing the first and second applicants, on 3 June 2000⁴.

[5] After failure to comply with the condition precedent in the Deed of Sale there were attempts to renegotiate the deal, even to the extent that a new deed of sale was drawn up and signed by the first respondent in his personal capacity as purchaser on 30 April 2002. The first and second applicants, however, did not sign this agreement and no further agreement was in fact concluded. They are in the process of selling the disputed property to another party, but that sale appears to be dependent on the successful eviction of the respondents from the disputed property. Because of this the respondents were asked to vacate the property but they refused to do so. That is where things stand at the moment.

[6] As mentioned at the outset, the respondents' main defence to the eviction claim is based on an improvement lien for the value of the improvements they effected to the disputed property. They nevertheless raised two other defences as well, neither of which, in my view, has any merit.

[7] The first respondent contended in his affidavit that the original deed of sale was not null and void because the time limits for the fulfilment of the condition precedent had impliedly been extended by the parties. His own conduct in accepting the nullity

⁴ The payment was made by the first respondent, presumably in his capacity as the fifth respondent, but this is not entirely clear from the papers.

of the sale in correspondence, and by signing a further purported deed of sale on terms different to the original one, makes that contention untenable.

[8] The second defence was to the effect that the applicants are not entitled to an eviction order because they did not make a proper tender of repayment of the R155700,00 paid to them as the original purchase price under the deed of sale, and more specifically because they did not tender payment of interest on this sum. I am not too certain in what legal pigeon-hole this defence belongs, namely whether it is grounded in the *condictio causa data causa non secuta*, or the *condictio indebiti*, or whether it is to be dealt with under the rules of the law of contract where a condition precedent fails⁵, but in the end I think it does not really matter. The payment was made earlier than required by the terms of the deed of sale: the deed required payment only on transfer of the property. Had payment been made only then, the respondents would in the meantime have had to pay occupational interest in terms of clause 4 of the original deed of sale. They never paid any occupational interest, presumably because of the early payment of the capital, and the earlier payment of the capital also meant that the applicants were not entitled to insist on payment of occupational interest as well. It seems to me that the final effect is that the applicants were not enriched by the earlier payment, nor will the respondents be impoverished if the capital is repaid.⁶ No legal obligation to pay interest on the capital in my view arose under these circumstances, nor did counsel appearing for the respondents refer me to any authority suggesting that interest was in fact payable.

⁵ Compare R.H.Christie, *The Law of Contract in South Africa*, 4th ed, at 166-168.

⁶ The applicants in fact tendered repayment of the capital and interest, less the occupational interest payable in terms of clause 4.

[9] That brings me to the main defence of a lien based on the improvements made to the disputed property by the respondents. I will accept for the purposes of this application that the respondents were *bona fide* possessors of the property when they effected the improvements. They nevertheless did so in contravention of statutory building regulations and standards. The fact that the applicants knew of this does not affect the issue *insofar as the claim to an improvement lien* is concerned. The applicants, on regaining possession of the disputed property, are still liable to the powers that the statutory authorities may exercise in respect of the illegally erected buildings, which include the power to order their demolition⁷. In that event the value of the property would obviously not have been enhanced at all by the buildings erected by the respondents on the disputed property. This uncertainty in the value of the disputed property is in my view fatal to the respondents' reliance on an improvement lien. Their lien is dependent on a claim against the applicants, based on the applicants' enrichment at their expense. The enrichment claim is for the lesser of the respondents' actual expenses in erecting the buildings or the enhancement in the value of the disputed property brought about by the alleged improvements. The respondents have given absolutely no detail of what the costs of the erection of the buildings were, nor have they presented any acceptable evidence of what the value of the disputed property is as a result of the addition of the buildings. The latter aspect becomes almost impossible to assess if the further prospect of statutory demolition is brought into play. In short, the respondents, in order to show their entitlement to an improvement lien, had to show that the value of the disputed property had been enhanced by their alleged improvements to the property, or at least had to prove what they expended in erecting the alleged improvements, but they failed to do so.

⁷ Section 21 of Act 103 of 1997.

[10] The right to compensation for useful expenses to property is in any event not an absolute right, and neither is its corollary, the lien preserving the right. In appropriate cases removal of the improvements may be ordered instead of granting compensation⁸, and in others return of the goods may be ordered against the giving of adequate security for the compensation claim⁹. The law allows a judge a wide and equitable discretion in deciding what order to make. In the present matter the applicants have tendered repayment of whatever may be payable in respect of the original purchase price on condition that the respondents vacate the property and remove the structures erected on the disputed property. In my view that is not unjust to the respondents. They have not, in these papers, shown that the applicants have been enriched at their expense. That means that they cannot rely on a lien to prevent their eviction from the disputed property.

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

1. The respondents are to vacate erven 326 and 69, now consolidated as erf 327, Glen Navar, Kwelega, East London District:
 - (a) after payment of the sum of R155700,00 by the first and second applicants to a person nominated to accept receipt of the said payment by the respondents, and
 - (b) within a reasonable period to allow the respondents to remove the structures they erected on the said erven;
2. The parties are to inform the Registrar in writing within 10 days of this judgment of the name of the person to whom payment should be made under 1(a) above, and

⁸ *The Law of South Africa*, 1st reissue, Volume 9, paragraph 98.

⁹ *Peter Cooper & Co v De Vos* [1998] 2 All SA (E) at 247b – 249d.

what reasonable period they have agreed upon for the purposes of 1(b) above, failing which this court will forthwith determine to whom payment must be made and determine the period for removal of the structures;

3. The respondents are ordered to pay the costs of the application jointly and severally.

J.C.Froneman

Judge of the High Court.