IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 20387/10

THE TRUSTEES FOR THE TIME BEING OF THE BODY CORPORATE OF THE SECTIONAL TITLE SCHEME KNOWN AS TYGERFALLS VILLAS II	1st APPLICANT
GERARD CHRISTIAAN VAN ROOYEN	2nd APPLICANT
SUNE VAN ROOYEN	3rd APPLICANT
JENNIFER ANN KENNEDY	4th APPLICANT
GLYNNE FELICE DAVIDSON	5th APPLICANT
ERICA FRANCISCA ERASMUS	6th APPLICANT
WRIGHT APPROACH INVESTMENTS 139 CC	7th APPLICANT
DIVINE INSPIRATION TRADING 67 (PTY) LTD	8th APPLICANT
RORY DUNCAN COLEMAN	9th APPLICANT
SUSANNA DEKKER	10th APPLICANT

and

JLK PROJECTS AND CONSTRUCTION (PTY) LTD	1st RESPONDENT
CHARLES POTGIETER INVESTMENT (PTY) LTD	2nd RESPONDENT

JUDGMENT DELIVERED ON THIS 24tn DAY OF AUGUST 2011

FORTUIN, J:

A. INTRODUCTION

[1] This is an application for the eviction of First Respondent from the building known as Tyger Falls Villas II ("the property"), and more specifically units 42, 47, 48, 52, 53, 57, 58, 60, 73, 77, 81 and the foundations of the north eastern portion of the building. Applicants did not proceed against Second Respondent after no appearance to defend was entered by Second Respondent.

B. THE PARTIES

[2] First Applicant is the trustees for the time being of the Body Corporate of the Sectional Title Scheme known as Tygerfalls Villas II (hereinafter referred to as "Tygerfalls") with registration number SS465/2005 and with offices at Room B4, 1 Bridal Close, Tyger Waterfront, Bellville. The Body Corporate of First Applicant is responsible for the control, management and administration of the common property of Tygerfalls.

[3] Second Applicant is the chairman of the Body Corporate of the Sectional Title Scheme known as Tygerfalls Villas II (hereinafter "the Sectional Title Scheme").

[4] Third to Tenth Applicants are owners of units 53, 52, 57, 77, 47, 60 and 73 respectively.

[5] First Respondent is JLK Projects and Construction (Pty) Ltd (hereinafter referred to as "JLK"), a private company with limited liability incorporated as such in terms of the Companies Act, Act 61 of 1973 with registration number 2002/003602/07 and with registered address at Kaplan Street, Paarl. At all relevant times First Respondents' directors were Johannes Adriaan Louw, an adult businessman with identity number and Anton Louw, an adult businessman with identity number .

[6] Second Respondent is Charles Potgieter Investments (Pty) Ltd (CPI), a private company with limited liability incorporated as such in terms of the Companies Act, 61 of 1973 with main place of business at Tyger Chambers 1, Willie Van Schoor Drive, Bellville. Second Respondent was the developer of Tygerfalls, a residential apartment building erected on Erf 31294, Bellville.

C. FACTUAL BACKGROUND

C.1 Common cause

[7] The property was completed in or about August 2005 and the owners of the different units took possession of their properties on or about 1 September 2005.

[8] The principal building contractor of Tygerfalls Villas II was *Johan Louw Konstruksie (Pty) Ltd,* which, in the meantime, changed its name to *Vecchio Modo (Pty) Ltd.*

[9] During 2006, cracks started appearing in the relevant units which progressively worsened during 2007 and 2008 as a result of a major structural fault. Applicants were forced to vacate their units for safety reasons. In terms of an order granted by this court on 26 January 2010 by agreement, CPI's liability was confirmed. The terms of the order were as follows:

> *"Respondents (CPI) have given Applicant an undertaking that Respondents shall by no later than 1 April 2010, resume the remedial work in respect of the structural defects in the building known as Tygerfalls Villas II, in compliance with its statutory obligations in terms of provisions of sec 13(2) of the Housing Consumer Protection Measures Act."*

[10] Second Respondent procured the services of First Respondent during March 2009 for the purpose of completing the construction and fixing the cracks that had appeared. First Respondent stopped working on the property during April 2010, claiming that Applicants had not paid for work done. In correspondence between the parties, First

Respondent refused to vacate the property and *inter alia* alleged that it had a lien over the property. Applicants' claim is for the eviction of First Respondent to enable them to gain access to their property to complete the remedial work.

C.2 Disputed issues

[11] First Respondent placed the following issues in dispute:

(i) Lack of urgency;

(ii) Lack of authority on the part of Mr van Rooyen (Second Applicant) to act on behalf of the Body Corporate;

(iii) Agreement between Applicants and First Respondent; and
(iv) First Respondent is exercising a valid lien against Applicants.

D. THE ISSUES D.1

Urgency

[12] Although First Respondent initially submitted that the matter should be struck from the roll due to a lack of urgency, this contention was not proceeded with.

D.2 Lack of authority on the part of Mr van Rooyen

[13] On behalf of First Respondent, it is submitted that the Body Corporate has no *locus standi* and that there was no authority given to Mr Van Rooyen to institute the present proceedings. In terms of the resolution dated 28 October 2008, the following authorisation is clear:

> *In terms of the requirements by Sub Section 6 of Section 36 of the Sectional Titles Act 95 of 1986, this resolution authorises and approves the Tygerfalls Villas II Body Corporate and its duly appointed trustees to institute/commence/conduct any legal action/proceedings and/or any other claim against the developer of said scheme, Charles Potgieter Investments (Pty) Ltd (CPI), any of its directors in their capacities as directors of CPI or in their personal capacities (as the case may be), or their contractors, and their*

sub-contractors, the NHBRC (National Home Builders Registration Council) or any other party whom, in the trustees' opinion, are liable for repairs or the payment of damages or compensation relating to or arising out of any damages, bad workmanship or subsequent/consequentual damages suffered to the common property and/or the scheme. The trustees of the Body Corporate are specifically authorised to appoint legal representatives, consultants, engineers and expert witnesses, and generally to do whatever is reasonable, necessary and/or requisite to give effect to the above resolutions."

[14] A special resolution was passed by the Body Corporate on 27 October 2010, which reads as follows:

"Special Resolution No. 001-2010

Legal action against JLK and Others/Regsaksie teen JLK en Ander

In terms of the requirements of Sub Section 36 of the Sectional Titles Act 95 of 1986, this resolution authorises and approves the Tygerfalls Villas II Body Corporate and its duly appointed trustees to institute/commence/conduct any legal action, obtain any interdict or submit any application and/or any other claim or restriction against any or all of the following parties:

- *JLK Construction and Projects (Pty) Ltd (JLKPC),*

Johan Louw Konstruksie (Pty) Ltd (JLK),

Vecchio Modo (Pty) Ltd (VM),

Mr. Johan Louw (ID 6011135053081), in his capacity as Director of JLKPC, JLKJ and VM as the case may be,

Mr. Anton Louw (ID), in his capacity as Director of JLKPC, JLKJ and VM as the case may be,

Mr. Johan Louw (ID) in his personal capacity,

Mr. Anton Louw (ID) in his personal capacity,

The developer, Charles Potgieter Investments (Pty) Ltd (CPI),

Any of its directors in their capacities as directors of CPI,

Mr Charles Cilliers Potgieter in his personal capacity,

Any holding company, subsidiary or shareholder of Charles Potgieter Investment (Pty) Ltd,

Any liquidator of Charles Potgieter Investments (Pty) Ltd in liquidation,

Any of their contractors, and their subcontractors,

The NHBRC (National Home Builders registration Council), or

Any other party Whom in the trustees' opinion,

Are liable for repairs or the payment of compensation because of any damages, bad workmanship or subsequent damage suffered to the common property,

Are unlawfully or illegally exercising any purported builder's lien or retention,

Are unlawfully or illegally occupying any part of the body corporate common property,

Are interfering with the legal or registered limited or real rights of the body corporate or any owner of a unit in said property."

[15] The first question is, therefore, whether the conduct by First Respondent caused damage to the common property and/or the scheme to such an extent that the Body Corporate was authorised to institute these proceedings in terms of the resolution of 28 October 2008. The second question is whether the resolution envisaged future conduct on behalf of contractors and subcontractors of Second Respondent. The third question is whether the conduct of the Body Corporate and its trustees, in instituting legal proceedings, was ratified in terms of the special resolution of 27 October 2010.

[16] A similar situation prevailed in the matter of **Smith v Kwanonqulela Town Council**[1]**,** where it was found that the institution of legal proceedings can indeed be ratified when the intention of the principle is clear:

> *"... the decision to continue with the case evinces a clear intention to ratify whatever action was taken, irrespective of the legal niceties involved."*

[17] I am of the view that the resolution of 28 October 2008 authorised the Body Corporate and Mr Van Rooyen, as its chairman, to institute the proceedings and that it also envisioned future conduct on behalf of contractors and subcontractors of Second Respondent. I am further of the view that the special resolution of 27 October 2010 ratified the conduct of both the Body Corporate and Mr Van Rooyen on its behalf.

D.3 Agreement between Applicants and First Respondent

D.3.1 Right to Occupy

[18] It is common cause that Applicants allowed First Respondent to take control of the area where the remedial work had to be effected. The content of the agreement to

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1 1999 (4) SA 947 SCA at par 952E

effect the remedial work is, however, in dispute. Applicants submit that, on Second Respondent's instructions, they granted permission for a builder to complete the remedial work within a reasonable time. First Respondent submits that Applicants, in addition, agreed not to interfere with the contractual arrangement between it and the developer (Second Respondent).

[19] First Respondent further submits that these two versions constitute a dispute of fact, and because Applicants should have foreseen this dispute before it decided to approach the court on application and not by action, First Respondent's version should be accepted.

[20] It is common cause that First Respondent commenced the remedial work on the instructions of Second Respondent, to whom he looked to for payment. No contractual relationship exists between Applicants and First Respondent. First Respondent cannot artificially create a dispute of fact by alleging an implied condition that Applicants would not interfere with his work. Applicants are innocent third parties who ought not to be prejudiced by the breach of the agreement between First and Second Respondent, which may or may not have included in that dispute the issue of effective workmanship.

D.3.2. Dispute of Fact

[21] The law with regards to a dispute of fact was clearly laid down in the matter of **Plascon-Evans v Van Riebeeck Paints Ltd[2].** The relevant section of this judgment is as follows[3]:

> *"Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in* ***Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd*** *1957 (4) SA 234 (C) at 235E-G, to be :*
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> ' ... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as

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21984 (3) SA 623 (A)

3Plascon-Evans v Van Riebeeck Paints Ltd, supra at page 634D - 635C

> stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'

This rule has been referred to several times by this Court (see ***Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd*** *1976 (2) SA 930 (A) at 938A-B;* ***Tamarillo (Pty) Ltd v BN Aitkin (Pty) Ltd*** *1982 (1) SA 398 (A) at 430-1;* ***Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd and Andere 1982 (3) SA*** *893 (A) at 923G-924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such and order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or* bona fide *dispute of fact (see in this regard* ***Room Hire CO (Pty) Ltd v*** **Jeppe** ***Street Mansions (Pty) Ltd*** *1949 (3) SA1155 (T) at 1163-5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D-H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf* ***Petersen v Cuthbert & Co Ltd*** *1945 AD 420 at 428;* ***Room Hire*** *case* supra *at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg* ***Rikhoto v East Rand Administration Board and Another*** *1983 (4) SA 278 (W) at 283E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so farfetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of*

Botha AJA in the ***Associated South African Bakeries*** *case,* supra *at 924A)."*

[22] In *casu,* First Respondent is in actual fact asking the court to apply the **Plascon-Evans** test selectively. It is trite that the mere mention of a dispute of fact will not suffice. The different versions should be tested to ascertain whether there is a genuine or *bona fide* dispute of fact and First Respondent's version can only be accepted where it is not untenable. In this regard see **Room Hire Co (Pty) Ltd v Jeppe Str Mansions (Pty) Ltd**[4]**.** Where it is so far-fetched or untenable, Applicants' version should be accepted on the papers.

[23] On consideration of First Respondent's version, firstly that the Applicants did give the necessary permission for them to occupy their property, I don't see any dispute of fact. Applicants admitted that they gave permission to Second Respondent for a builder to enter their property to complete the remedial work. The second part of First Respondent's version, i.e. that an undertaking was given not to interfere with the contractual arrangement between them and the developer (Second Respondent), however brings me to a different conclusion. I am of the view that it is untenable that Applicants, even if they did give the necessary permission for First Respondent to enter the property, would have given permission for the builder to stay on their property indefinitely and irrespective of what the future relationship between the builder and the developer would be. I am, therefore, of the view that First Respondent's version in this regard is so far-fetched and untenable that it should be rejected and Applicants' version accepted, merelyon the papers. In my view, no genuine or *bona fide* dispute of fact was raised and Applicants' version that permission was granted only for a reasonable time is therefore accepted.

[24] The question that remains is whether this limited arrangement afforded a lien to First Respondent.

41949 (3) SA 1155 (T)

E. LIEN BY FIRST RESPONDENT[5]

[25] A lien is defined as the right to retain physical control of another's property as a means of securing payment of a claim relating to the expenditure of money on the property, until the claim has been satisfied.

[26] Where expenditure was incurred on property because of a contractual obligation, a debtor and creditor lien comes into existence. Where there is no such agreement, as contended by the Applicants, someone who has effected work on another person's property has a right of retention on that property, operative against the entire world. This right may be a real lien, salvage and improvement lien or an enrichment lien. A salvage lien will be used to ensure payment incurred for necessary expenses, for example those expenses necessary for the continued existence of the property in its present form.

[27] On the Applicants' own version, the expenses incurred by First Respondent were necessary to stop the asset from further deteriorating, i.e. they were necessary expenses.

[28] It is common cause that Second Respondent was legally obliged to effect remedial work pursuant to the court order granted by agreement on 26 January 2010. It is further common cause that the repairs by First Respondent to the property, on instruction of Second Respondent, were indeed necessary.

E.2 Unjustified enrichment of Applicants

[29] First Respondent claims that Applicants were enriched by the work done by them to the Applicants' property. An underlying enrichment claim was also at the centre of the decision in **Buzzard Electrical (Pty) Ltd v 158 Jan Smuts Ave Investments (Pty) Ltd**

5Lawsa, 15, Part 2, para 49 - 84

& Another[6]**.** This matter is on point. In this case the owners of a certain property had contracted with a developer for the purposes of effecting certain improvements to such property. The developer in turn subcontracted such work to another company. The developer was later placed in provisional liquidation and in turn did not pay for the work done. The subcontractor retained possession of such property relying on a supposed right of retention as a result of the alleged unjustified enrichment of the owners. The parties entered into an agreement in terms of which the subcontractor would vacate the property on the basis that the subcontractor would be compensated, should the owners be found to be liable. The subcontractors did vacate the property and claimed against the owners for unjustified enrichment.

[30] The Appeal Court emphasized that a lien cannot exist in isolation, but that it serves to reinforce an underlying claim based on unjustified enrichment. It was held that only when the enrichment was unjustified, would the

possessor have a claim against the owner. Where there was no agreement between the owner and the possessor, but only between the possessor and the developer and the work done was also in the interest of the owner, the owner was enriched. The next question is, therefore, whether the enrichment was unjustified. Where the owner received only what he contracted for with the developer and nothing more, his enrichment was not unjustified.

[31] In *casu,* it is Applicants' case that the expenses incurred were to correct and/or replace the uninhabitable units. Further, that, in the event that they were given back habitable and safe units, they would have received only what they paid for and nothing more.

[32] It is further Applicants' case that the value of their properties is negatively affected by the structural defect and that the work currently done by First Respondent did not increase the value of their property. To illustrate this, the following examples were given:

61996 (4) SA 19 (A)

- Unit 14 was originally bought for R1 560 000.00 and later sold for R481 100.00;
Unit 16 was originally bought for R728 000.00 and sold for R237 000.00; and
Unit 50 was originally bought for R938 000.00 and later sold for R351 000.00.

[33] Applying the principles as laid down in the **Buzzard** matter that the lien cannot exist in a vacuum and considering the above, I do not find that any underlying claim exists.

[34] On the papers before me, I am unable to determine whether there was any enrichment at the expense of First Respondent, as I am unable to determine what the value of the limited remedial work is. The only evidence before me is that Applicants received a portion of what they paid for in terms of the agreement entered into with Second Respondent, and nothing more. First Respondent does, therefore, not have an underlying claim necessary for a valid lien against Applicants.

F. <u>THE PROVISIONAL LIQUIDATION OF SECOND RESPONDENT</u>

[35] The issue of the insolvency of Second Respondent and whether it is indebted towards First Respondent is not before me and I am therefore not making any ruling with regards thereto. The issue of whether First Respondent has a claim against Applicants and the quantum of that claim, is similarly not before me.

G. <u>FINDINGS</u>

[36] I am in agreement with the *dictum* in the **Buzzard** matter and with the submissions by Applicants, and I am of the view that there is no underlying claim by First Respondent and that it therefore does not have a valid lien against Applicants.

[37] In the circumstances, I make the following order:

- **First Respondent is evicted from the building known as Tyger Falls Villas II; First Respondent is evicted from Units 42, 47, 48, 52, 53, 57, 58, 60, 73, 77 and 81**

of Tyger Falls Villas II as well as the foundations on the north eastern portion of Tyger Falls Villas II;

First Respondent is to pay the costs of this application, including the costs of two counsel.

FORTUIN, J