De Lange and Others v Two Oceans Beach Body Corporate and Others

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 878/WC/17
Adjudicator: Andries du Toit
Date: 25 September 2018
Applicant: Willem de Lange and others
Respondent: Two Oceans Beach Body Corporate and others

EXECUTIVE SUMMARY

Category(ies) of relief sought: In respect of scheme governance issues - Applicant is seeking " an or der requiring the association {body corporate] to approve and record a new scheme governance provision " (Section 39{3}{b) of CSOS Act).

In respect of meetings- Applicant is seeking " an order declaring that a motion for resolution considered by a general meeting of the association was not passed because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion as was originally proposed, or a variation of the motion proposed". {Section 39(4)(d) of CSOS Act).

Brief synopsis of the dispute:

[1] Applicant seeks an order that requires the body corporate to approve and record the proposed amended conduct rule regarding the enclosure of balconies. Also that the opposition to such motion for a special resolution to be passed as considered by a special general meeting, was unreasonable in the circumstances.

Finding(s) - Applicant's relief sought in terms of prayers (more fully described in par21.1 & 21.2}, is refused.

Each party is responsible for its own casts.

INTRODUCTION

[1] The applicant Mr Willem de Lange is the registered owner of unit 604 and duly authorised representative of the Verona SA Trust (IT 4363/99) relating to unit 806, within the scheme, situated in Bay Road, Mouille Point, Cape Town. Twenty one co-applicants have further joint the proceedings. All applicants are represented herein by Ms Zerlinda van der Merwe from Paddocks.

[2] The respondent is Two Oceans Beach Body Corporate, a Sectional Title Development Scheme registered as such (SS 516/2005), herein represented by Mr Gary Moore in his capacity as chairperson of the board of trustees. Two Oceans Beach Body Corporate is represented by Ms Judith van der Walt from same Attorneys and a further twenty one co-respondents and dissenting owners are represented by Mr AC Hoeben from ENS Attorneys.

[3] This is an application for dispute resolution in terms of Section 38 of the Community 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 and was concluded on the 7th of August 2018. 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.

[5] Both parties attended the adjudication hearing in person subsequent to the Notice of Set Down issued in this regard on the 26th of June 2018.

RELEVANT STATUTORY PROVISIONS

[6] The hearing was conducted 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".*

[7] Section 45(1) provides that -

> *"The ombud hos 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".*

[8] 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".*

[9] 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 on adjudicator".

[10] Accordingly, a certificate of Non- Resolution was issued in terms of Section 48(4) of the CSOS Act No.9 of 2011. The Ombud therefore, referred the matter to adjudication, in terms of Section 48 of the Act.

APPLICANT'S SUBMISSIONS

[11] Two Oceans Beach scheme consists of 51 units, owned by 42 different registered owners, of which 47 units are used for residential purposes and 4 commercial units. Ms van der Merwe contends that applicant represents 25 owners (in favour of enclosures) in the hearing.

[12] Mr De Lange raised the issue of the enclosure of his balcony in 2010 with the then trustees. The fact that the balconies in question forms part of the respective sections (as is evident from the sectional plans of the scheme) is common cause. The reasoning for the proposed enclosure of the balconies is its underutilisation due to weather, noise from road traffic, parking layout and use by customers, busses and taxis and the use of the commercial section (restaurant) at the ground level.

[13] Reference is *inter alia* made in particular to prescribed Management Rule 30 (that repealed and replaced management rule 68(1)(iv) of the Sectional Titles Act), obliging a body corporate as represented by trustees to take "reasonable steps" to ensure that any member/occupier of a section does not in terms of sub section (e): "do anything to a section…that has a material negative effect on the value or utility of any other section…". Applicant contends that the test to be applied here is an objective test in contrast to the subjective test applied in the interpretation of what constitutes the harmonious appearance of a building and the alleged contravention of management rule 68(1)(iv). Therefore it is argued that an owner may proceed to enjoy their section (and enclosure of the respective balconies), provided the trustees take reasonable steps to ensure compliance to the provisions of the sub-rules of prescribed Management Rule 30.

[14] Applicant further referred to applicable prescribed conduct rule 5(1) providing that the owner must not, without the trustees' written consent, make a change to the external appearance of the section unless the change is minor and does not detract from the appearance of the section or the common property. The test as determined in prescribed Management Rule 30(e) (above) then becomes relevant again. Conduct Rule 7 of the body corporate dealing with alterations of sections and the application thereof, provided the required procedure (i.e. application form to be completed and submitted to the trustees for approval) be followed. Therefore the current status quo provides that any owner can apply in terms of Conduct Rule 7 of the body corporate's rules, read with prescribed Conduct Rule 5 and prescribed Management Rule 30, for their balconies to be enclosed.

[15] The trustees initially tabled applicant's request for the enclosure of his balconies for consideration by the members of the body corporate at various annual general meetings, as he was the first to apply. Following an opinion by Ms Van der Walt, the members resolved at the AGM of 6 February 2017 that the trustees obtain a legal opinion from adv. Rogers in this regard. The proposed amended conduct rule was then tabled at the trustee meeting held on 28 November 2017, where it was resolved that a special general meeting be convened to table the amendment via a special resolution of the members.

[16] Mr de Lange proceeded with the preparation of plans to enclose his balconies for submission to the City of Cape Town at his own cost as resolved at a trustee meeting held on 22 October 2015, upon the legal advice of Ms Van der Walt. Mr de Lange has also placed architect renderings of the proposed façade of the building in the common foyer since April 2010 for all owners to view, with no comments raised to date.

[17] Applicant also obtained the advice and report of a structural engineer, similarly involved in the neighbouring scheme Aquarius, also built by the same developer as Two Oceans Beach, which has balcony enclosures, in order to ensure that the stability of the building would not likely

be impaired (as per prescribed Management Rule 30(d) required). The trustees are further obliged to ensure that inter alia prescribed Management Rule 30(e) is also applied equally to all applicant members, as required by section 10(3) of the Sectional Titles Schemes Management Act ("STSMA").

[18] The majority of co-applicants are resident owners within the scheme and directly affected as such, whereas the majority of the objecting owners, including two of the current three trustees, are non-resident and not affected (owning units either not occupied or of commercial nature).

[19] Applicant is further of the opinion that provision is specifically made in the draft conduct rule for the "use and enjoyment of sections" as required by Section 10(2) of the STSMA and that respondent's argument that this rule should be contained in the management rules of the body corporate (more specifically Management Rule 77 regarding awnings) is not relevant. Two Oceans Beach Body Corporate's Conduct Rules (inclusive of the process and design of balcony enclosures) have further been approved by CSOS Offices' and is therefore enforceable.

[20] Applicant contends that in the absence of the proposed amended conduct rule, the trustees may consider and approve balcony enclosure applications in the circumstances, albeit without the guidance as to the manner and method of such enclosure, thereby necessitating the proposed conduct rule.

APPLICANT'S PRAYERS

[21] Applicant's prayers as described in their submission, as follows;

21.1 CSOS to order Two Oceans Beach Body Corporate to approve and record a new scheme governance provision, being the proposed amended conduct rule.

21.2 CSOS to declare that a motion for a special resolution considered by a special general meeting held on 11 January 2018 of the association was not passed, because the opposition to the motion was unreasonable under the circumstances, and giving effect to the motion (special resolution) as was originally proposed, or a variation of the motion proposed.

RESPONDENT'S SUBMISSIONS

[22] Mr Gary Moore (chairperson of the board of trustees) contends that the trustees are fully aware of their obligation to consider the views and protect the rights of all owners as contained in the Sectional Titles Schemes Management Act of 2011 as well as to enforce the current management and conduct rules of the scheme. The lack of communication and disregard of the opinion of a substantial number of the owners (opposed to balcony enclosures) shown by the previous group of trustees, is concerning. This whole process was engineered by a group of trustees to subvert the previously recorded opinions of a substantial group of owners to remove the requirement of trustees to make a determination in respect of prescribed Management Rule 30(e) by attempting to establish a new conduct rule. Mr Moore further contests that all previous group of trustees either refused to consider or approve balcony enclosures due to the previous "harmonious appearance" Management Rule 68(1)(iv) and that the previous trustees also (inclusive of applicant) were not prepared to approve balcony enclosures, notwithstanding the management rule change in October 2016. The enclosure of some balconies and not all balconies will have an aesthetically displeasing effect, which will consequently have a material negative effect on the value or utility of other sections and exclusive use areas in the scheme, as contemplated by Management Rule 30(e), which is also supported by two independent architects consulted in this regard.

[23] RS Stevens (partner at KMH Architects) is of the opinion (dated 12 July 2018) that "there is a high asset value in the fact that this premium building hasn't enclosed any of its balconies. It retains the 'harmonic integrity its architect created" and further states that if enclosure should be considered, the following is inter alia important to consider;

(i) "All balconies must be enclosed simultaneously to a standard design which protects the architectural and structural integrity of the building;

(ii) It must never permit some owners to enclose and

others not to otherwise Two Oceans Beach will become just another 'ill-considered' unfortunately altered building ...and this can effect value."

[24] Kevin Gadd from Kevin Gadd Architects is also of the opinion (12 July 2018) that by allowing ad hoc enclosure of some balconies in this scheme would be "extremely detrimental to the aesthetic quality of the design...and would lead to a significant loss of value of the property." Iconic status and architectural statement are fundamental value determinants in the upper end of the residential market and balcony enclosures will significantly effect this as per Steer and Co. (Valuation Report of 20 July 2018), who concluded that it would be detrimental to the market value.

[25] Mr Moore contests that applicants seek to enforce;

25.1 a poorly drafted and contradictory new conduct rule without obtaining the requisite vote;

25.2 remove the previously entrenched right of all owners to agree to fundamental alterations to the use and appearance of the building, and

25.3 remove the requirement that trustees consider and undertake the responsibility of determining whether or not a balcony enclosure - negatively affect the aesthetics of the building and/or Conduct Rule 4.1 and if the enclosure may negatively affect the value of all other owners' investments.

25.4 The trustees contest that this application be rejected in its entirety.

[26] Mr Moore submits that 26 units representing 46,44% of the PQ have confirmed support for enclosures, whereas 21 representing 41,37% do not support the notion. Therefore only 55% of the PQ present at the meeting voted in favour, whereas the requirement is 75% in number and PQ. No formal discussion has been recorded/held with owners since 2013 regarding this issue and none subsequent to the amendment of Management Rule 30(e). Prior to the meeting of January 2018 also no discussion was held on the proposed design and rules with owners and the potential impact relating to the value of other sections should the enclosure of balconies proceed. Mr Moore further argues that all of the conditions (wind and weather) are pre-existing conditions and the owners purchased knowingly the prevailing weather conditions.

[27] The trustees however confirmed that they are prepared to call a general meeting specifically to discuss the merits of balcony enclosures with respect to the value change requirement in the management rules, if so requested by applicants herein. Further that if such meeting determine sufficient consensus, applicant will be provided with an opportunity to re-submit proposals regarding design and methodology for installation, for the approval by all the owners.

[28] Mr Hoeben (on behalf of 21 dissenting members) contests that the opposition to the balcony enclosures (as referred to in the trustees submissions) in actual fact started 8 years ago already. It was resolved at the AGM held on 19 January 2015 that the balcony enclosure project would not be pursued, but members may however obtain their own legal opinion in this regard. Despite this the chairperson at the time (and a co-applicant herein) proposed (which was accepted) at the February 2017 AGM that formal advice be sought. This resulted in the opinion of adv. Rogers in April 2017, who expressed inter alia the following viewpoints;

28.1 The random permission of enclosure of balconies would result in a patchwork of open and enclosed balconies that would likely prejudice the harmonious appearance of the building, which consideration is regarded as important and should be taken into account in considering the provisions of the new prescribed Management Rule 30(e).

28.2 Adv. Rogers recommended that when trustees are faced with such application for enclosure, comment from all owners should be invited and professional assistance should be sought in evaluating the likely effect on the value of other sections by allowing the enclosure of a single balcony.

[29] Mr de Lange (a trustee at the time) and other trustees however did not adhere to these recommendations from adv, Rogers when permission was sought, instead convened a Special General Meeting on the 11th of January 2018 (contrary to significant opposition to the enclosure of balconies and without any effort to address the concerns expressed by the opposing members) for purposes of adopting a conduct rule with intention that if this should succeed all members would then have approved the

concept of the enclosure of balconies,

[30] The enclosure of balconies issue was also discussed with the architect (who originally designed the building), who advised in correspondence to the opposing members as follows in this regard;

> 30.1 "I stated that with a few minor modifications, I was satisfied with the aesthetic and visual impact of the proposal. I did however state that it would be necessary for all the apartments (or at least a whole façade) to follow the same route to maintain visual harmony. It would be unsightly for the building to have some enclosed balconies and some not. I stated that if that happened, it would be like 'missing teeth'",

[31] Mr Hoeben further contests that it would be inappropriate to regulate the matter via a conduct rule and that a new management rule would have to be adopted to amend existing management rules, which would in turn require a unanimous resolution. Members representing 44.95% of the vote at the SGM voted against the adoption of the proposed conduct rule 32.

[32] It is also contested that the balcony enclosure motion is inconsistent with the Body Corporate's rules in that;

> 32.1 Management Rule 77 specifically guards against external alterations on the balconies impacting on the harmonious appearance of the building;
>
> 32.2 Conduct Rule 4.1 prescribes that an owner may not use any portion of their section, including balconies, patios and stoops, which in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed from the outside of the section;
>
> 32.3 Conduct Rule 31 of the Body Corporate.

[33] Section 10(12) of the Sectional Titles Schemes Management Act of 2011 further stipulates that; "any rules made under the Sectional Titles Act are deemed to have been made under this Act" enforcing these rules and consequently continue to apply in as far as it is not inconsistent with the new prescribed rules.

[34] Mr Hoeben also contests that CSOS does not have the required jurisdiction to grant an order giving effect to a proposed resolution voted against by the Body Corporate, where the Act prescribes a threshold higher than a simple majority vote.

[35] It is common cause that applicant should demonstrate that the opposition to the proposed special resolution is "unreasonable under the circumstances". The twenty one opposing members agree with the reasons and concerns advanced by the trustees for opposing the enclosure of balconies in this instance. Mr Hoeben submits in this regard that applicant conceded during the hearing that the proposed conduct rule in its current format require amendment, thereby nullifies there argument that the opposition to the proposed conduct rule was unreasonable in the circumstances.

[36] Ms Van der Walt (on behalf of the Body Corporate) submits that they are in agreement with the submissions made by Mr Hoeben. She further confirmed that 2 owners representing 26 sections and 46,4% of the PQ are now in favour and 12 owners representing 21 sections and 41,4% of the PQ are against the enclosure of balconies and consequently the approval of the proposed conduct rule.

[37] Ms van der Walt also contests that the applicant submitted his application to the City of Cape Town, notwithstanding the advice from The City that plans for the entire building should be submitted together, at a time when the opposition to the enclosure was obvious and well known. Therefore the advice of The City can never be construed as confirmation of approval and that no objection was raised.

[38] The argument that the balconies are currently underutilised and the refusal to approve the conduct rule places an unjustifiable limitation on ownership and constitutional infringement is without merit. The building was designed and built with open balconies and that every owner purchased their property knowingly that it is exposed to the elements and noise.

RESPONDENT'S PRAYERS

[39] CSOS to refuse applicant's relief sought in this instance.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

[40] In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witnesses must be considered.

[41] 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 presented, it must be evaluated and determined whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities. I have perused all written submissions and taken into consideration all submissions stated before me at the day of the hearing as well as supplementary submissions.

[42] It seems to be common cause from the evidence that;

42.1 None of the balconies in the development is currently enclosed,

42.2 The balconies of sections could be enclosed without encroaching on common property (and therefore all work relating to the enclosure of balconies would not involve any work beyond the boundaries of the relevant sections), resulting in alterations to the sections themselves only, according to the sectional plan.

42.3 Some of the owners of sections wish to enclose their balconies, whereas others are strongly opposed to any enclosure of balconies.

[43] Rule 68(1)(iv) of the old prescribed Management Rules determined that, in addition to an owner's obligations in terms of section 44 of the then Sectional Title Act, he: "shall not do anything to his section or exclusive use area which is likely to prejudice the harmonious appearance of the building".

[44] This old prescribed Management Rule (68(1)(iv)) has however not been incorporated into the new prescribed management rules, instead rule 30(e) of the new prescribed management rules provides that the body corporate must take all reasonable steps to ensure that a member or any occupier of a section or exclusive use area does not: "do anything to a section or exclusive use area that has a material negative affect on the value or utility of any other section or exclusive use area."

[45] Cognisance should also be taken of the following legislation in the circumstances;

45.1 Section 10(12) of the Sectional Titles Schemes Management Act ("STSMA") provides that any rules made under the Sectional Titles Act are deemed to have been made under the STSMA.

45.2 Section 21 of the STSMA that provides for rules prescribed under the Sectional Title Act to continue to apply to new and existing schemes until regulations are made prescribing rules referred to in section 10(2) of the STSMA.

45.3 Section 2(5) of the STSMA determines that a body corporate is responsible for the enforcement of the rules.

[46] It further does not seem to be in dispute that - the developer of the scheme made additions to the old prescribed management rules and substituted the old prescribed conduct rules, when an application was submitted for the opening of the sectional title register. The members of the body corporate subsequently passed an unanimous resolution (on 8 October 2009) in terms of which certain alterations were made to the additions to the old prescribed management rules made by the developer and an additional conduct rule was incorporated about 28 January 2010.

[47] I am in agreement with adv. Rogers opinion (of 21 April 2017) that the mere additions made to the old prescribed management rules by the developer constitute that rule 68(1)(iv) was substituted by the new prescribed management rules in this instance, subject to the developer's additions aforesaid, altered by the members, as mentioned. Further on the other hand also that the developer's substituted conduct rules, as supplemented, continue to apply here, to the exclusion of the new prescribed conduct rules.

[48] Conduct Rule 4.1 of the developer's substituted conduct rules, determines under "Usage" that; 'An owner or occupier of a section used for residential purposes shall not place or do anything on any part of such section or exclusive use area attached to such section, such as balconies, patios, stoeps, and gardens, or on any part of the common property which, in the discretion of the trustees, is aesthetically displeasing or undesirable when viewed

from the outside of the section.'

[49] Rule 7 of the developer's substituted conduct rules stipulates that any owner wishing to undertake alterations to his section has to comply with the "Alterations Procedure" as per 'Annexure A'(application form to make alterations and/or renovations) which forms part of the developer's substituted conduct rules. The term 'alterations' is defined herein as: "any work involving structural alterations to a section including the removal, creation or modification of a wall or any structural part of the building and shall include any alterations, modifications or decorative work which effects the exterior appearance of a section". The procedure to be followed to obtain approval is also set out in the conditions to 'Annexure A', which entails;

49.1 The application to be accompanied with a sketch plan of proposed alterations, which must be submitted to the trustees for agreement in principle, where after,

49.2 The owner ought to, if necessary, obtain professionally prepared plans, which need to be approved by the City of Cape Town in this instance. In this regard cognisance is taken of the letter to the City of Cape Town from Mr Moore (dated 28 June 2018) indicating that no authorisation was sought from the owners prior to the submission of the building plan approval application on 27 October 2015 to the City by the previous trustees. The City was also requested to retract their approval granted on 20 December 2016 (valid until 20 December 2018) in this regard.

49.3 The approved plans then need to be submitted to the trustees, alternatively the trustees need to be satisfied that such approval is not required.

49.4 It is also the prerogative of the trustees to seek advice from an architect regarding the acceptability of the proposals, if they deemed it necessary.

[50] I am also in agreement with adv. Rogers opinion regarding the procedure to be followed to apply for balcony enclosures, in that;

50.1 An owner needs to apply to the board of trustees for permission, by way of utilising 'Annexure A' to the developer's substituted conduct rules and to inter alia provide a sketch plan and indicate the 'visual impact' the enclosure would have.

50.2 The trustees then need to establish whether the enclosing will be aesthetically displeasing or undesirable when viewed from the outside (as per Conduct Rule 4.1) and will have a material negative affect on the value or utility of any other section or exclusive use area (as determined in prescribed Management Rule 30(e).

[51] Having perused the relevant documentation and considered the evidence herein, I am not convinced that applicant proved its case (on a balance of probabilities) in that a motion for a special resolution considered by a special general meeting held on 11 January 2018 of the association was not passed, because the opposition to the motion was unreasonable under the circumstances. The special resolution tabled could not be passed due to the fact that 75% of the votes calculated both in value and number of the members of the body corporate present or represented voted against the proposed amended conduct rule to enclose balconies. Section 11(1)(a) of the STSMA provides that the PQ of a section determines the value of the vote of the owner of the section where the vote is to be reckoned in value, which is applicable here where a special resolution is tabled for resolution to approve a conduct rule, also taking into account the vote in number.

[52] Respondents have further indicated by way of architect reports, which is accepted, that the proposed enclosure of some of the balconies (in the absence of a whole façade) would have a detrimental affect on the value of other sections and consequently Two Oceans Beach development (as determined in prescribed Management Rule 30(e)).

[53] Applicant has further conceded that the proposed draft conduct rule is not correct (complete) in its current format, necessitating change to the design details.

[54] I am also of the opinion that the incorrect process was followed in the circumstances in that the application for enclosure of balconies should have been determined by the trustees in the first place, based on the authority of Conduct Rule 4.1, and not have been directed to a special general meeting for resolution on a proposed new conduct rule. Then only in the instance where the trustees have refused such an application the "reasonableness" of their decision under the circumstances becomes relevant and should be evaluated and determined.

[55] Respondents argument that Management Rule 77 is relevant necessitating an unanimous resolution to amend, is rejected on the basis that Management Rule 77 primarily deals with 'awnings', which do not seem to be relevant here, whereas Conduct Rule 7 specifically refers to alterations together with the procedure to be followed in such instance.

[56] Applicant's relief sought in terms of Section 39(3)(b) of the CSOS Act relating to the approval and recording of a new scheme governance provision is regarded in the circumstances as supplementary to the relief sought in terms of Section 39(4)(d), which is rejected (as mentioned above), consequently resulting in the relief sought in terms of Section (3)(b) also to fail then.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[57] 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 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

[58] Accordingly, the following order is made in terms of Section 54(1)(a) read with Section 39 of the Community Schemes Ombud Service Act No.9 of 2011;

58.1 Applicant's relief sought as set out in his prayers, as described in 21.1 & 21.2 (above), is refused.

58.2 Each party is responsible for its own costs.

This order to be circulated amongst all the members in the scheme.

RIGHT OF APPEAL

The parties' attention is drawn to -

Section 57(1) of the CSOS Act of 2011 refers -

"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".