Barbara Bernadie v Botania Court Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 261/GP/2016
Adjudicator: Zama Matayi
Date: 23 January 2017
Applicant: Barbara Helen Bernadie
Respondent: Botania Court Body Corporate

PARTIES

[1] The Applicant is the registered owner of Unit 5 and 16 in Botania Court, a Sectional Title Scheme situated in Meyerton, Gauteng.

The Respondent is the Body Corporate of Botania Court, a body corporate as contemplated in section 2 of the Sectional Titles Scheme Management Act No. 8 of 2011 and to which it would be convenient to refer as 'the body corporate'.

BACKGROUND

[2] 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 Gauteng Provincial Ombud office situated at 1st Floor Block A, 63 Wierda Road

East, Sandton. The application includes a statement of case which sets out the relief sought by the applicant which relief is within the scope of prayers for relief contemplated in section 39 of the Act as will more fully appear in the evidence. The application in general terms complies with section 38 of the Act.

This application is before me as a result of a referral sent on the 13th of December 2016 by the Gauteng Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties by email to their respective email addresses. The Notice of referral was sent by email to me by the Gauteng Provincial Ombud. The Applicant and respondent Mr Mark Hencock, Chairperson of the Body Corporate were also recipients of the same Notice of referral. The respondent's email address as appearing in the prescribed form is mark.huizemark@vodamail.co.za and for all intent and purposes used as a means of communication with the Respondent. On the 14 of December 2016 the matter was then set down for adjudication at the Gauteng CSOS offices for the 16th and 171h January 2017 at 09h00. On the 14 December 2016 the Notice of Set Down was sent by email to both parties to their known email addresses.

On the 16th of January 2017 at about 09h30 the matter was called up to be proceeded with as scheduled. The Applicant made an appearance and there was no appearance on behalf of the Respondent. On inquiry from the Applicant as to the where about of the Respondent's representative, the Applicant indicated that she has no instructions and or information about the respondent's non-appearance and provided a cell phone number 072 455 2618 whose number she indicated was that of Ms Dina Pretorius who is the caretaker tr stee of the Body Corporate.

Section 50 of the CSOS Act reads:

> *"The adjudicator must investigate an application to decide whether it would be appropriate to make an order, and in this process the adjudicator-*
>
> *(a) must observe the principles of due process of law; and*
>
> *(b) must act quickly. and with as little formality and technicality as is consistent with a proper consideration of the application; and*
>
> *(c) must consider the relevance of all evidence, but is not obliged to apply the exclusionary rules of evidence as they are applied in civil courts".*

In applying section 50 of the Act I contacted the said Ms Dina Pretorius who advised that she was aware of the intended proceedings and that she cannot attend because she does not have transport to attend. She however requested that we roll the matter over for the 17th of January 2017 and that she will arrange for someone else to represent the Body Corporate. This telephonic conversation with Ms Pretorius was then followed by an email to her confirming the contents of the conversation. The matter was then remanded to the 17th January 2017.

On the morning of the 17th of January 2017 an email that was sent on the 20 December 2016 was received on my Junk Email from Mr Mark Hencock advising me that with regard to the hearing of the 16th & 17th of January 2017 that he no longer was the chairperson of the Body Corporate with effect from 20 October 2016. On the Morning of the 17th January 2017 Ms Dina Pretorius was once again telephonically contact to inquire about the non-appearance of a representative of the Body Corporate and she advised that no one was available

including herself as she had a doctor's appointment and does not have transport.

On the 17th of January 2017 at about 1Oh15 the matter was then called up and the Applicant confirmed her appearance and no appearance was entered by the Respondents. The Applicant was asked to comment on the non-appearance of the Respondent.

APPLICATION TO PROCEED IN RESPONDENT'S ABSENCE

[3] The adjudication process and my appointment as the Adjudicator was explained to the Applicant and the Applicant had no objection to me presiding over the matter. The Applicant brought an application that the matter be proceeded with in the absence of the Respondents. The Applicant submitted that the Respondents knew about the hearing date and were given sufficient notice. She further contended that the Respondent were granted the indulgence on the 16th of January 2017 when the proceedings were scheduled to commence. The Applicant requested that the matter proceed in the absence of the Respondent. Unlike other legislations the CSOS Act does not make provision for default judgement proceedings, however default judgement forms an integral part of our legal system in order to administer justice and for justice to be seen to be done. In the circumstances I considered the motion for default judgement.

Factors to consider in deciding whether to grant default judgment include (1) the possibility of prejudice to Applicant, (2) the merits of the claims, (3) the sufficiency of the complaint, (4) the amount of money at stake, (5) the possibility of a dispute concerning material facts, (6) whether default was due to excusable neglect, (7) whether the Body Corporate received reasonable notice of the time, date and place where the adjudication would be held, (8) whether any good and sufficient cause for the failure of the Body Corporate to attend has been shown, (9) the conduct of the trustees before and during the proceedings.

Most of these factors weighs in favor of granting Applicant's request for an award of monetary damages because Applicant will be prejudiced if default judgment is not entered. The process was served on Respondent more than a month ago. The Notice of set down was sent to the chairperson of the body corporate by email on 14 December 2016 which email was duly

received by the chairperson as can be seen from the response email by the chairperson regarding his termination of chairmanship of the body corporate. Ms Dina Pretorius, the caretaker trustee telephonically indicated that she knew about the hearing but that she had no transport to attend it. This explanation can surely not be said to be good and sufficient to justify non-appearance and is therefore rejected. The manner in which the Respondent's trustees conducted themselves between 14 December 2016 and 17 January 2017 cannot be condoned. There was no timeous notice of an intention to apply for a postponement and no indication was also given to the Applicant about the possibility of non-appearance.

FINDING ON THE APPLICATION

[4] In the circumstances I find that the Respondent received reasonable notice of time, date and place where the adjudication would be held. I also find that no good and sufficient cause for the failure of the Respondent to attend has been shown and that the adjudication shall proceed in the absence of the Respondent. The Respondent have not answered or otherwise responded to the complaint. If Applicant's motion to proceed in the absence of the Respondent is not granted, The Applicant will likely be without other recourse for recovery.

MAIN APPLICATION

SUMMARY OF DISPUTE

[5.1] 5.1.1 The Community Schemes Ombud Service is considering a dispute from Ms Barbara Helen Bernadie (Applicant) regarding the following allegations:

a) Failure and or refusal by the Body Corporate Botania Court to repair damage caused by storm to the roof of her Unit 16. The damage apparently occurred on the 22 April 2015 and 19 November 2015 .

b) Failure and or refusal by the Botania Court Body Corporate to repair damage to the Ceiling and internal

walls of her Unit which damage was caused by the leaking roof.

c) Inflated levy account as a result of incorrect water billing calculations.

APPLICANT'S VERSION

[5.2] 5.2.1 Roof Leak and Damage to the Ceiling

The Applicant was sworn in.

In respect of the above the Applicant testified as follows:

She is the owner of Unit 5 & 16 in a Sectional Title Scheme known as the Botania Court situated in Gallaway Street, Meyrton. On the 22 April 2015, Unit 16 experienced a roof leak as a result of a storm that occurred in the area. The Applicant then sent an sms to Ms Elsie Swanepoel, a member and a trustee of the Botania Court Body Corporate informing her about the damage and requested that the Body Corporate to consider repairing the damage caused by the storm. Subsequent to the sms sent to Ms Swanepoel the Applicant then sent an email to Mr Mark Hanckock (Huizemark) the then Chairperson of the Botania Court Body Corporate informing him of same. This email was sent on the 27 April 2015 and the contents thereof were read into the record. No action was taken by the Body Corporate to either assess the damage or to repair same.

The Applicant was then informed via email by Mr Mark Henckock that it was not necessary to submit an insurance claim. The roof of Unit 16 was never repaired and it leaked again during another storm on 19 November 2015. The Applicant further testified that she sent another email to Mark Henckock to inform him about the storm of the 19th of November 2015. There were photographs taken of the ceiling and the walls, the ceilings are cracked, sagging and there is now water coming through the light fittings on the ceiling and damages just getting worse and the paint is peeling off the walls and that she is scared that the cracks and the damage on the ceiling is getting and the ceiling might just fall in. The external damage was looked at by the Applicant's tenant. The cause of the damage to the ceiling is the leak from the external structure. (Copies of Photographs handed in and marked as Annexure "A").

The next communication from the Body Corporate was at an Annual General meeting held in 20 October 2016. The Applicant did not attend the meeting because she was working at a time. The minutes reflects that the roof damage of Unit was discussed and treasury commented there was no sufficient fund to repair the damage. A special levy was also discussed but was rejected by members of the Body Corporate. (The Minutes of the AGM of the 20 October 2016 handed in and as evidence marked as Annexure "B"). Because of this problem at the flat the Applicant testified that she is suffering loss of income as she cannot increase her rent because of the dilapidated state of the Unit. To date the roof has not been repaired. The Applicant did not obtain any quotations in her personal capacity to quantify the damage.

5.2.2 Inflated levy / Water Bill account as a result of incorrect calculations of the Water Billing

The Applicant testified that there was a meeting which the Body Corporate called on 24 April 2013 to discuss water billing to each flat using the occupancy system. There were objections to this motion but the trustees advised that they will be going ahead with the occupancy billing system. As a result of the objections an extra ordinary meeting was held on 06 June 2013. The meeting was called by Ms Owner Yvonne Ackerman The new system was to charge for water per occupancy of a unit and the old system was that water charges were covered by the levy payment in other words there was a flat rate for the water billing. The Applicant testified that she was part of the meeting and the final response was that the new system be accepted even though the witness believed that this was not a workable solution.

The problem with this system is that the Body Corporate needs to know how many occupants were in each flat per month. On the 25th of each month a head count was conducted in each unit. The applicant testified that she had tenants who were not always there so she regularly sent an sms to Ms Elsie Swanepoel giving details of occupancy every month. The Applicant testified that the new system would use occupants ages to determine water consumption ie babies were not charged, toddlers were charged a proportion of the charge and any school going child or

adult would be charged the full amount. Dividing the water account with the number of occupants ranging from R75.00 per head. The period in dispute is from October 2014 to July 2016. During this period the Applicant testified that she submitted her occupancy statistics to Ms Dina Pretorius / Ms Elsie Swanepoel every month and despite such submission her water bill was incorrectly calculated. As a result of incorrect calculation the applicant suffered actual financial loss in the amount of R1 221.73 (that is in incorrect occupancy calculations) and an amount of R2 331.74 in penalties charged on her levy account. as she had to pay inflated water account during this period. The Applicant gave a detailed breakdown of how this amount is calculated.

The Applicant further testified that in November and December 2015 an amount of R57.72 and R79.29 was short billed by the Body Corporate because she was billed for less occupants whilst she in actual fact had more occupants. The Applicant conceded that the two amounts are owed to the Body Corporate as a result of their incorrect calculation. Lastly the Applicant testified that on 25th of July 2016 she "without prejudice" on advice from Legal Wise paid an amount of R3 375.83 to the Botania Court Body Corporate.

PRAYERS

[5.3] 5.3.1 The Body Corporate needs to take responsibility of repairing the roof damage and the internal damage to the ceilings and walls caused by the roof leak.

5.3.2 The repayment of the amount of R3 375.83 being the incorrect occupancy calculation and the penalties charged on the amount.

THE RESPONDENT'S VERSION

[5.4] As stated above the respondents did not enter an appearance and therefore there is no version on record.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

[5.5] In evaluating the evidence of the Applicant, the probabilities of the case together with the reliability and credibility of the Applicant must be considered.

The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. The degree or extent of proof required is a balance of probabilities. This means that once all the evidence has been tendered, it must be weighed up as a whole and determine what version is more probable. It involves findings of facts based on an assessment of credibility and the probabilities. It is further trite that direct evidence is more reliable than hearsay evidence.

The credibility of the Applicant as a witness inter alia depend on the frankness and demeanor in the witness box. In this regard it is relevant to consider for example whether the Applicant:

- answered the questions in a logical and straightforward manner;
- attempted to avoid answering questions;
- was unable/reluctant to answer questions that he/she should have knowledge of;
- exaggerated his/her version;
- gave evidence or made concessions favorable to the other party e.g. that he/she did not observe everything; in this regard the Applicant testified that in November and December 2015 she was short billed in the amounts of R57.72 and R79.29 respectively. This piece of evidence is in fact in favour of the Body Corporate.

In dealing with the damage to the roof and damage to the ceiling, it is important to note that the Sectional Title Schemes Management Act is very clear that the Body Corporate through its trustees is responsible for the maintenance and upkeep of the common property of the scheme. This responsibility is both operational and financial.

The Body Corporate must arrange for the maintenance and repair to be done and must pay for it. Maintenance and repair inside the units are not included in the responsibilities of the trustees, unless the damage has been caused by something in or on the common property. It follows that repairs and ongoing maintenance need to be adequately budgeted for in the operational I administrative budget and cannot be cross subsidized. It cannot be disputed that the roof of Unit 16 forms part of the common property and therefore lies squarely within the responsibilities of the Body Corporate.

The Applicant testified that as a result of the water coming through the damaged roof the ceilings and walls inside the unit were also damaged and continues to be damaged whenever it is raining. The Applicant's situation should

therefore be treated as an exception to the general rule that the inside of the unit is the responsibility of the owner as the damage to the inside was occasioned by the damage to the common property as per the Applicant's evidence. It is important to note that there is no evidence on record to gainsay the evidence of the Applicant. It is unavoidable to think that with the continued worsening condition of the ceilings this poses a serious threat to the safety of the occupants of the unit and could expose the Body Corporate to serious personal injury claims if left attended. The evidence of the Applicant therefore remains undisputed. I therefore find the roof of Unit 16 forms part of the common property which is the responsibility of the Body Corporate to repair and maintain. I further find that as a result of the failure by the trustees to act and or their delayed reaction when notified by the Applicant of the damage to the roof, they attracted an additional liability to the Body corporate in respect of the damaged ceilings and interior walls of Unit 16.

In as far as the incorrect calculation of the Applicant gave a detailed breakdown on how the amount claimed is made up. I do not wish to belabour the record by repeating the evidence of the Applicant. As stated above there is no evidence to rebut the evidence of the Applicant. With regard to the total amount claimed, the amount by which the Applicant was short billed during November and December 2015(R57.72 and R79.29 respectively) it is only fair that these amounts should then be deducted from the amount claimed. The evidence of the Applicant is then accepted in its entirety.

I therefore find no basis to fault the evidence of the Applicant. As may be seen from the record the Applicant gave a thorough breakdown of the issues. She answered all questions frankly in a logical and straight forward manner and did not exaggerate her version and even gave evidence in favour of the Respondents.

In conclusion the manner in which the Applicant dealt with her dispute with the Body Corporate must be commended and should be encourage amongst all Sectional title owners. She complied with her responsibilities towards the Body Corporate as she continued to pay he levies and water bill including the disputed amount which is the subject of this application.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[5.6] The Adjudicator is empowered to investigate, adjudicate and issue adjudication order in terms of sections 50, 51 53, 54 and 55 of the Community Schemes Ombud The CSOS Act enables residents of community schemes including sectional titles schemes and Home Owners Associations to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts. The cost of arbitration and litigation, has to some extent fostered a culture of impunity in sectional title schemes, because trustees, owners, or even managing agents know that they are unlikely to be called to account if they ignore the Sectional Titles Schemes Management Act as was clearly demonstrated in this matter.

ORDER

[5.7] In the circumstances the following order is made: The Respondent is ordered to:

1. Repair the roof, ceilings and interior walls of Unit 16 Botania Court, Meyerton within thirty (30) days from the date the order is made given the serious threat the damage poses to the safety of the occupants.

2. To repay to the Applicant an amount of R3 238.82 (three thousand two hundred and thirty eight rand eighty two cents) in respect of incorrect calculations and penalties charged.