

Adolphs v Helderberg Village Master Home Owners Association

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 108/WC/17
Adjudicator: Adv. Dries du Toit
Date: 14 September 2017
Applicant: Mrs I Adolphs
Respondent: Board of Directors: Helderberg Village MHOA



PARTIES

[1] The applicant is the owner of dwelling unit 821 (Section No. 48 and more fully described on Sectional Plan No SS 458/1998) Helderberg Village Bredell, Somerset West, Cape Town as per Deed of Transfer No ST 6099/1999.

[2] The respondent is the Board of Directors of Helderberg Village Master Homeowners Association NPC ("HVMHA") duly incorporated in terms of the Companies Act and represented by Mr Vagn Nielsen in the capacity of CEO and duly authorised to represent the HVMHA in this hearing as per resolution passed on 28 August 2017 (Meeting M6/2017) by the directors of the company. HVMHA is a "community scheme" as contemplated in the CSOS Act of 2011. The definition of "community scheme" means any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings.

INTRODUCTION

[3] This is an application for dispute resolution in terms of Section 38 of the Community Schemes Ombud Services Act No.9 of 2011. The application was made in the prescribed form and lodged with the Western Cape Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.

[4] The adjudication hearing took place on 11 September 2017. This application is before me as a result of a referral sent by the Western Cape Provincial Ombud in terms of section 48 of the Act, which 'Notice of Referral' was communicated to both parties.

APPLICABLE PROVISIONS OF THE ACT

[5] The application was submitted in terms of section 38 of the CSOS Act No,9 of 2011 which provides that -

"Any person may make an application if such person is a party to or affected materially by a dispute".

[6] Section 39 provides that -

"An application made in terms of section 38 must include one

or more of the following orders:

(6) In respect of works pertaining to private areas and common areas -

(c) an order requiring the association (i) to carry out, within a specified time, specified works to or on the common areas for the use, convenience or safety of owners or occupiers; or (ii) not to carry out specified works, and (e)(iii) to dispose of specified property, within a specified time".

[7] Section 47 provides that -

"on acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, the ombud must refer the matter to conciliation".

[8] Section 48 provides that -

"If conciliation contemplated in section 47 fails, the ombud must refer the application together with any submissions and responses thereto to an adjudicator".

SUMMARY OF EVIDENCE

[9] Applicant and owner of unit 821 Helderberg Village complains that the Ce/tis Sinensis tree planted at the corner of her neighbour's unit 822, which is common property, is now blocking out her view, sunshine and most of the light. Applicant wants this tree to be removed and contests that it is in contravention of the 'Gardening Guidelines'. Respondent is of the view that their refusal to remove the tree in the circumstances is 'within reason' and in accordance with the 'Guidelines'.

APPLICANT'S VERSION

[10] Applicant (a 90 year old lady) avers that they bought the property in 1998 with an unrestricted view. Trees were subsequently planted in the village and this Celtis Sinensis tree planted by neighbour Mrs Will from unit 822 (next to her unit on common property), is now fully grown and restricts her view and blocks out the sun. Permission to remove

the tree was sought from Mrs Will's daughter "Dorothea Anthes", who lives abroad and who handles her mother's affairs due to her old age and the fact that she suffers from Dementia. Permission to remove the tree was however refused, after which applicant wrote to the Chairman of the Board of Directors to seek permission, which was also refused. Applicant further concedes in her letter to the chairman of 4 April 2016 that some pruning was done to the tree on the east side, however this constituted an unsightly shape and did not resolve the issue. Applicant contests that the tree is in contravention of Helderberg Village Gardening Design Guidelines clause 5 which provides inter alia that: "Generally, the layout and plantings when fully grown must: (1) Not block out or, within reason, interfere with neighbours' views".

APPLICANT'S PRAYERS

[11] That the Celtis Sinensis tree in question be removed, as the mere topping of the tree would only be a temporary solution, and her view and sunlight be restored from the western side.

RESPONDENT'S VERSION

[12] Helderberg Village is a premier life-style sectional title gated village managed by Helderberg Village Master Homeowners Association NPC. The Association (a non-profit company) is incorporated in terms of the Companies Act and managed in terms of a Memorandum of Incorporation and Rules. The development is complete and comprises about eighty-four hectares of land on which 776 dwelling units, a healthcare centre, clubhouse and various sporting and recreational facilities have been built. The Association is further managed by a non-executive Board of Directors, all owners themselves of properties in the Village, also home to 1100 permanent residents with approximately 4000 trees.

[13] The Homeowners Association and Village management do not usually get involved (intervene) in these type of disputes and leave it for the owners / neighbours to resolve amongst themselves, unless the tree in question here causes a danger or obstruction to buildings or infrastructure. A neighbours 'Consent Form' is required, signed by all

affected Villagers, and submitted to the Common Property & Infrastructure Management with the request to have the offending tree topped or trimmed (as per clause 8.2.10 P47 of the General Policy & Guidelines submitted). It is further stated under said clause that: "While Village management will assist Villagers in preserving a view by topping or trimming trees, shrubs or creepers, it is up to the Villagers concerned to negotiate between themselves the preservation of such views." Respondent expressed his reservations concerning the susceptibility of the Celtis Sinensis to be topped however.

[14] Trees, shrubs and creepers which: (8.2.15) "in the sole opinion of Management are the cause of a nuisance of whatever nature, will be removed or pruned to preserve views except as provided for in clause 8.2.11", which provides for the removal of structured shrubbery only on prior sanction by Management. Annual pruning and individual pruning on request are done in accordance with the guidelines.

[15] The Helderberg Village Gardening Guidelines determines inter alia that:

(5) "Generally the layout and plantings when fully grown must; (1) not block out or, within reason, interfere with neighbours' views". In this instance neighbour Mrs Will does not consent to the removal of the tree.

[16] Respondent also submitted photos taken from applicant's patio indicating the unrestricted view of about 150 degrees overlooking the Bredell dam with the Celtis Sinensis tree only restricting about 30 degrees of the view to the far left side.

[17] Respondent further stated that applicant's home faces north-north west (as per section plan) allowing sunlight during the majority of the day. A satellite photograph indicating the position of applicant's home as well as graphs indicating the movement of sunlight at different times of the year favouring applicant. Applicant can further open her roof to allow for more sunlight as well according to respondent.

[18] Respondent is of the opinion that applicant's request is not in the spirit of the Village's Gardening Guidelines and the board's refusal in the circumstances was not unreasonable. The granting of this application may further also open a floodgate to similar claims in the Village. Respondent however conceded that he is willing to revisit the matter when the circumstances change.

EVALUATION OF EVIDENCE SUBMITTED

[19] The Memorandum of Incorporation for a Non-Profit Company Helderberg Village Master Homeowners Association NPC (as adopted by special resolution 10.2 passed on 15 August 2013) clause 4 determines that: (4.1) "The objects of the Company are to manage and oversee the collective interests of all its Members and the Village amongst other things; (4.1.12) promotion of the communal, cultural, social, and recreational interests of all Members through amongst others the provision and maintenance of cultural, social and recreational facilities and amenities for the community at the Village."

[20] "All trees, shrubs and creepers growing in Helderberg Village whether planted by the developer or individual Villagers, are planted on common property and are legally therefore the property of all Villagers in an undivided share apportioned in accordance with the participation quota as endorsed on the sectional plan." (P48 of the General Policy & Guidelines).

[21] The Gardening Guidelines clause 9 'Common Property Gardens and Grounds' also determines: 9.2 "The gardens have been laid out according to a plan which aims at a pleasing design, using species of plants and shrubs most suited to the area, which will give you beauty and privacy, but at the same time give the entire Village a pleasing overall appearance. Villagers may not remove, cut down or prune any trees, shrubs or vegetation in the communal and neighbouring gardens and grounds, including the road verges. Requests for such work must be addressed to the Manager: Common Property & Infrastructure. Similarly, Villagers may not plant trees and shrubs in these areas without the prior written authority of Village Management."

[22] The determination of 'reasonableness and equal application to owners' for rules entails a rule in circumstances of a particular scheme to be;

22.1 "Necessary,

22.2 Not to be excessively wide in its scope,

22.3 Based on good reason, i.e. sensible in the circumstances, and Operate so as to promote the best interest of the sectional community, for example in preserving the quality of life in the scheme or the value of the units as investments." (Sectional Title Survival Manual Paddocks 8th Ed January 2017 Graham Paddock P80).

[23] In LJ de Kock and Saldanhabaai Municipality & Others (case no 7488/04) (C) Unreported, which application dealt with a review and the setting aside of certain approved building plans. Klapper AJ made the following remarks concerning applicant's right to an unrestricted see-view in this instance on P19 par 36; "n Oorsig van ons reg in hierdie verband sal egter aandui dat n persoon se reg op n uitsig in die omstandighede wat van toepassing is in hierdie aansoek beperk word, tesame met enige ander eiendomsregte deur ander regte soos bepaal word in die Nasionale Bouregulasies, soneeringsskemas en stadsbeplanningwetgewing." The just of the matter here is that a person's right to a view can be restricted.

[24] Paddocks is also of the view that the cutting out of sunshine is not encroachment, because we don't have a right to a view or to light (Paddocks Press Newsletter of 29 July 2015/3). Paddocks however also reiterates that the Act prohibits an owner from using their sections or exclusive use areas in such a way as to cause a nuisance to the occupier of another section.

[25] It is evident from the relevant facts and evidence presented (inclusive of photos submitted) that the trees in the Village form an integral part of the beauty and privacy, creating a pleasing overall appearance, which preserves the quality of life in the scheme.

[26] It is consequently found that the refusal of permission granted by the board of directors not to remove (or top the tree) in the circumstances was reasonable, fair and in accordance with Helderberg Village's Memorandum

of Incorporation, General Policy & Guidelines and the Gardening Guidelines.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[27] The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the Community Schemes Ombud Service Act. The CSOS Act enables residents of community schemes including sectional title schemes to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts. The purpose of this order is to bring closure to the case brought by the applicant to the CSOS.

ADJUDICATION ORDER

[28] In the circumstances, the following order is made in terms of Section 54 of the Community Schemes Ombud Service Act No.9 of 2011; Applicant's relief sought in this instance is refused.

No order is further made as to costs herein.

SECTIONS 56 (1) OF THE CSOS ACT, 2011

[29] The parties' attention is drawn to Section 56 (1) of the Act provides that-

'If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order must be enforced as if it were a judgement of such Court and a clerk of such Court must, on lodgement of a copy of the order, register it as order in such Court '.

RIGHT TO APPEAL

[30] Section 57 of the CSOS Act of 2011, also determines that;

(1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.

(2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

(3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.