Baxter v Ocean View Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 588/WC/17
Adjudicator: Nomonde Keswa
Date: 26 January 2018
Applicant: Kevin Baxter
Respondent: Trustees of the Ocean View Body Corporate

PARTIES

[1] Parties in this matter are:

a. The Applicant, Mr Kevin Baxter, the owner of Section 38/Unit B1201, an apartment consisting of two levels on the 12th and 13th floors in the Ocean View Sectional Title Scheme in Blouberg, Cape Town

b. The Respondent, the Trustees of the Body Corporate of the Ocean View Sectional Title Scheme

INTRODUCTION

[2] After the parties failed to resolve the dispute amicably between themselves, the Applicant lodged the dispute for resolution by the Community Schemes Ombud Services (CSOS) in terms of Section 38 of the Community Schemes Ombud Services Act 9 of 2011 (CSOS Act). The conciliation process of resolving this dispute in terms of Section 47 of the said Act was unsuccessful. The matter was then referred for adjudication in terms of Section 48 (4) of the said Act.

APPLICABLE PROVISIONS OF THE ACT

The hearing was conducted in terms of:

[3] Section 38 of the CSOS Act which provides that -

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

[4] Section 45(1) which provides that -

"The ombud has a discretion to grant or deny permission to amend the application or to grant permission subject to specified conditions at any time before the ombud refers the application to an adjudicator".

[5] Section 47 which 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".

[6] Section 48 (4) which 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

[7] The Applicant is in dispute with the Respondent because of the bad state of repair of the common property he is allocated as Exclusive Use Areas, namely a portion of the balcony on the 12th floor and the entire balcony on the 13th floor. The repairs which were effected are reported not to have been effective because water continues to seep into the Applicant's apartment. The Respondent on the other hand claims to have made arrangements to repair the balconies according to the specification which was determined to produce a lasting solution but the Applicant interfered with the contractor such that some items of the specified repair work were not done. Applicant also did not provide access to the balconies for the contractor to correct his work which was guaranteed for ten years. Respondent, therefore, considers that he was absolved from the responsibility to repair the balconies again. He considers the Applicant to be liable for future repairs to the said Exclusive Use Areas (EUAs) because a lasting solution to the water ingress was not implemented as a result of the interference by the Applicant. The Applicant disputes this.

[8] Although at first the parties were in disagreement about the validity of the resolution of the special general meeting of the Body Corporate held on 5 March 2009 which adopted a conduct rule that effectively allocated balconies and other common areas to the Applicant and other owners as EUAs, the parties subsequently resolved the impasse and the Applicant accepted the EUAs on condition that the waterproofing problems in them and the roof were fixed and that the Applicant would pay a reduced levy for these EUAs. Subsequently disagreements arose about the effectiveness of the repairs done to these balconies. The Respondent submitted that as Trustees they agreed to enforce the observance of the conduct rule that was adopted at the said

special general meeting. This enforcement resulted in legal costs being incurred for which the Respondent debited the Applicant's levy account. This has become another area of dispute.

APPLICANT'S VERSION

Applicant submitted that:

[9] At the special general meeting of the Body Corporate held on 5 March 2009 a resolution was passed which resulted in him being allocated as EUAs two balconies which were common property. Although he contested the legitimacy of that meeting, he ultimately agreed to accept the EUAs with conditions (vide file page 16, being page 4 of the Applicant's submission in support of the dispute). However, the balconies were in a bad state of repair due to long standing waterproofing problems. When Applicant agreed to take over these balconies as EUAs, he demanded an assurance which was granted by the Trustees that the balconies would be repaired and be restored into a good state of repair before Applicant took them over as his EUAs (vide file page 48 being the agreement reached on 6 March 2013 between the Trustees and Mr Baxter).

[10] The repair work that was agreed to between the parties did not effectively waterproof the balconies and water continued to ingress into the Applicant's unit (vide file page 19). The water ingress also came from the roof into the Applicant's apartment (vide file page 20) due to inadequate or lack of maintenance. The roof is common property.

[11] The Trustees charged the Applicant's levy account to recover their legal costs purportedly incurred to enforce the rules. Applicant denies that he violated any rules which required the Body Corporate to seek legal advice. Applicant also considers these legal costs to be excessive because they are charged at rates far higher than the normal tariff of attorney-client fees (Magistrate's court). This he considers unfair and illegal. He wants these legal costs to be reversed from his levy account and the appropriate credits effected.

[12] Applicant submitted that the Body Corporate is still responsible to waterproof the balconies before he can take them over as his EUAs because the Respondent failed to ensure lasting waterproofing as was agreed.

APPLICANT'S PRAYER

In the application, the Applicant prays for:

a. "An order that the exclusive use area balcony was incorrectly allocated" *to* him;
b. "An order that the body corporate take steps to remedy the common area balconies (s39(6)(a); (b); (7)(b) damages being loss of rental;
c. "An order that the debit of legal fees to the owner's levy account is unlawful and falls to be reversed (section 39(1)(c); 39(1)(e))". (vide page 11 on file)

At the hearing, Applicant submitted that he was not pursuing the damages for loss of rental at this stage and that he will review the claim for rental once the rest of his claims have been adjudicated.

RESPONDENT'S VERSION

Respondent submitted that:

[13] The special general meeting of the Body Corporate held on 5 March 2009 which adopted the new conduct rule that allocates identified common areas including balconies to the owners of sections adjacent to them as EUAs was legally constituted. Respondent indicated that documents to prove this fact are difficult to obtain because Managing Agents have changed over the last five years since the said meeting took place. Respondent undertook to search for and submit into evidence the agenda for the meeting and its minutes (agenda vide file page 162; minutes vide file page 25).

[14] Respondent submitted also that the Body Corporate kept to the agreement with the Applicant and sourced a contractor to effect the repairs to the balconies according to agreed specifications (vide file page 164).

Respondent claimed that the effectiveness of the repairs to waterproof the balconies such that water does not ingress through the sliding door and windows depended on the repairs being done strictly according to the specifications agreed upon. Respondent claimed that the Applicant

refused that the sliding door be removed and refitted according to the specification (vide file page 168-169 being the affidavit deposed by an ex Trustee who was delegated to oversee this work). The Applicant denied that he refused that the sliding door be removed but that it was the contractor's decision not to remove the door for fear that it could be damaged in the process and that he would be held liable for the damages (vide file pages 152-155).

Respondent submitted that the Applicant never raised this issue with them instead he agreed with the contractor to amend the Respondent's specifications without the Trustees' approval. Applicant refuted this by submitting email correspondence from the contractor dated 20 April 2015 which indicates that the decision not to remove the sliding door was unilaterally taken by the contractor (vide file page 152).

[15] Respondent also submitted that the contractor guaranteed his repair work for a period of ten (10) years but the contractor was refused entry when he needed to perform subsequent remedial work on the balconies. The ten year guarantee by the contractor did not benefit the Respondent until it expired in 2016 because the Applicant refused the contractor access to the areas which required remedial work. The Applicant denies that he refused access to the contractor to do remedial work during the existence of the guarantee. The Respondent contends that had the specifications which had been agreed, specifically those that required the removal of the sliding door, the slope reconstructed and sliding door refitted, not been interfered with there would not be recurrent ingress of water into the Applicant's unit.

[16] The Respondent submitted that because the Applicant interfered with the specifications without first consulting the Trustees he must be liable for any costs for remedial work which would not have been required had the specifications been adhered to or would have been carried by the contractor's guarantee should be for the Applicant's account.

EVALUATION OF EVIDENCE

The evidence submitted by the parties is evaluated in terms of the following legislation which was applicable at the time the alleged events occurred:

[17] Sections 35 (1) and (2) of the Sectional Titles Act, 95 of 1986 (STA) respectively which provides that:

> "A building and the land on which it is situated shall as from the date of the establishment of the body corporate be controlled and managed, subject to the provisions of this Act, by means of rules (my emphasis)"
>
> "The rules shall provide for the control, management, administration, use and enjoyment of the sections and the common property and shall comprise-
>
> (a) "Management rules, prescribed by regulation .. and which may be added to, amended or repealed from time to time by the body corporate as prescribed by regulation;
> (b) "**conduct rules, prescribed by regulation … and which may be added to, amended or repealed from time to time by special resolution of the body corporate** (my emphasis).

[18] Sections 35 (3) and (4) of the STA respectively provide that:

> "Any management or conduct rule made by the developer or a body corporate shall be reasonable, and **shall apply equally to all owners of units** (my emphasis) put to substantially the same purpose."
>
> "The rules referred to in subsection (2) shall as from the date of the establishment of the body corporate be in force in respect of the building or buildings and land concerned, and shall **bind the body corporate and the owners of the sections and any person occupying a section** (my emphasis)".

[19] Section 21 of the Sectional Titles Amendment Act, 44 of 1997 which inserted the following provision regarding rules relating to EUAs to Section 27 as section 27A of the STA:

> "A developer or a **body corporate may make rules which confer rights of exclusive use and enjoyment of parts**

of the common property upon members of the body corporate (my emphasis): Provided that such rules shall-

(1) not create rights contemplated in section 27(6);
(2) include a layout plan to scale on which is clearly indicated-

i. the locality of the distinctively numbered exclusive use and enjoyment parts; and
ii. the purpose for which such parts may be used;

(3) include a schedule indicating to which member each such part is allocated."

[20] Prescribed rules in terms of STA (Rules): Rule 54 (1) provides that:

"Unless otherwise provided for in the Act, at least fourteen days' notice of every general meeting specifying the place, within the magisterial district where the scheme is situated, or such other place determined by special resolution of members of the body corporate, the date and the hour of the meeting and, in the case of special business, the general nature of such business, shall be given-

a. to all owners;
b. to all holders of registered mortgage bonds over units who have advised the body corporate of their interests; and
c. to the managing agent."

[21] Rule 54 (7) provides that:

"A special general meeting for the purposes of passing a unanimous or special resolution may be convened for a date 30 days or less after notice has been given to all the members of the body corporate if, in the opinion of the trustees, it is necessary due to the urgency of a matter or due to the specific nature of a matter to convene the meeting with such shorter period of notice".

[22] The notice of the Special General Meeting for 5 March 2009 that was to discuss and adopt the "new rule" in dispute is dated 28 January 2009. The notice period for the said meeting is consistent with that prescribed in Rule 54 (1) and (7) (vide the notice of the said meeting on page 162 of the file). The quorum is also confirmed to have been met (vide minutes of the said meeting on pages 24-26 of the file). The Applicant's concern that the Special General Meeting of 5 March 2009 may not have been properly constituted is baseless.

[23] In terms of the legal provisions in paragraphs 19-23 above, the Body Corporate of Ocean View was within its legal right to add a rule to its conduct rules which allocated the EUAs to the owners as adopted by its Special General Meeting of 5 March 2009. The correctness of the wording of the rule, however, will be evaluated below.

[24] The new rule applied to all the owners whose names appeared in the schedule attached to the rule. The Applicant was therefore not singled out to apply the new rule. The Applicant did not submit anything to the contrary. The rule is binding on all the identified owners in terms of Section 35 (4) of the STA.

[25] Section 37 (1)(b) of the STA provides that the Body Corporate shall "require the owners, whenever necessary, to make contributions to such fund for the purposes of satisfying any claims against the body corporate: Provided that the body corporate shall require the owner or owners of a section or sections entitled to the right to the exclusive use of a part or parts of the common property, whether or not such right is registered or conferred by rules made under the Sectional Titles Act, 1971 (Act 66 of 1971), **to make such additional contribution to the fund as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such part or parts** (my emphasis), including the provision of electricity and water, **unless in terms of the rules the owners concerned are responsible for such costs** (my emphasis)."

[26] Section 37 (1)(j) of the STA states that "A body corporate … shall perform the functions entrusted to it by or under this Act or the rules and such functions shall include- properly to maintain the common property … and **to keep it in a state of good and serviceable repair**" (my emphasis).

[27] In terms of the legal provisions in paragraphs 26 and 27, the Body Corporate of Ocean View is responsible to maintain and keep in good state of repair all common property including the roof of the Applicant's unit and the balconies identified as common property. In the normal course of performing its functions the Body Corporate would be responsible to remedy the cause of the water

ingress into the Applicant's unit and the consequent damage. However, the events which led to the issues in dispute need closer attention and will be dealt with later.

[28] Section 44 (1)(c) provides that "An owner shall repair and maintain his section in a state of good repair and, **in respect of an exclusive area, keep it in a clean and neat condition** (my emphasis) while contributing to the cost of maintenance of such exclusive use areas. In terms of this legal provision, the owners to whom EUAs are allocated are not responsible to ensure the EUAs are in a state of good repair but rather that they are kept clean and neat and contribute to the cost of such maintenance. The new rule the Body Corporate registered with the Deed's Registrar which gives the owners a duty to not only keep EUAs clean and neat but to also maintain and repair them (vide page 114 on file) is permissible by the Act on condition the owners who enjoy these exclusive rights are not called upon to also contribute to the cost of repair and maintenance of these EUAs.

[29] Rule 15 (2) provides that:

> "A trustee may at any time convene a meeting of the trustees by giving to the other trustees and all first mortgagees in the circumstances referred to in sub-rule (3) hereof, not less than seven days' written notice of a meeting proposed by him, which notice shall specify the reason for calling such a meeting: Provided that in cases of urgency such shorter notice as is reasonable in the circumstances may be given".

[30] Rule 16 (1) provides that:

> "At a meeting of the trustees, 50 percent of the number of trustees but not less than two, shall form a quorum." The meeting of the Trustees held on 30 October 2012 which resolved to take legal action against Mr Baxter was properly constituted as there was a quorum (vide page 139 on file). The challenge raised by the Applicant that such a decision may have been taken irregularly or unprocedurally has no basis because the decision was taken by a properly constituted meeting of the Trustees.

[31] Rule 31 (5) provides that:

> "An owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, or any other arrear amounts due and owing by such owner to the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act".

[32] The Applicant demands that the legal costs which have been debited to his levy account be reversed because the he has never been in breach of rules "that required the body corporate to seek legal advice". The reason cited at the meeting of 30 October 2012 by the Trustees to seek legal advice is that the Applicant prevented them from performing their work in terms of the STA (vide page 139 of the file) in contravention of the provisions of the STA and prescribed rules. The Applicant was reported at the said meeting to have denied access to the window cleaning contractor "since the beginning of the year" thus preventing the Trustees to perform their functions. A letter dated 22 May 2012 regarding access among other issues reads: "Mr Baxter has clearly and blatantly been obstructive insofar as access to the balcony is concerned. The window cleaners have had ongoing problems in this regard and have reported their complaints to our client on a number of occasions… "(vide page 33 on file). The Applicant's representative submitted that "if it is access that is needed, then it is granted here and now". Such a submission did not deny the Respondent's assertion that the Applicant continually denied access to the Trustees to do their work. The Applicant is also reported to have undertaken upgrades to his unit without observing the scheme's relevant conduct rule. The involvement of the Applicant's legal adviser is also said to have contributed to the need for the Respondent to engage a legal adviser as well (vide page 141 on file). Prescribed rule 31 (5) makes the owner liable for all legal costs incurred to enforce compliance with the provisions of the STA and the rules (paragraph 32 above). The rule does not limit the legal costs for which an owner is liable.

[33] The Applicant also claimed that the fees charged the body corporate were excessive because they were far above those prescribed in the tariff for Magistrate's courts. He did not submit what this tariff was to enable a comparative analysis save to say that it "is less than the R2500,00 per hour charged by Paddocks"(vide page 173 on file). He further submitted that "those fees must of necessity and implication be taxed" (vide page 6 of the file) to become due and payable. He did not submit evidence that proves that those fees were not taxed. The onus of proof lies with the

alleging party.

[34] The invoice for legal costs dated 13 June 2016 is said to be for face-to-face consultation about two owners (Kevin Baxter and Gawie Greyling). It did not disaggregate how much the consultation cost for each owner is to be able to charge the correct amount to each owner. This is irregular.

[35] Rule 26 (1) (b) provides Trustees with a power "to delegate to one or more of the trustees such of their powers and duties as they deem fit, and at any time to revoke such delegation". In terms of the agreement between the representatives of the Trustees and the Applicant, the Trustees delegated Messrs Schalk Burger and Everard Smit (former Trustees, who were Trustees then) to act on behalf of the body corporate (vide page 45 of the file). Mr Smit submitted an affidavit which explains the history of the dispute between the parties and gives his perspective on the issues (vide pages 168 and 169 on file). The Applicant's representative asked that this affidavit should not be accepted as he considers it as irrelevant and untested (vide page 175). However, the affidavit corroborates the submission the Respondent made at the hearing. The concerns of the Applicant's representative have no basis.

[36] Respondent submitted and Mr Smit's affidavit corroborates that there was an agreement to repair the balconies-turned-EUAs; specifications were drawn up and a contractor was engaged to perform the repair work. Respondent further submitted that the repair work was not done according to the specification because of an agreement between the Applicant and the contractor which changed some of the items in the specifications. This change, according to the Respondent, prevented that a lasting solution is implemented which permanently drained water away from the sliding door and windows of the Applicant's unit. The Applicant disputes that he had anything to do with the change in the specification but that the contractor on his own volition opted not to remove the sliding door (vide email trail between Applicant and contractor on pages149-156).

[37] From the email sent to the contractor by the Applicant on 8 April 2015 in which he called for the presence of a window company to be present at the time of removal of windows, it is reasonable to deduct that he was concerned about the effect the removal of the sliding door would have on the frames (vide page 150 on file). While a representative of the Respondent was still organising a site meeting on 9 April 2015 (vide emails from Danie Booyens of the Managing Agent dated 8 April 2015) the contractor indicated that "I have already met with Kevin and we know what must be done… There is no need to meet again unless Kevin has anything **to add** (my emphasis) from last week" (vide email dated 8 April 2015 on page 155 on file). The only logical inference that can be drawn from these words is the Applicant said something to the contractor relating to what must be done. It is reasonable to conclude that the Applicant influenced the change of scope and interfered with the specifications given to the contractor by the Respondent in the absence of a representative of the Respondent.

[38] A site meeting between the contractor and the Applicant which resulted in change of specifications in the absence of the Respondent who appointed the contractor is irregular. The Applicant should have raised with the Respondent his concerns about the damage to the frames when the sliding doors were removed. The Respondent would have been obliged to address such eventuality either by amending his specifications or providing new frames should the others be damaged by being removed to carry out the repairs. It was not the Applicant's or the contractor's call to change the specifications. That the Applicant and the contractor took upon themselves to amend the specifications which resulted in repairs that did not completely address the problem of water seepage absolved the Respondent from the responsibility for future repairs involving water seepage into the Applicant's unit through the sliding doors.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[39] 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 9 of 2011.

ADJUDICATION ORDER

Based on the above evaluation, it is ordered that:

[40] The Respondent was within its legal right to make rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate if the majority of its members in a properly constituted special general meeting vote in favour of such a rule. The special meeting which allocated the common

property in question as exclusive rights was properly constituted.

[41] Because lr1e Applicant is complicit in the repair work ordered by the Respondent not to be completed in its entirety and also denied access to the contractor to perform the agreed remedial work. Applicant is also responsible to repair the cause of water seepage into his unit through the sliding door. He must implement the job specification which was commissioned by the Body Corporate to remove the sliding doors, create the necessary slope and waterproof accordingly. Once this has been successfully completed, the Respondent must take over the maintenance thereof as required by the STA (refer to paragraph 27 above).

[42] The Respondent must fix or replace the sliding door as recommended by a window expert should it be damaged when being removed and refitted by the Applicant as per the order in paragraph 41 above.

[43] The Respondent is responsible for repairs and maintenance of all areas in the building/s which are declared common area including EUAs provided that the owners of the rights of exclusive use contribute to the cost thereof.

[44] The Applicant must keep the EUAs clean and neat and contribute to the cost of their maintenance.

[45] The Applicant is responsible for the legal costs incurred by the Body Corporate to enforce compliance with the STA, the prescribed rules and the conduct rules of the scheme.

[46] The Respondent must reverse the charge for the legal cost in the invoice dated 13 June 2016 and charge the Applicant the correct amount after apportioning the legal cost to Kevin Baxter and Gawie Greyling.

ENFORCEMENT OF ORDER

[47] The parties' attention is drawn to the following section of the Community Schemes Ombud Service Act 9 of 2011 for the enforcement of this order:

Section 56 (1) 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".

Blouberg falls within the area of jurisdiction of the Magistrate of Cape Town.

RIGHT TO APPEAL

[48] The parties' attention is also drawn to the following legal provisions for appeal:

Section 57 of the Community Schemes Ombud Service Act 9 of 2011 provides that:

57 (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.

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

57 (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"