IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 36878/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED. ✓

4/6/14
DATE

SIGNATURE

4/6/2014

In the matter between:

RICHARD JOHN COLLEDGE N. O.	**FIRST APPLICANT**
DANIEL JOHN COLLEDGE N. O.	**SECOND APPLICANT**
SHELLEY MARY COLLEDGE N. O.	**THIRD APPLICANT**

(IN THEIR CAPACITIES AS DULY APPOINTED
TRUSTEES OF THE MONTEREY TRUST IT 1232/1997)

And

OLIFANTS NORTH GAME RESERVE SHARE BLOCK LIMITED	**RESPONDENT**

JUDGMENT

Fabricius J,

1.

In this application, the three Applicants in their capacities as appointed Trustees of the Monterey Trust seek the following order:

a. "Confirming the Applicants' right to demand the permanent closure of Ebony Road (in a Game Reserve known as Olifants North Game Reserve);

b. Compelling the Respondent to close Ebony Road permanently to all vehicles, save in cases of emergency."

The whole application is comprised of some 380 pages, but it is my intention to give only a summary of the essential facts.

2.

The Respondent is the registered owner of the farm on which it conducts the business of a game reserve. The ***Share Blocks Control Act 59 of 1980*** is applicable as is the Respondent's Memorandum and Articles of Association. The Respondent acts through a board of directors appointed in accordance with these mentioned Regulations, if I can call them that for present purposes. It is stated in the Founding Affidavit that the Board is, *inter alia*, in terms of the Respondent's Memorandum and Articles of Association, entitled to make, vary or rescind Regulations governing the use of the Respondent's property.

3.

Before I commence with the tale, it would be convenient to refer to certain applicable provisions regulating the use of the various members' rights and obligations:

3.1

S. 16 of the Share Blocks Control Act reads as follows:

"The contract for the acquisition of a share and a use agreement entered into and any amendment of cession of any such contract or agreement, after the commencement of this *Act*, shall be reduced to writing and signed by the parties thereto or by their representatives acting on their written authority, failing which the contract, agreement, amendment or cession, as the case may be, shall, subject to the provisions of ***s. 18,*** be of no force or effect."

In terms of the Share Block Scheme, shareholders had a right to build a lodge/private house at a certain indicated position. Their rights were contained in Use Agreement. The Use Agreement made provision for "Reserved Areas" which "shall mean portions of the Common Areas, included selected roads, designated by the Directors from time to time into which entry by Users is prohibited at all times or during certain hours as provided in 21.2." Clause 21 is headed Rules and Regulations and provided the following:

"21.1 The Members agree that the Directors shall be entitled at all times to lay down terms and conditions governing the use and enjoyment of the Property generally,

including those matters described in clause 16, provided that such terms and conditions do not override the terms of this Agreement.

21.2 In particular the Members agree that the Directors shall be entitled from time to time to designate Reserved Areas which may include, but are not limited to, staff houses and gardens, staff villages, workshops, storerooms, electricity substations, pump and borehole installations and the like and, ecologically sensitive areas, sensitive animal breeding areas and areas where traversing will adversely affect the privacy of Units or units on neighbouring farms."

According to clause 29, disputes arising out of or in connection with the Use Agreement would be referred to private arbitration, except where an interdict was sought from a Court of competent jurisdiction.

4.

During 2006 a Mr John Platter, a Trustee of the Bila Shaka Trust constructed a lodge which was referred to in these affidavits as a Unit 4. The present Applicants, as Trustees of the Monterey Trust, later acquired this unit. I was told during

argument that Mr Platter knew something about the enjoyment of wines, and, no doubt keeping in mind the terrible winter conditions that the Cape Province experiences regularly and without fail, probably (I presume) decided to enjoy his wines during the mild, warmy, calm and quiet winter months of the Limpopo Province. He was however sadly surprised and disappointed by the lack of privacy of Unit 4, inasmuch as it was too close to Ebony Road. Mr Platter did not say in his confirmatory affidavit exactly what disturbed him the most in this context, but in any event, the owners of the various units could over many years not resolve the conflict that arose about the lack of privacy experienced by an occupant of Unit 4. Mr Platter then at some stage, fed up with all the disappointment and strife that he did not expect (I presume) sold his share to the Monterey Trust and left for other pastures. I was not told where he ultimately found the peace and quiet that he could not experience in this wonderful area which is close to the Timbavati and Klaserie Reserves.

5.

Applicants, in the founding affidavit, relied on an Agreement of Sale of Shares which in Clause 5 contained a Resolutive Condition which stated that the sale was subject to the condition that should the Directors of the Company refuse to issue an undertaking to the Purchaser by 17 February 2006, which had to read as follows:

"Duly instructed by the Board I wish to confirm that the choice as to whether Ebony Road is permanently closed or utilized temporarily and under strict conditions, lies with the owner of Site 4. At the moment the Platters, the current owners of Site 4, have agreed that on a strictly temporary basis, other owners may use Ebony Road, except when they are in residence. It is confirmed that if you, as the new owner of Site 4, wish to alter that arrangement so that access is limited further or even permanently, that decision is at your discretion and will be enforced by the Board", the Agreement would be of no force and effect. In the answering affidavit, the Respondent points out that this Agreement was amended during February 2006 by the deletion of clause 5.2.3. Respondents therefore deny that when Mr Platter took occupation, he did so with the full knowledge and understanding that the Ebony

Road would be closed permanently once Unit 4 was occupant by him, which Applicants referred to in the founding affidavit as "the initial arrangement". It was stated however that Mr Platter took occupation during about October 2003 and that Ebony Road was closed and remained closed till the end of 2004. The exact date of occupation is disputed, but in any event the Respondent says that there was no valid agreement as required by the applicable Regulations that the occupant of Unit 4 could demand closure of Ebony Road. In the founding affidavit, it is then alleged that there was a further "temporary arrangement" in that Mr Platter offered to re-open Ebony Road mainly because another road, for unknown reasons called "Rocky Horror" was upgraded by Respondent, and could be used by other owners. It is also stated by the Applicants that had the right to demand closure of Ebony Road not being transferred to the Monterey Trust, it would not have purchased the relevant shares giving rights to Unit number 4. Further, in the founding affidavit, the Applicants then referred to an "extended temporary arrangement".

6.

Applicants then gave further details about what do they refer to as an "extended temporary arrangement". In this context they relied on a letter written by Respondent to first Applicant dated 20 February 2006. It reads as follows: "Duly instructed by the Board, I wish to confirm that the current owners of Site 4 have agreed that other owners may use Ebony Road under strict conditions agreed by the Board, except when they are in residence. It is acknowledged that if you wish to alter these arrangements it would need to be agreed by the Board. Should a satisfactory agreement not be reached you may instruct the Board to close Ebony Road. You acknowledge that should you instruct the Board to close Ebony Road it will be closed to Site 4 as well. The Board records that in terms of the Use Agreement it has the right to close any road to all members at its discretion." The last mentioned sentence is of course what the Respondent regards as being the crux of the case, quite apart from the provisions of ***s. 16 of the Share Blocks Control Act***. Applicants then continued to say in the founding affidavit that the Ebony Road remained a contentious issue and having given details of all types of unpleasant occurrences,

this harmony and strife, Applicants say that they accepted the "offer" of 20 February 2006 by way of a letter to Respondent dated 29 September 2011. They referred to certain temporary arrangements that had been in place from time to time, and advised that any such arrangement as in place at the time was not workable and was of such a nature that the patience of the Trust had worn thin. Accordingly, and having set out the background of the various arrangements in place from time to time, they said the following in par. 6 of this letter: "6.In the circumstances we are instructed to advise you, as we hereby do, that:

6.1

Unless a viable and generally acceptable alternative to the arrangement is achieved within 45 days of the date of this letter;

6.2

Our client requires that Ebony Road be closed to all members of Olifants, their guests and invitees, permanently."

On behalf of the Applicants I was told that this letter was in fact an acceptance of the offer made on 20 February 2006. Respondent in turn argued that if such an

offer had been made, which it did not admit at all, it was not accepted within a reasonable time, the ostensible acceptance being some five and a half years later. I agree with that contention. It is in any event also abundantly clear from this letter that even the Applicants did not regard any previous "arrangement" as having been of a contractual nature binding between the parties. This is abundantly clear from the letter of 29 September 2011 where they repeatedly referred to arrangements only, and certainly no binding duties and obligations between the parties. If however the letter of 20 February 2006 could be construed as an offer, which I do not agree that it did, there was no unequivocal acceptance in any event as is abundantly clear from the terms of clause 6 that I have quoted. It is a clear counter-demand.

See: ***Christie's: The Law of Contract in South Africa - 6th edition at page 52 (f).***

7.

Respondent's argument in this context was also, and in any event, that neither the letter of 20 February 2006, nor the reply thereto dated 29 September 2011, amounted to a written agreement such as was required by the provisions of ***s. 16 of***

the Share Blocks Control Act. Furthermore, there was no allegation anywhere in the affidavits that the relevant representatives had acted on the written authority of the parties. Accordingly, and quite apart from any other argument, any correspondence between the parties about Ebony Road, its closure and any arrangement in regard to thereto, was not a written agreement as required by the Act. I agree with this contention and it follows from the clear wording of the Act itself.

8.

In any event, it is also clear that Respondent did not regard itself as even having been a party to any such written agreement and on 20 March 2012 it adopted the following resolution: "Ebony Road will remain open at all times provided that no one is in residence at Unit 4. Should someone be in residence at Unit 4, Ebony Road will be closed to all persons including the residents of Unit 4. No other unit will be granted the right to close any road while they are in residence or at any other time." Respondents of course relied on their discretion given to them in the mentioned Use

Agreement. Applicants in turn said that this resolution by the Board amounted to a unilateral fundamental amendment to the Ebony "alternative". No Trustees of the Monterey Trust were given notice of this resolution or given an opportunity to comment on it. There was no application before me to have this resolution set aside on the basis of some or other unlawful conduct by the Board.

9.

As far as the interdict that was sought was concerned the Applicants said in the founding affidavit that they have, as they were entitled to do, demanded permanent closure of Ebony Road. This road has not been closed by Respondent. The right of the Applicants to demand the closure of this road has never been disputed by the Respondent, the Board and the members of the Respondent. In the circumstances they say there was at least one ground upon which the Applicants were entitled to the order that they sought and this was said to be the following: "The agreement between the Bila Shaka Trust and the Board, alternatively Olifants North Development Company (Pty) Ltd created a right to demand the permanent closure

of Ebony Road, which right was transferred/ceded by the Bila Shaka Trust to the Monterey Trust. As aforesaid, the right was subsequently confirmed, and never disputed, by the Respondent, the Board and the members of the Respondent." Accordingly they said they were entitled to a final mandatory interdict. I have already referred to Respondent's defence regarding its discretion in terms of the Use Agreement and also the provisions of ***s. 16 of the Share Blocks Control Act.*** Having been confronted with that in the answering affidavit, the Applicants in the replying affidavit then said the following (there was some debate as to when exactly Mr Platter had taken occupation): "The exact timing of when Mr Platter took occupation of the property is, in any event, irrelevant to the issues before this ... Court. The Applicant's right to demand the closure of Ebony Road does not rely on the rights held by its predecessor in title but is based on an independent undertaking given by the Board of Directors of the Respondent and recorded in Annexure RJC25 to my founding affidavit." This is the mentioned letter of 20 February 2006. They also relied on the doctrine of estoppel on the basis that the Applicants had concluded the Sale Agreement having accepted or relied upon the undertaking by

the Respondent that they could demand closure of the road. They say in the replying affidavit that their case is in fact that when the Monterey Trust acquired Unit 4, it acquired the right to demand permanent closure of the road known as Ebony Road. They have demanded this closure and Respondent has refused to do so. Accordingly they seek the mandatory interdict. It is clear from the wording of the replying affidavit that Applicants no longer rely on, any initial temporary or extended "arrangement". I have referred to what Respondent relies on and I agree with its contentions. I also agree with the argument that Applicants cannot rely on the estoppel issue inasmuch as any such representation would have been contrary to the specific provisions of ***s. 16 of the Share Blocks Control Act.*** Further objection was that they also made out their ultimate case only in the replying affidavit. I agree that it is clear from this affidavit that Applicants rely upon a specific right acquired at a specific time. Contrary to all the allegations in the founding affidavit they no longer relied on any "arrangement" that may or may not have been in place from time to time over the years. As I have said, and in any event, Respondent argued that the terms and conditions of an owner's occupancy rights are to be contained in the Use

Agreement between the Company and the member according to s. 16 of the mentioned Act. The legislature obviously sought to sharply delineate, as between the shareholder and the Company, the precise ambit of usage rights. It was argued that the Act thereby forged an inseverable link between block shareholding and occupancy rights, which was confirmed by the Scheme's documentation. The purpose of the Use Agreement was therefore to specify the exact terms and conditions of such occupancy rights. It was for that reason, that pursuant to s. 16 of the mentioned Act such Agreement had to be in writing and signed by the parties or their representatives acting on written authority. Accordingly it was contended that having regard to the abovementioned considerations, Applicant had not made out a case for any clear right in respect of the interdict sought. I agree with Respondent's mentioned arguments.

10.

Upon reading the affidavits and all the annexures, I deemed it a pity that the Applicants have sought to have recourse to this Court. It is of course their good right

to do so, but it is also patently obvious to me that whatever decision I would give in this case would not result in any harmonious relationship between the parties in the context of whether the road should be closed or not and under which circumstances. They ought to perhaps have considered alternatives, such as the upgrading of the despised "Rocky Horror" Road or even the permanent closure of Unit 4 by way of an offer to the owners. That may have been a drastic step but it would have solved all their problems permanently. Be that as it may, a wise referee/mediator would probably have been of some assistance.

11.

Applicants however did have the right to approach this Court and it is my duty to make a judgment according to law, and not be concerned at all with what I would have done or recommended in the place of the parties.

It is my judgment that Applicants have not established a clear right in the present context and accordingly I order that the application be dismissed with costs.

JUDGE H.J FABRICIUS

JUDGE OF THE NORTH GAUTENG HIGH COURT

Case no.: 36878/2013

Counsel for the Applicants: Adv R. D. McClarty SC

Instructed by: Bowman Gilfillan Attorneys

Counsel for the Respondent: Adv T. O'Hannessian

Adv L. T. Leballo

Instructed by: Turner Douglas Attorneys

Heard on: 13/05/2014

Date of Judgment: 04/06/2014 at 10:00