

Benatar v Pavilion Place Body Corporate and Others

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 357/WC/17
Adjudicator: Adv. Louis van Wyk
Date: 31 July 2018
Applicant: David Benatar
Respondent: Trustees of the Pavilion Place Body Corporate
Robbie Lessem (Freedom Trust) and Suzanne Kempen
Property Management



The above-mentioned matter was referred to the CSOS Western Cape Office on 04 May 2017 by Prof. David Benatar. The application is for orders in terms of section 39(3)(d) and 39(7)(a) and (b) of the Act.

On 16 August 2017 the parties attended a conciliation session, in terms of Section 47 of the CSOS Act 9 of 2011, at the offices of CSOS Western Cape. No settlement could be reached at the conciliation session and the matter was referred to adjudication in terms of Section 48(4) of the CSOS Act 9 of 2011. The parties were all notified of the date. The matter was set down for the 25th of October 2017

The Applicant was represented by Prof David Benatar in person. The Respondent was represented by members of the board of trustees, Mr Robbie Lessem and Mrs Suzanne Kempen, representing the managing agent.

In terms of Section 50 of the Community Schemes Ombud Service Act of 2011 the adjudicator has the power to conduct a hearing “quickly and with as little formality and technicality as is consistent with the 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 the light of the animosity in the room, the vast amount of evidence and the nature of the applications, I considered it all and discussed the application of Section 50 to the parties. All representatives were in favour of such an approach.

After hearing the parties, the matter was postponed giving the parties the opportunity to complete the process of obtaining an opinion and to hold the special general meeting. By the time the dispute reached the adjudication stage the parties have obtained opinions to resolve the issues. All the issues have been dealt with extensively and all the facts seemed clear and could be regarded as common cause. However, further consultations and an inspection of the premises was still to be completed before the special general meeting would be held.

It was anticipated that the disputes would be resolved after completion of the opinion of Professor Van der Merwe and the subsequent special general meeting.

No date was set due to the uncertainty of the time it might require completing the process. It was agreed that an agreement or resolution would be formalised as an adjudication order. In case the parties would not be able to find common ground, the matter would proceed, and an order would be made. It was agreed that the managing agent and the trustees will inform the adjudicator of the outcome of the special general meeting.

After the special general meeting was held 9 April 2018 a meeting was arranged with a number of the trustees of Pavilion Place. I was informed that no resolution could be reached. It was then agreed that an adjudication order was required to resolve the dispute.

It must be stressed at the outset, that it was disconcerting to witness the extent of the acrimony between the parties. The level of disrespect and lack of trust in each other's bona fide indicated a history of deep distrust and resentments that made the task as adjudicator extremely difficult.

At the core of the dispute is the very complex structure of this Body Corporate consisting of a residential block, referred to as the tower block, (1-93 and 96- 99), a commercial section, Mojo (section 95) and La Perla Restaurant (Section 94). Due to the nature of these entities the interests are not aligned, causing the frustrations in managing the scheme.

The application is based on the actions of Mr Lessem, the owner of Mojo and occupier of Section 95, and the lack of action against him, and failure to fulfil their fiduciary duty, on the part of the trustees. It is common cause that Mr Lessem has committed acts violating the conduct rules by renovating and improving common property within section 95. It is alleged that, even though he was requested to cease these alterations, he proceeded to complete these renovations and improvements. Alterations were made to the parapets and roof and balconies were built, extending over common property. Alterations were also made to windows overlooking the parking area. The applicant objected to these but Mr. Lessem proceeded to complete all these alterations regardless of the objections and apparent demands made by the trustees. It seems that, at a stage during 2016, there were uncertainties whether the conduct rules applied to section 95. According to the applicant these

uncertainties were not addressed by the trustees.

A further determination is required on the portion of the common property on the roof area or the top of section 95 which is practically used exclusively for the benefit of Section 95 and its occupants.

The third issue is the alleged unfairness of the voting rules in terms of which the application is for an alteration of the rules. The effect of the participation quota is that section 95 has a 28% vote, and effectively dictates the vote on decisions made by the body corporate, even though section 95 has no interest in some decisions, decisions relating exclusively to the tower block. He believes section 95, or Mr Lessem, has the power to manipulate the composition of the board of trustees, thereby ensuring that his interests are supported by the board.

Further to the above Prof Benatar applied for an order relating to the governance of the body corporate affairs. The applicant stated that the trustees failed to follow proper governance procedures relating to the approval, the correctness and distribution of minutes of general meetings. He raised his concerns about the governance in writing and presented these at an AGM. He requested the circulation thereof to all members of the body corporate.

Without repeating the exact wording of the relief sought by the applicant his prayers are that the above issues be resolved. It is well articulated in his application form to CSOS.

At the first hearing the applicant made it clear that he wishes to find a solution to the issues raised instead of wasting time discussing and arguing about the transgressions of Mr Lessem and the trustees in the past. He made it clear however, that he has no intention of becoming a trustee, even though he was requested by the current trustees to make himself available.

The issues surrounding the correctness, and the circulation of all minutes were resolved by agreement. The managing agent represented by Suzanne Kempen undertook to ensure that all AGM and SGM minutes will be approved and distributed in accordance with good governance. Minutes

of all trustee meetings will also be made available to all members of the body corporate. This agreement between the parties is hereby made and order.

The applicant presented a well motivated argument on the unfairness of the voting rules. Section 95 can effectively have the deciding vote on issues pertaining exclusively to the tower block, while not having an interest in some of the decisions. According to the applicant this creates a bizarre situation that section 95 does not contribute 28% percent of the levies, yet section 95 has a 28% vote on tower block issues. Mr Lessem responded that the rules and the Act determine the voting rules and he legally has the right to vote on these decisions. He responded correctly, that "it is what it is", and that any owner buys into the scheme knowingly. He conceded to using the voting rules to influence the composition of the board of trustees on one occasion but denied using his vote to influence decisions that exclusively affect the tower block.

In considering the fairness of the voting rights one should distinguish between voting on the composition of the board of trustees, voting on issues related to the scheme and voting on decisions relating exclusively to the tower block.

The reality, that few of the owners attend the AGM is not a ground for arguing that the voting rules are unfair. All owners have the right to attend body corporate meetings, and it is their choice whether to attend or not.

The trustees manage the scheme, which also affects section 95, and one cannot argue that it is unfair that section 95 can cast a 28% vote on the trustees forming the board.

Similarly, the voting rules applied on decisions relating to the scheme is not unfair and should remain.

However, I agree with the applicant that some alteration to the voting rules is justified in the case of decisions related to the tower block exclusively. I order that section 95 and section 94 will not be entitled to vote on matters related to financial or other decisions which affect the tower block exclusively.

Regarding the unauthorised alterations and improvements

to section 95 I have considered the arguments for and against the regularisation thereof. I cannot agree more with the opinion and solutions recommended by Prof CG van der Merwe.

The only options available to the body corporate is to bring a High Court application for the improvements to be demolished, or to regularise the alterations. If the alterations are to be regularised, it can either be by way of a sales agreement or by way of a rental agreement.

The option of an application to the High Court for an order that the alterations and improvements be demolished will be an expensive and time-consuming process. The further risk in bringing such an application is the likelihood of success. Without debating the odds of being granted such an order, I believe the success of such an application, in these circumstances are unlikely, and considering the time and cost involved, not a viable option.

The only viable solution would therefore be to regularise the alterations made to the first and second floor of section 95. I have heard the parties' arguments and considered the thorough investigation and recommendations of Prof CG van der Merwe. Considering the complexities of the option of rental agreements I agree that the proposal made at the Special General Meeting is the best solution under the circumstances. I refer to the Special Resolution proposed at the Special General Meeting held on 09 April 2018 (set out below).

3. SPECIAL RESOLUTION - APPROVAL OF THE EXTENSION OF SECTION 95 ALREADY MADE

3.1 In terms of section 5(1)(h) of the Sectional Titles Schemes Management Act 8 of 2011 ("the STSMA") and section 24(3) of the Sectional Titles Act 95 of 1986 ("the STA") the Extension of Section 95 already made must be approved by special resolution.

At the Special General Meeting held on 09 April 2018, the members of the body corporate, present either personally or duly represented by proxy, hereby resolved by Special Resolution:

THAT the registered owner of section 95, the Freedom

Trust, is hereby granted approval for the extension of the boundaries or floor areas of section 95 already made as is more fully explained on the draft amending sectional plan, marked Diagram "A", and annexed hereto, on the following conditions:

[1] The authorisation for the extension of section 95 applies only to the registered owner.

[2] The authorisation is strictly limited to the draft amending sectional plan, marked Diagram "A".

[3] The extension did not result in any cancellation, alteration or amendment to the boundaries of a registered exclusive use area.

[4] The survey and conveyancing required to affect the extension to section 95 will be carried out by the land surveyor and conveyancer appointed by the registered owner of section 95.

[5] The authorisation for the extension of section 95 applies subject to the payment of compensation, in an amount of R4 000 000.00 to the body corporate calculated as the average of the two valuations conducted and obtained by the body corporate, as annexed hereto. The registered owner of section 95 hereby also agree that his voting rights remain at 28.595% and need not to be increased because the authorised extension of the boundaries and the floor area of section 95.

[6] The registered owner of section 95 must arrange for a land surveyor or architect to submit a draft sectional plan of extension to the Surveyor-General for approval.

[7] All survey, plan approval, and registration costs, including any transfer duty and the possible costs associated with the obtaining of bondholder consent/s, required in terms of section 24(6)(d)(ii) of the Sectional Titles Act, must be paid by the registered owner of section 95.

[8] Until the approved sectional plan of extension is registered, the body corporate shall not issue a levy clearance certificate in respect of section 95.

This proposal, made at the Special General Meeting, was

opposed by Prof Benatar, who has obtained many proxies from members that was not going to attend the meeting. In fact, not one of the special resolutions put forward were implemented. Unfortunately, only the above-mentioned resolution was included in the dispute and I can only make a ruling on this particular issue.

I find that the opposition to the motion, for a resolution that the alterations be regularised, was unreasonable under the circumstances. I order that the alterations are regularised as per the proposed motion (above), based on the recommendations made by Prof. Van der Merwe. My order in terms of the quantum, referred to as the "sweetener" which is due to the body corporate, is that the amount of R 4 000 000.00, previously agreed upon by the parties as the average of the two valuations obtained, is payable before or on 31 August 2018 by the owner of section 95.

My ruling is further that the short-term lease concluded between the body corporate and the owner of section 95 on the 13th of September 2016 (attached herewith) will be valid until the transaction proposed at the Special General Meeting (including the payment) has been concluded.

I order that the voting power of section 95 will not be increased beyond the current 28%.

In terms of section 57 of the Community Schemes Ombud Service Act, 2011 a person who is dissatisfied with an adjudicator's order is entitled to appeal to the High Court, but only on a question of law. The appeal must be lodged within 30 days after delivery of the order.