Faurie and Another v Sheraton Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 54/WC/17
Adjudicator: Nomonde Keswa
Date: 12 September 2017
Applicant: Charl Faurie and Francois Toerien
Respondent: Trustees of the Sheraton Body Corporate

PARTIES

[1] The applicant is Mr Chari Faurie. Mr Faurie spends most of his time overseas.

As a result, he was represented at one stage by his partner Mr Francois Toerien. In their absence, Mr Faurie requested his daughter Nicola Faurie to stand in for him as an applicant in this matter. Mr Faurie is the owner of unit 601 in the Sheraton Sectional Scheme No. 39/1980 of St Andrews Road in Sea Point, Cape Town.

[2] The Respondents are the Trustees of the Sheraton Body Corporate as contemplated in Sections 2 and 7 of the Sectional Titles Schemes Management Act No. 8 of 2011.

INTRODUCTION

[3] After the parties failed to resolve the dispute amicably between themselves, the applicants lodged the matter for dispute resolution by the Community Schemes Ombud Services (CSOS) in terms of Section 38 of The Community Schemes Ombud Services Act, Act 9 of 2011. The matter was referred for adjudication in terms of Section 48 (4) of the said Act after the conciliation process had failed.

[4] The matter was first set down for adjudication on 02 august 2017. The Respondents asked for postponement. They indicated that they did not have any information on the matters raised by the applicant because they came into office after this matter had been dealt with at the conciliation stage. The Respondents also raised an objection to the representation of the applicant by his daughter because she is an admitted attorney. The hearing was postponed and rescheduled for 12 September 2017 after an adjudication order was made on the representation of the applicant by his daughter.

[5] The applicant was represented by Ms Nicola Faurie as ordered in the adjudication order referred to in paragraph 4 above. The Respondents were represented by Mr David Diamond, an owner of one of the units and a Trustee. Mr Diamond was assisted by the Managing Agent, Ms Suzanne Kempen.

APPLICABLE PROVISIONS OF THE ACT

The hearing was conducted in terms of:

[6] 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) 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"

[8] 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'.

[9] Section 48 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

[10] The applicant complained of illegal, unprocedural and unfair treatment meted out to him by the Trustees who:

10.1 imposed on him a fine of R1000 (one thousand rands) without due process;

10.2 unilaterally changed the decision of the AGM of the Body Corporate to grant him use of the common property, the storeroom, on a rental to be negotiated between him and the Trustees;

10.3 threatened him with eviction from the storeroom before following an appropriate legal process. He submitted that he had to incur legal costs in an attempt to assert his rights to natural justice. He further submitted that he also incurred costs to remove some of his most valuable belongings from the store room for fear of them being lost or damaged should the Trustees effect their threat to remove his belongings from the store room.

[11] The respondents disputed the veracity of these complaints. They submitted that:

11.1 it is their duty to impose fines for a violation of the rules of the scheme;

11.2 the AGM did not take a decision on the issue of the storeroom but deferred it to the Trustees to decide. They decided to decline the request by the applicant to continue using the store room because they needed the store room for use by the Body Corporate;

11.3 the threat to evict the applicant from the store room was not acted upon by the respondents on the basis of legal advice that to do so would be an act of spoliation on their part.

APPLICANT'S VERSION

A) Use of the store room

[12] The applicant submitted that when he purchased the unit in July 2013, he took over the store room, adjacent to his unit, which was used by the previous owner. At the time he did not know that the store room was common property. When he became aware of this, he tried without success to get the Trustees to lease this facility to him. In January 2016 his proxy at an annual general meeting (AGM) of the Body Corporate expressed interest in the store room they had used over the years and proposed to pay rental for it. He maintained that the AGM did not object to his continued use of the store room and deferred the decision on the rental amount to be decided by the Trustees in consultation with him. The minutes of the AGM were submitted into evidence (vide Addendum D page 61 of the attachment to the application in the file). No objection was raised to accepting the copy of the AGM minutes into evidence.

[13] However the Trustees decided that he should vacate the store room and that he should pay rental of R200 per month until he vacated the store room. This decision of the Trustees became a subject of numerous emails between the parties because in the applicant's opinion the Trustees were abusing their power and victimizing him. He questioned whether the Trustees have the power to change unilaterally the decision of the AGM. He offered the Trustees rental of R100 per month for the store room and authorized the Trustees to debit his account and backdate payment for 3 (three) months. No response to this offer was received.

[14] He subsequently received letters from the attorneys of the Trustees demanding that he should vacate the store room (vide Addendum D pages 28, 36 and 43 of the attachment to the application). The last letter he received gave him the 1O August 2016 as the ultimatum for him to vacate the store room. On the 09 August 2016 he decided to remove from the store room his most valuable belongings for fear of loss or damage to them. For this removal he incurred a cost of R1,500.

[15] He consulted an attorney for legal advice to assert his rights to a legally correct, procedurally fair and reasonable treatment from the Trustees. For the several consultations with his attorney and letters written by the attorney to the Trustees he incurred costs amounting to R16,530 because of the Trustees direct actions.

B) Fine

[16] When he renovated his unit, the applicant applied to and entered into an agreement with the Trustees as required by the rules of the scheme and paid the mandatory refundable deposit of R5,000. The respondent provided a copy of the signed agreement which was entered into evidence by agreement of both parties (vide Addendum E pages 9-13 of the attachments in the file). However, when the refund was due, he received a letter detailing transgressions relating to cleanliness allegedly committed during the renovation. For the alleged transgressions he was fined R1000. This decision of the Trustees became a subject of several emails in which the applicant attempted to understand the

procedure followed to arrive at the fine without being given an opportunity to put his side of the story. However, the Trustees deducted the fine from his deposit and did not entertain any further discussion on the matter. The applicant maintained that this decision was in contravention of the remedies agreed on in the agreement referred to above. Paragraph 9 of the application/agreement provides that the contractors must clean up the common property at the end of each work day. If this is not done, the schemes' cleaners will clean up at the owner's expense at overtime rates. This amount should have been debited against his levy account instead of deducting it from his deposit.

APPLICANT'S PRAYER

[17] The applicant's prayer is that the Trustees should:

17.1 refund him the R1000 fine that was illegally imposed upon him;

17.2 submit a substantiated claim for damages and/or costs incurred as a result of the alleged transgressions during renovations;

17.3 negotiate with him the rent for the store room as per the minutes of the AGM of 27 January 2016;

17.4 put a proposal to the members of the Sheraton Body Corporate to ratify the lease of common property store room by means of a special resolution as per new legislation;

17.5 reimburse him the legal costs amounting to R16,530 he incurred as a direct result of the trustees' actions;

17.6 reimburse the cost of removing and transporting his most valuable belongings to safe premises amounting to R1,500.

RESPONDENT'S VERSION

[18] The respondents denied that a decision was taken at the AGM to lease the store room to the applicant. The AGM deferred this decision to the Trustees. The Trustees decided that the store room would better serve the Body Corporate if it reverted to them. This decision was not taken with any malicious intent but with due consideration of the needs of the Body Corporate. The applicant was being disingenuous when he submitted that he was not aware that the store room was common property and that he was enjoying use thereof without paying for it. They questioned why he did not regularise the lease of the store room in 2015 when he was the chairperson of the Body Corporate as then he had a fiduciary duty to the Body Corporate. He continues to use the store room without benefit to the Body Corporate.

[19] They did not know that the applicant removed his belongings from the store room on 9 August 2017. He did so on his own free will not because of threats from the Trustees. He knew that the Trustees could not act on their threats because of the legal advice on spoliation the applicant's lawyer sent to the Trustees on 22 April 2016 to which he was privy. The cost he incurred for the removal and transportation of his belongings should be for his own account.

[20] The fine was imposed on the applicant because of the violation of the agreement entered into between the two parties. It is within their duty as Trustees of the Body Corporate to act on its behalf in between AGMs. The costs incurred by the Trustees to remedy the breaches arising from the applicant's failure to supervise and monitor the contractors which were renovating his property justify the fine imposed on him and deducted from his deposit. They refuted the claim that the applicant was not informed of the infringements. An email was sent to the applicant warning him that his contractor's conduct is in violation of both the agreement and the Conduct Rules. In terms of Rule 14 (1) of the Conduct Rules, one written warning to bring the violation to the attention of the owner of a unit is sufficient after which a fine is imposed should such infringements continue.

[21] Attempts were unsuccessfully made to arrive at a mutually acceptable solution of the dispute with the applicant even on the eve of the CSOS adjudication process (vide emails correspondence with the applicant dated 24 July 2017 at Addendum E pages 5 and 7 of the attachments on file). The applicant made it difficult to pursue this option before the start of the adjudication process at CSOS because

his demands were not achievable. The time frames he set were short to consider his settlement offer of R15,000 for legal costs. The Trustees argued that a 24 hours deadline set by the applicant for their response was impractical as some of them are employed and others are in business.

[22] The decision to approach lawyers was necessitated by the protracted discussion with the applicant without reaching any finality and also because the applicant had already involved lawyers. They cannot be held responsible for the legal costs incurred by the applicant because he opted to take the matter out of the internal mechanisms for dispute resolution which would not have attracted any cost.

EVALUATION OF EVIDENCE

[23] The minutes of the AGM read: "***Francois Toerien stated interest in the storeroom they have had use of, and will proposal (sic) a rental amount to be agreed upon by the trustees***". It is this sentence that gives the applicant the reason to believe that the members of the Body Corporate present at the AGM agreed to his continued use of the store room and that the only decision that was deferred to the Trustees was to determine the rental amount. There is no indication in the minutes that the stated interest was rejected by the meeting. Although the respondents interpreted this sentence to mean that the entire decision on the continued use of the store room and the rental amount was deferred to them, in my view, there are two issues recorded in the minutes, namely: the continued use of the store room and the rental amount. I interpret this record to indicate that no objection to the stated interest was noted.

Therefore there was tacit approval of the continued use of the store room and that the rental amount would be negotiated with the Trustees.

[24] Section 7 (1) of the Sectional Titles Schemes Management Act No. 8 of 2011 provides that:

> *"The functions and powers of the body corporate must, subject to the provisions of this Act, the rules and any restriction imposed and direction given at a general meeting of the owners of sections, be performed and exercised by the trustees of the body corporate holding office in terms of the rules".*

Regulation 9 (b) promulgated in terms of Section 19 of the said Act provides that the trustees must:

> *"exercise the body corpora/e's powers and functions assigned and delegated to them… in accordance with resolutions taken at general meetings and at meetings of trustees".*

The question that arises is whether the Trustees can change the "direction" given and resolutions taken at the general meetings without reverting to the general meeting to obtain a new "direction" or resolution. Unless they obtain a new direction from the general meeting the trustees must not unilaterally change the "direction" given. To do so would exceed their powers. Indeed the letter from the respondent's attorney on 29 July 2016 (vide Addendum D page 43) giving the applicant an ultimatum of 10 August 2016 to vacate the store room is proof that the respondents continued to act beyond their powers because there was no new "direction" from the AGM of the Body Corporate that rescinded the decision of the earlier AGM and that the applicant's further use of the store room be discontinued. It is reasonable that the applicant decided to remove his valuable belongings on the 09 August 2016, a day before the date of the ultimatum for fear of loss of and/or damage to his belongings.

[25] The agreement entered into by the parties relating to the renovations in the applicant's unit stipulated that:

> *"Contractors must clean up the common property each and every afternoon before leaving the site. If this is not done it is understood that the building's cleaners will do so at overtime rates, at relevant owner's expense"(clause 9 of the said agreement, vide Addendum E page 12 of the attachments on file.)*
>
> *"a deposit of R5,000 (five thousand rands) shall be paid to the Managing Agents before any work may commence, from which costs of rectifying any damage to common property, as mentioned above, as well as any other charges accruing to the owner arising out of paragraphs 10, 11 and 12 may be deducted"(clause 15 of the said agreement, Addendum E page 12 of the attachments on file).*
>
> *"any and all charges, expenses and costs accruing against the relevant owner arising from matters contained anywhere in the foregoing conditions are payable on demand and as stated in paragraph 15 will be deducted from the deposit" (clause 16 of the said agreement, Addendum E page 12 of the*

attachments on file).

[26] In terms of the clauses in paragraph 25 above, the Trustees would be justified to deduct from the deposit to provide for "any and all charges, expenses and costs" arising from the renovations agreed between the parties. This presupposes that the "the charges, expenses and costs" would be documented and evidential proof provided when requested by the relevant owner as per rule 14.1 on the enforcement of rules (vide Addendum A xiii). However the respondents submitted that the R1000 (one thousand rands) withheld from the deposit was not to provide for the charges, expenses and costs as contemplated in the agreement and conditions for renovations. It is a fine for infringements that happened during the renovations (vide Addendum D page 6 of the attachments on file). There is nowhere in the agreement where a fine is provided for as well as the procedure to be followed to arrive at such a fine. In the absence of such a clause in the agreement, the determination of a fine seems arbitrary and punitive. The respondents submitted that they used the rules of the scheme to arrive at a decision to fine the applicant for the infringements. It was not explained why the Trustees did not abide by the conditions of the agreement that was concluded to guide both parties to manage the renovation project and instead rely on the conduct rules.

[27] Rule 14 of the Conduct Rules of the scheme provides that:

> *"any contravention or breach of any of these Conduct Rules shall, after one prior written warning to the Owner concerned, be punishable by the Trustees raising a fine or penalty against such Owner's levy account".*
>
> *"fines or penalties shall be added to the monthly levies payable by the Owner and is both due and payable by the Owner concerned on receipt of such a levy statement …"*

In terms of these rules, the Trustees are empowered to impose fines on owners for breaches of conduct rules on condition that one written warning is issued to the owner. Such a warning was given on 22 January 2016 by the email at Addendum D page 1 of the attachments to the application. The submission by the applicant that he was not given an opportunity to put his side of the story is not provided for in these rules as they currently stand. Although the applicant is a signatory to these Rules, they are deficient in that they do not provide a section owner accused of infringements an opportunity to be heard before a fine is imposed. According to these rules the fines so imposed must be added to the monthly levies. No provision is made for deducting such fines from the deposit which is meant to provide for charges, expenses and costs incurred during the renovations.

[28] To determine whether the respondents can be held liable for the legal costs incurred by the applicant in the course of this dispute, considering the size of the amounts in dispute, it must be established why the applicant opted to take the legal route. The applicant submitted that he sought legal advice because he wanted to assert his rights to correct, procedurally fair and reasonable treatment from the trustees in connection with his continual use of the storeroom which the Trustees denied him as well as the fine imposed on him. For this reason, he submitted there could be no cost spared to protect his rights. The applicant's first consultation with an attorney is recorded to have taken place on 20 April 2016, one or two days after receiving emails from the trustees informing him that:

> 28.1 On the issue of the imposed fine, the matter is closed (vide Addendum D page 14 of the bundle of attachments).
>
> 28.2 On the issue of the storeroom, the trustees will "empty" the store room on 26 April 2016 (vide Addendum D page 15 of the attachments on file).

The question to be answered is whether the correspondence cited in 28.1 and 28.2 above was sufficient to convince the applicant to resort to an external mechanism for dispute resolution for which he claims the costs from the respondents. The amount of correspondence between the parties and the fact that the respondents had terminated further discussions on these matters indicate that they had reached a stage where outside intervention was necessary and justifiable as the applicant had exhausted all available internal remedies.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[29] 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 No 9 of 2011.

ADJUDICATION ORDER

[30] In the circumstances the following order is made:

30.1 The respondents are ordered to submit to the applicant proof of the damages and the costs incurred in remedying such damages caused by the contractor during renovation of the applicant's unit. This must be done within seven (7) days from the date of this order.

30.2 It is ordered that the costs of rectifying the damages proved in terms of paragraph 30.1 above must be deducted from the deposit as provided for in paragraph 15 of the agreement between the applicant and the respondents.

30.3 It is ordered that the balance of the deposit after the cost of substantiated damages has been recovered must be refunded to the applicant by the respondents. This must be done within thirty (30) days from the date of this order.

30.4 In terms of Rule 14 of the Conduct Rules of the scheme, the respondents are ordered to provide the applicant with the details and the nature of the offence, breach or contravention for which the fine is imposed. This must be done within seven (7) days from the date of this order. It is further ordered that the fine so imposed must be added to the monthly levies payable by the applicant as Rule 14 (2) provides and not deducted from the deposit.

30.5 The proposal of the Trustees conveyed in the email of 14 July 2017 accepted by the applicant in the email of 2 August 2017 must be implemented. It is ordered that an agreement to lease the store room at a monthly rental of R150 payable with effect from 1 July 2017 and renewable annually must be concluded by the respondents and the applicant within thirty (30) days from the date of this order.

30.6 Although the respondents had been advised that removing the applicant's belongings from the store room would constitute an act of spoliation on their part, they persisted, through their attorney to threaten to remove the applicant's belongings giving him an ultimatum to this effect. Therefore the applicant was justified to remove what he refers to as "most valuable belongings" to a safe place. The cost of removing and transporting these belongings must be borne by the respondents. Accordingly, I order that the respondent reimburse the applicant the amount of R1,500 (one thousand, five hundred rands) within thirty (30) days from the date of this order

30.7 Because the respondents closed the discussions and stopped the internal process of resolving the dispute with the applicant, thus leaving the applicant with no alternative but to seek recourse in legal processes, the respondents are liable for the legal costs the applicant incurred. Therefore, the respondents are ordered to reimburse the applicant the amount of R15,000 (fifteen thousand rands) which is the amount the applicant is willing to accept as a settlement of the legal costs he had incurred according to his email of 24 July 2017 (vide Addendum E page 5 of attachments in file). This must be done within sixty (60) days from the date of this order.

30.8 The Body Corporate is ordered to take the necessary steps and amend the Conduct Rules or cause such rules to be amended to give effect to the Rules of Natural Justice. The Body Corporate is ordered to file a copy of such amended Rules with the Community Schemes Ombud Service within ninety (90) days from the date of this order.

ENFORCEMENT OF ORDER

[31] The attention of parties is drawn to the following legal provision to assist them to enforce compliance with the orders detailed in paragraph 30 above:-

Section 56 (1) of the Act 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 an order in such court".

The relevant court in this matter is the Magistrate's Court in Cape Town.

RIGHT OF APPEAL

[32] The parties' attention is 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"