

Coetzee v Orangerie Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 92/WC/17
Adjudicator: Adv. GPC De Kock
Date: 27 July 2017
Applicant: Gert Coetzee
Respondent: Trustees of the Orangerie Body Corporate



ADJUDICATOR'S ORDER

[1] This matter was set down for adjudication on Thursday, 27 July 2017 at 09:00.

[2] The Applicant, Dr G Coetzee, was present and Mr R Broll (Trustee) and Mr M Howard (Pam Golding Property Management Services) represented the Respondent.

[3] Both parties presented their respective submissions and the crisp matters to be decided are the following:

a. Was the Annual General Meeting (AGM), that was also a Special General Meeting (SGM), that was held on 25 October 2016 to be run in terms of the old Sectional Titles Act (95 of 1986) or in terms of the new Sectional Titles Schemes Management Act (8 of 2011); and

a. Whether minutes of each trustee meeting should be distributed to the persons entitled to notice of the meeting not later than 7 days after the date of the meeting.

[4] I was also presented with copies of the following correspondence:

a. A letter of 17 March 2017 from Pam Golding Property Management Services addressed to CSOS (Annexure "A");

b. Dr Coetzee's response contained in his letter of 18 March 2017 ("Annexure "B").

[5] I do not propose to repeat the content of the above correspondence in this order, save to state that I have read and considered the submissions contained therein.

[6] I fully appreciate that there will be different opinions in this regard, but in my view, the AGM (and SGM) that was called in terms of the notice sent out on 26 September 2016 was correct to have been held in terms of the old Sectional Titles Act. The notice had to give at least 30 days' notice and this was done before the new Sectional Titles Schemes Management Act came into operation on 7 October 2016.

[7] While there is no "sunset" clause in the new Act, I am of the view that it could not have been expected of the trustees to change the format of the agenda and the running of the meeting at such short notice.

[8] Any proposed changes to the minutes can be dealt with at the next AGM in terms of Prescribed Management Rule (PMR) 17(6)(f).

[9] However, Item 15 of the previous minutes should not be taken as having been agreed upon in the interim and should be properly dealt with at the next AGM.

[10] PMR 9(e) clearly states as follows: "The trustees must... (e) compile minutes of each trustee and general meeting in accordance with rule 27(2)(a) and distribute these to the persons entitled to notice of the meeting concerned as soon as reasonably possible, but not later than 7 days after the date of the meeting".

[11] While this may place a heavy burden on trustees and managing agents, as submitted by Mr Howard, this remains a statutory requirement and must be adhered to.

[12] The following orders are made:

a. The AGM held on 25 October 2016 was correctly held in terms of the old Sectional Titles Act and, in the event that it was not, such failure is condoned in the light of the facts of this particular matter;

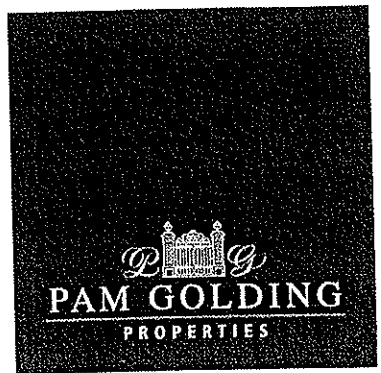
b. Any proposed changes to the minutes can be dealt with at the next AGM in terms of Prescribed Management Rule 17(6)(f);

c. The trustees must comply with the provisions of Prescribed Management Rule 9(e).

Signed at Cape Town on 27th day of July 2017.

"A"

PROPERTY MANAGEMENT SERVICES
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17 March 2017

Community Schemes Ombud Service
Attention Miss Thora Sikholiwe

By email: Thora Sikholiwe thora.sikholiwe@csos.org.za

Dear Miss Sikholiwe,

CSOS 92/2017 – RESPONDENT'S WRITTEN RESPONSE

We refer to the above mentioned application received on 1 March 2017 and confirm that we act on behalf of our client, The Trustees for the time being of The Orangerie Body Corporate, and advise that our client has instructed us to respond to the allegations contained therein as set out herein below:

From the outset our client records that they do not intend on dealing with all of the aspects and allegations contained in the Applicant's Application for Dispute Resolution Form ("Application Form") signed 9 February 2017 and their failure to do so should not, in any way, be construed as a waiver of their rights to deal therewith at the appropriate time and in the appropriate form.

Firstly, we wish to thank you for affording our client an extension to respond to the Application. We wish to respond to the details of the **alleged breach** contained on page 3 of the Application Form as follows:

AD PARAGRAPH 1

Please be advised that the agenda for the AGM held on 27 October 2016 was prepared in accordance with the provisions of the Sectional Titles Act 95 of 1986 as the notice was sent to all owners on 26 September 2017, before the introduction of the Sectional Titles Schemes Management Act. Furthermore, the business at the AGM was conducted in terms of the Sectional Titles Act due to the reasons stipulated above.

AD PARAGRAPH 3

We confirm that the minutes of the AGM were circulated within a reasonable time following your office's requested to do so per your letter dated 28 November 2016.

AD PARAGRAPH 4 AND 5

Please note that the minutes of the AGM will be tabled for approval at the following AGM in terms of Prescribed Management Rule 17(6)(f) and the Applicant is entitled to note his proposed amendments and/or additions at that stage in the correct forum.

AD PARAGRAPH 6

Please find our client's response to the Applicant's letter dated 21 November 2016 attached hereto marked Annexure "A".

AD PARAGRAPH 7 and 8

Please note that our client did in fact notify the Applicant of the Trustees Meeting held on 7 March 2017 (being the only Trustees Meeting held subsequent to the AGM) by providing the Applicant with a copy of the Notice and Agenda of the meeting. We wish to record that Applicant failed to attend the Trustees Meeting.

Finally, we wish to respond to the **relief sought** by the Applicant contained on page 4 of the Application Form as follows:

AD PARAGRAPH 1

Please note that our client's response to the Applicant's letter is attached hereto marked Annexure "A". Furthermore, please note that the AGM minutes are currently draft minutes which are subject to final approval by the members of the Body Corporate at the next AGM and therefore any amendments to the minutes will take place at the next AGM in accordance with Prescribed Management Rule 17(6)(f).

AD PARAGRAPH 2

As stated above please note that the Applicant was in fact notified of the Trustees Meeting held on 7 March 2017. Our client takes exception to the Applicant's baseless allegations in this regard.

AD PARAGRAPH 3

Our client confirms that it will continue to endeavour to comply with the provisions of Management Rule 9(e).

Kindly provide us with the outcome of your decision in this matter.

Yours faithfully,

PAM GOLDING PROPERTY MANAGEMENT SERVICES

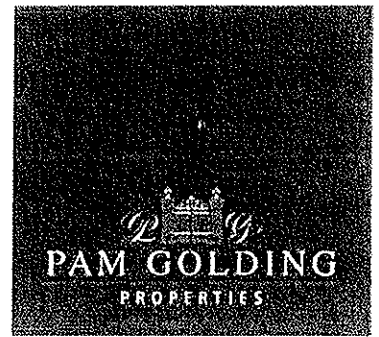
Per:

AUREN FREITAS DOS SANTOS



Annexure "A" to CSOS 92/2017

PROPERTY MANAGEMENT SERVICES
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17 March 2017

Dr GJ Coetzee

By email: Dr GJ Coetzee email@gertcoetzee.com

Dear Dr Coetzee,

RESPONSE TO YOUR LETTER DATED 21 NOVEMBER 2016

We refer to your letter dated 21 November 2016 and confirm that we act on behalf of our client, The Trustees for the time being of The Orangerie Body Corporate, and advise that our client has instructed us to respond to the allegations contained therein as set out herein below:

From the outset our client records that they do not intend on dealing with all of the aspects and allegations contained in your letter dated 21 November 2016 and their failure to do so should not, in any way, be construed as a waiver of their rights to deal therewith at the appropriate time and in the appropriate form.

AD PARAGRAPH 1

Please be advised that the agenda for the AGM held on 27 October 2016 was prepared in accordance with the provisions of the Sectional Titles Act 95 of 1986 as the notice was sent to all owners on 26 September 2017, before the introduction of the Sectional Titles Schemes Management Act. Furthermore, the business at the AGM was conducted in terms of the Sectional Titles Act due to the reasons stipulated above.

Our client is of the opinion that it would have been prejudicial to change the rules of the meeting after the notice had been sent in terms of the Sectional Titles Act and that they were not entitled to alter or amend the agenda which had been sent to all owners. As a result the AGM was conducted in term of the Sectional Titles Act, based on the view that the Sectional Title Schemes Management Act does not apply retrospectively, and therefore Section 6(5) of the Sectional Title Schemes Management Act did not apply to the AGM held under the auspices of the Sectional Titles Act.

AD PARAGRAPH 2

Please refer to Ad Para 1 above.

AD PARAGRAPH 3

Please note that you are entitled to table your proposed amendments to the minutes at the next AGM for the members' consideration and approval in terms of Prescribed Management Rule 17(6)(f).

AD PARAGRAPH 4

Please note that you are entitled to table your proposed amendments to the minutes at the next AGM for the members' consideration and approval in terms of Prescribed Management Rule 17(6)(f).

AD PARAGRAPH 5

Please note that you are entitled to table your proposed amendments to the minutes at the next AGM for the members' consideration and approval in terms of Prescribed Management Rule 17(6)(f).

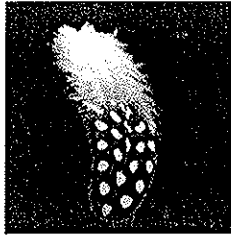
Yours faithfully,

PAM GOLDING PROPERTY MANAGEMENT SERVICES


Per:

MIKE HOWARD

For and on behalf of the Trustees of the Orangerie Body Corporate



MBChB MMed (Anaes)
Practice No 0110000
Cell 083-5640636
email@gertcoetzee.com

Dr GJ Coetzee

"B."

PO Box 12312
Mill Street
8010

18 March 2017

Dear Ms Sikholiwe

Re: CSOS 92/2017

Your email and attached documentation of March 18th 2017 refer.

My first question is whether the response should not signed by the respondent, being the Chairman and Trustees of the Body Corporate of Orangerie? Paragraph 10 (1) of the Sectional Schemes Management Regulations states "No document signed on behalf of the body corporate is valid and binding unless it is signed on the authority of a trustee resolution by (b) two trustees or one trustee and the managing agent in the case of any other document." Furthermore, the Community Schemes Ombud Service Act, 2011, states in adjudication "The applicant and any other relevant person are not entitled to legal representation, unless the adjustor and all other parties consent (etc.)". I note that the response was written and signed by by Mr Auren Freitas Dos Santos. Mr Freitas Dos Santos is an attorney working for Pam Golding, the Managing Agents. I think the Chief Ombudsman has to make a ruling in this regard.

Notwithstanding the above, thank you for the opportunity to respond to the comments of the Managing Agent, acting on behalf of the Trustees of the Orangerie Body Corporate. My assumption will be that this response is the response of the Trustees and that the Chairman and all the Trustees have approved it as it stands.

In my application I sought the following relief:

1. CSOS should instruct the Trustees of Orangerie to answer my letter regarding the Minutes of the AGM and correct the Minutes to accurately reflect the proceedings.
2. CSOS should instruct the Trustees of Orangerie to comply with regulations which states that members of the Body Corporate is entitled to be informed of, and attend Trustee Meetings.
3. The Trustees should be instructed to abide by the regulation which states "TRUSTEE MEETINGS AND DECISIONS General powers and duties 9. The trustees must— (e) compile minutes of each trustee and general meeting in accordance with rule 27(2)(a) and distribute these to the persons entitled to notice of the meeting concerned as soon as reasonably possible, but not later than 7 days after the date of the meeting."

The Managing Agent, on behalf of the Trustees, has opted to address these by commenting on the Details of Application, but has in the process addressed the three points. For clarity, I will comment under these three headings.

1. CSOS SHOULD INSTRUCT THE TRUSTEES OF ORANGERIE TO ANSWER MY LETTER REGARDING THE MINUTES OF THE AGM AND CORRECT THE MINUTES TO ACCURATELY REFLECT THE PROCEEDINGS.

After prompting from the CSOS my letter regarding the Minutes of the AGM was answered on 17 March 2017, almost 4 months after I wrote to the Trustees.

Flowing from the response, as well as the cover letter addressed to CSOS, also dated 17 March 2017, the following needs to be addressed:

- a. Should the meeting have been held in accordance to the Sectional Title Management Act promulgated on 7 October 2016, or in accordance with the Sectional Titles Act of 1986?

In their reply the Managing Agent seems to justify the decision to hold it in terms of the Sectional Titles Act on the fact that the Agenda was send out before (26 September 2016) the Sectional Title Management Act was promulgated (7 October 2016).

On 10 October 2016 I had a consultation with Dr. Durham, of Paddocks, Sectional Title Specialists. On 12 October 2016 I wrote to the Trustees to forewarn them of the legal implications of calling a meeting in terms of an Act from which those paragraphs dealing with the meeting had been repealed, and the existence of the newly promulgated Act. I believe Dr. Durham's firm was involved in the training of CSOS personnel and that the firms head, Prof Graham Paddock, was a consultant in the drafting of the new Act. I was therefor acting on solid advice and in good faith when I urged the Trustees to either correspond with me or meet with me, or take legal advice (correspondence available).

The Trustees decided to do neither and the AGM took place on 27 October 2017.

As per my letter to the Chairman regarding the Minutes of the meeting, and the admission in their letter to both CSOS and myself in this matter, the Chairman decided to continue in terms of the Sectional Titles Act.

It is thus up to the Chief Ombudsman to decide whether the Trustees' and specifically the Chairman's decision during the meeting to conduct the meeting in terms of the Sectional Titles Act was legal.

I am no legal expert, but would say that it was not legal, since there is no “sunset” clause or the like in the new Sectional Titles Scheme Management Act, nor any provision for meetings after the promulgation of the new Sectional Titles Scheme Management Act to be conducted under the rules and provisions of the “old” Sectional Titles Act.. In fact the “new” Sectional Titles Scheme Management Act specifically states that the rules of the “old” Sectional Titles Act only continued to apply until the “new” regulations were put in place, which was done on 7 October 2016 (see Government Gazette of 7 October 2016, and Section 21 of the Sectional Titles Scheme Management Act). Based on the advice I sought and offered to the Trustees, had the Trustees timeously acted regarding my concern (i.e. on or before 16 October 2016), they could have, in terms of Part 4: 15 (1) or Part 4: 15 (7) of the (new) Regulations given 14 days (or 7 days) notice of the meeting with a new agenda, in the proscribed form, which would have been legal in terms of the (new) Sectional Titles Scheme Management Act, and enabled the meeting to proceed legally on the arranged date (27 October 2016).

In my humble opinion the Chief Ombudsman of the CSOS should therefor find that the AGM of the Orangerie Body Corporate on the 27th October 2016 should have been held in terms of the Sectional Titles Scheme Management Act and not in terms of the Sectional Titles Act.

It follows that in my opinion the Chief Ombudsman should therefor find that in accordance with the Sectional Title Scheme Management Act, where a person acted as a proxy for more than two members, these proxies were not valid.

It also follows that the Chief Ombudsman should therefor find that the Agenda did not follow the order as prescribed (Management Rules Section 17 (6)) and therefor did not allow these concerns regarding the agenda (17(6)(e)) to be raised.

In my opinion the Chief Ombudsman should also find that in accordance with the Sectional Title Scheme Management Act, if a decision was made at the meeting regarding item 15 on the Agenda, (15. Special Resolution to approve new and amend existing Management and Conduct Rules in terms of Section 35 of the Sectional Titles Act of 1986), it will be invalid for two reasons. (1) The Sectional Titles Act Section 35 had been repealed, and (2) The notification did not comply with Section 17 (7)(b) of the “new” Management Rules as prescribed by the Sectional Schemes Management Act, which states that the agenda must contain a description of the matters that will be voted on at the meeting, including the proposed wording of any special or unanimous resolution.

b. Should the Trustees alter the draft minutes?

I accept that the Trustees are not prepared to amend the draft minutes at this stage to truly reflect the proceedings and that I will be able to table my corrections at the AGM of 2017. Should these not be accepted, or should I not be given the chance to table same, I will be entitled to contact CSOS for relief after the minutes of the 2017 AGM is circulated. In my opinion, even if CSOS condones the fact that the meeting proceeded in terms of the (repealed) Sectional Titles Act and not in terms of the (newly promulgated) Sectional Titles Schemes Management Act, CSOS should instruct the Trustees not to implement any decision where a vote was taken due to the dispute regarding proxies and voting. To this effect I have written to the Trustees to enquire whether or not the amendments to the Conduct Rules, where I dispute the fact that a vote was taken, have been lodged with CSOS, as required by law subsequent to the AGM.

on facebook
25/4/2017

2. CSOS SHOULD INSTRUCT THE TRUSTEES OF ORANGERIE TO COMPLY WITH REGULATIONS, WHICH STATES THAT MEMBERS OF THE BODY CORPORATE IS ENTITLED TO BE INFORMED OF, AND ATTEND TRUSTEE MEETINGS.

I acknowledge that I have received the Minutes of the AGM, only after CSOS intervention.

I acknowledge that I have received the Agenda for the Trustee Meeting of 7 March 2017 on the 6th of March 2017. I am yet to receive the minutes of this meeting. If there were any Trustee meetings prior to this, after the AGM, I have not received any agenda, was not informed of the meeting, and did not receive any minutes of such meetings.

The comment that I did not attend is irrelevant, since the regulations require the Managing Agent and Trustees to inform members of the Body Corporate of Trustee meetings, but does not require members of the Body Corporate to attend such meetings. For the record, I was unable to attend due to the short notice given.

The comment that "our client takes exception to the Applicant's baseless allegations" with regard to me not being notified of meetings is baseless in itself, since the Managing Agent and Trustee will note that the date of the application, in which I seek CSOS to instruct that regulations be complied with, on which they comment, is 2 February 2017, and the Agenda mentioned was send out on the 6th of March. The Managing Agent and Trustee might want to comment on whether they had complied with the regulations prior to the 6th of March.

3. THE TRUSTEES SHOULD BE INSTRUCTED TO ABIDE BY THE REGULATION WHICH STATES "TRUSTEE MEETINGS AND DECISIONS GENERAL POWERS AND DUTIES 9. THE TRUSTEES MUST— (E) COMPILE MINUTES OF EACH TRUSTEE AND GENERAL MEETING IN ACCORDANCE WITH RULE 27(2)(A) AND DISTRIBUTE THESE TO THE PERSONS ENTITLED TO NOTICE OF THE MEETING CONCERNED AS SOON AS REASONABLY POSSIBLE, BUT NOT LATER THAN 7 DAYS AFTER THE DATE OF THE MEETING."

The reply of the Managing Agent, acting on behalf of the Trustees, that "it will continue to endeavor to comply with the provisions of Management Rule 9 (e) is totally unacceptable and indicative of the attitude to the rule of law and regulations.

The Management Rule states that the trustees must compile minutes of each trustee and general meeting and distribute these to the persons entitled to notice of the meeting concerned as soon as reasonably possible, but not later than 7 days after the date of the meeting.

Note that the management rules use the word "must", which any dictionary will explain means "to be obliged to".

There is therefor, by law, according to the regulations, no scope for "endeavor", meaning, "to try hard to do or achieve something".

Accordingly, in my opinion the Chief Ombudsman should instruct the Trustees that this is not an option, but an obligation.

REASON FOR THIS APPLICATION

All the above might seem to the Chief Ombudsman as unnecessary nitpicking by a member of the Body Corporate. In order for the Chief Ombudsman to understand the reason for this application, the following background information is given, which could be considered.

1. In 2016 I wanted to apply to the Trustees for permission to keep my two dogs in our Apartment for a couple of months in 2017.
2. I was told that the Trustees had in 2011 decided on a blanket ban, despite the Management Rules allowing for permission to be sought.
3. I came to the understanding that that decision was illegal primarily based on the often-quoted Body Corporate of the Laguna Ridge Scheme v Dorse 1999 case.
4. I subsequently took legal advice, and based on correspondence between Dr. Durham of Paddocks and the Trustees permission was granted, with conditions.
5. When I received the Agenda for the 2016 AGM it became clear that the Trustees wish to alter the Rules in such a way that the possibility of permission to keep animals is moved from the Management Rules to the Conduct Rules.
6. I realised that this will allow the rule to be removed completely in the future, since Conduct Rules can be amended without a unanimous vote, whereas Management Rules cannot. This will have an impact on my rights, and the value of the property.
7. I wrote to the Trustees regarding my concerns, and received no reply.
8. Based on the track record of the Trustees (see above) I was then advised by Dr. Durham of Paddocks to make sure that the Trustees act in accordance with the law and regulations, to attend the AGM and make sure my concerns are noted in the minutes.
9. As it happens, the (new) Act and Rules were promulgated, which puts an obligation on the Body Corporate and especially the Trustees to act in a fair and transparent manner, especially when it comes to changing the Management and Conduct Rules, which explains why I insist that the AGM should have been conducted legally under the Sectional Schemes Management Act, whilst it seems the Trustees wishes the Sectional Titles Management Act to prevail. It also explains why I wish the minutes to reflect what was said at the AGM, and it also explains why I wish to be informed of what is discussed and decided at Trustee meetings.

I trust that my comments and explanation will be useful in the process of conciliation and/or arbitration.

Yours sincerely



Dr GJ Coetzee