Gloucester Court Body Corporate v Maher and Others

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 794/WC/17
Adjudicator: H E Louw
Date: 14 August 2018
Applicant: Gloucester Court Body Corporate
Respondent: Maher and Others

EXECUTIVE SUMMARY

This dispute relates to behavioural and governance issues.

Applicant is seeking an order to declare the Conduct Rule restricting the use of units in the Scheme for short term letting purposes and adopted by the Body Corporate in October 2016 lawful and to enforce the particular rule.

The dispute between the parties relates to the amendment of the Applicant's Conduct Rules to, inter alia, restrict the use of units for short term letting purposes in the Scheme. The Applicant alleges that the rules of the Scheme were lawfully and correctly changed and adopted and that the Respondents are bound to those rules. The new rule (13.1.5 in the adopted Conduct Rules) provides that no owner is allowed to let his or her unit for a period shorter than three months without the prior written consent of all the owners in the Scheme. The Respondents contend that new rule

13.1.5 was not lawfully adopted and did not comply with the provisions of the Sectional Titles Schemes Management Act (the "STSMA") in that it is unfair and unreasonable. As such, the Respondents aver that they are not bound by the amended Rules.

There is no dispute between the parties insofar as the use of their units for purposes of Airbnb by the Respondents are concerned. The parties, however, do dispute the effect of short term letting on the Scheme and whether or not it is fair and reasonable to impose a restriction on short term letting, given their respective experiences thereof and of the available measures to control it. The Respondents furthermore dispute that the correct procedure for the adoption of the rule was followed.

Based on the evidence submitted, it was found that the amendment of the Conduct Rules, including the adoption of the new rule pertaining to short term letting in the Scheme, was procedurally correct. It was furthermore found that the rule is not per se unreasonable and unfair in the particular circumstances of the Scheme and that of the Respondents and, provided that fair notice is given to the Respondents, the Respondents should be bound by it. However, it was in conclusion found that there is no jurisdiction in terms of Section 39 of the Community Schemes Ombud Services Act to grant the Applicant's prayers for relief in an adjudication of this nature. As such, the Applicant's prayer for relief was dismissed.

INTRODUCTION

The Applicant is the Body Corporate of Gloucester Court, a sectional title scheme registered in terms of the Sectional Titles Act of 1986 (the "Scheme"). The Scheme consist of 21 units and is situated in Beach Road, Sea Point, Cape Town.

The Respondents are Messrs T Maher and V Cohen and Ms H Suzor, the owners of units 101, 103 and 105, respectively.

A claim was brought in terms of s 39 of the CSOS Act No.9 of 2011 as follows:

The Applicant requires an order declaring the Conduct Rules, in particular Rule 13.1.5, valid and instructing the Respondents to comply with the Conduct Rules adopted by the Body Corporate in October 2016 and approved by the Community Schemes Ombud in May 2018.

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.

The adjudication hearing took place on 26 July 2018. This application is before me because 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.

On 26 July 2018, the Applicant was present at the hearing, represented by Mr Robert Katz, the chairperson of the trustee committee, Ms E McKenzie of the managing agent of the Scheme and Mr Davies, a trustee. All of the Respondents were represented by Mr Trevor Maher. The parties entered an appearance in terms of the Notice of Set Down which was sent out to them on 25 May 2018 as contemplated in Section 48(4) of the Community Schemes Ombud Service Act No.9 of

2011. By mutual agreement, the matter originally set down for 19 June 2018 was postponed to 26 July 2018.

APPLICABLE PROVISIONS OF THE ACT

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 o party to or affected materially by a dispute".

Section 45(1) 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"

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 applicatian, the ambud must refer the matter ta conciliatian'.

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 an adjudicator".

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 47 of the Act.

SUMMARY OF EVIDENCE

Applicant's Submissions

The Applicant stated that the Body Corporate, at a meeting held on 10 October 2016 resolved to introduce a new rule whereby the rights of owners to let their units are restricted. The new rules were compiled following expert advice sought by the Body Corporate from Ms Jenny Ravencraft, a sectional title expert. Ms McKenzie explained that the previous conduct rules of the Scheme were a set of standard rules, lodged with the Deeds Office in terms of the Sectional Titles Act of 1986. As such, these rules did not contain any regulations or restrictions pertaining to short term letting. Prior to the adoption of the new rules, a set of house rules did however exist, and, although these restricted short term letting to periods beyond six months and were never registered, these were mostly adhered to by owners in the Scheme and short term letting was not a problem or an issue.

Mr Katz explained that the new proposed rules were sent to members of the Body Corporate with the notice of an annual general meeting to be held on 10 October 2016. The meeting of 10 October 2016 was attended by more than 50% of the owners in the Scheme and the new set of Conduct Rules were adopted unanimously. Rule 13.1.5 determines that no owner is allowed to let his or her unit for any period shorter than 3 months without the prior consent of all owners.

Following the adoption of the rules at the 10 October 2016 meeting, the rules were sent to the Community Schemes Ombud for approval in terms of the STSMA. Ms McKenzie stated that the Ombud (in January 2018) sent a notice approving the rules, but referred to the Scheme by a wrong name or description and the rules had to be resubmitted. Following the re-submission, the new Conduct Rules were finally approved in May 2018. In the period pending the final approval of the rules, the Body Corporate did not attempt to enforce the Conduct Rules. They did contact the Respondents and asked them to co-operate by ensuring that a schedule of tenants is supplied on each let and that tenants comply with the rules of the Body Corporate with regard to pets, neatness, security and the like.

Mr Katz testified that composition of the Scheme changed over the last five years and that the majority of occupants are now tenants and not owners. The rationale for amending the rules was explained by Mr Katz as issues of security and other problems associated with the presence of short term tenants. He stated that the increased throughput of

people compromised the security systems of the Scheme and that problems were experienced due to the behaviour of the cleaning agents entering units to clean for short term tenants. He stated that the front doors of the building are being abused due to the volume of people using the doors and that the Body Corporate struggles to maintain water consumption within the guidelines set by the local authority. In his view, the nature of the Scheme changed due to the presence of short term tenants and it became more like a hotel, impacting on the investment value of units in the Scheme.

Mr Katz stated that, in the run-up to the approval of the Rules by the Ombud, owners who used their units for purposes of Airbnb and other short term letting were asked to provide full details of tenants on each occasion that a unit is let. This, in the case of Mr Maher, happened once or twice, but not on a regular basis. Mr Katz and Ms McKenzie stated that the problem with short term lets is that action against the tenants is almost impossible as, by the time a transgression is reported, the tenants have left. Mr Katz explained that the real problems come from units 101 and 105 as they are exploiting the Airbnb option.

Mr Katz stated that the trustees did discuss increasing levies for short term letting, but that it was not something they seriously considered.

Mr Davies, who lives in Zimbabwe, stated that the presence of the new rules was an important factor in him deciding to purchase a unit in the Scheme as he preferred a scheme that restricted short term letting.

APPLICANT'S PRAYERS

The Applicant claims:

That the newly adopted Rule 13.1.5 be declared lawful and enforceable and that Respondents be ordered to comply with the Scheme's adopted Conduct Rules pertaining to short term letting.

Respondent's Submissions

The Respondent, by way of Mr Maher, claimed he, through Paddocks attorneys, requested a copy of the previously (in other words, prior to the 2016 amendment) registered rules, but that nothing was forthcoming. Mr Maher further stated that he had asked for a copy of the meeting notice and documentation relied on by the Applicant in order for him to judge whether processes were followed correctly, but that these were not forthcoming either. In his view, Rule 13.1.5 is unfair and negatively impacts on his rights as a property owner to maximise his investment. He stated that he believed it unreasonable that, generally in terms of the STSMA, a special resolution is required to amend conduct rules, but that the new rule requires the consent of all owners to sanction short term letting for periods shorter than three months. In his view, this meant that this particular rule is given more weight than rules in general.

The Respondents stated that they did not believe that short term letting negatively impacts on the Scheme on the basis that a single tenant (for a longer period) or an owner did not necessarily mean that fewer people made use of the security and other features of the Scheme. In their view, short term tenants are more likely to be controlled than long terms tenants as short term tenants may be asked to vacate immediately upon transgressing a rule whereas it is legally difficult to terminate the lease of a long term tenant. Insofar as water consumption is concerned, the Respondents believed that there is no reason to believe that short term tenants use more water than a permanent inhabitant. Mr Maher stated that he had installed a dedicated water meter in his unit and in his view, water consumption is likely to be less as short term letting does not imply 100% occupancy and tenants are unlikely to be doing laundry and cooking. Mr Maher believed that the Body Corporate

should have increased levy contributions to cater for increased water tariffs. He further stated that, in his view, the fact that insurance companies do not load the premiums of units where there is short term letting indicates that there is no increased risk. Insofar as compliance with municipal by laws are concerned, Mr Maher stated that there is no change in usage as, despite short term letting, units are still used for residential purposes and that he does not see short term letting as running a business. In fact, according to the Respondents, the City of Cape Town encourages Airbnb. Mr Maher noted that there is, in his view, no legal definition of

short term letting.

Mr Maher stated that he did not believe that an extra load is placed on the security of the Scheme by short term tenants as the same number of people access the building- in fact, he expressed the view that the impact is likely to be lower in the case of his unit which sleeps 6 (six) people as "permanent" occupants are more likely to be coming and going through the front entrance on a frequent basis.

With regard to the Applicant's argument that short term letting devalues the Scheme, Mr Maher expressed the opinion that the increased income possibility due to Airbnb actually has the opposite effect.

With respect to the alleged transgressions by tenants and noise complaints, Mr Maher stated that he has not been made aware of those. He gave his agent instructions to comply with the request that details of tenants are to be supplied and have not been told that this is not done.

Mr Maher confirmed that he did receive notice of the meeting of 10 October 2016, but cannot recall draft rules being attached. Mr Maher confirmed that he became the owner of unit 101 in 2011, but had commenced letting via Airbnb only 18 (eighteen) months ago. Before that he used his unit for personal purposes. He confirmed that he did not enquire at the time when he started letting via Airbnb if the Scheme allows it. In his view, if Rule 13.1.5 is enforceable, it should be enforced against all tenants, not only short term tenants as there is no distinction between different types of tenants.

Mr Maher stated that, in his view, the Body Corporate should have advised him of the approval of the rules by the Ombud (in January 2018) prior to the conciliation hearing as he came to Cape Town for the conciliation to oppose the ratifying of the rules, not knowing that the rules had in fact been ratified earlier, albeit incorrectly at the time.

RESPONDENT'S PRAYERS

The Respondent claims that Rule 13.1.5 be declared invalid and that he be awarded costs for his attendance of the conciliation hearing.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

There is no dispute of fact with regard to the main considerations in this matter: the Respondents do not dispute the fact that they are utilising their units for purposes of short term letting and that such short term letting is in contravention of Rule 13.1.5. The factual disputes with regard to the notice to the Managing Agents of tenants, the implications of short term letting on the Scheme (with regard to security, noise, problems with staff and water usage) and the impact or not on the value of units are largely irrelevant for purposes of this ruling and I do not intend addressing those in any detail. Insofar as the governance and procedural aspects of the approval of the new Conduct Rules in October 2016 are concerned, I accept the Applicant's evidence of the notice of and procedure at the meeting and am satisfied that the necessary procedures were followed and that the Body Corporate indeed adopted the new Rules at the meeting held on 10 October 2016 in a procedurally correct manner.

DISCUSSION

This case addresses a very pertinent and relevant dispute in schemes. Many schemes, especially those situated in desirable holiday locations, are currently facing the dilemma of how to deal with short term letting. There are valid arguments on both sides: on the one hand, one can understand the desire of owners to maximise their investment and earn income from their units; on the other hand, the additional strain on the body corporate and other owners who live permanently in schemes cannot be ignored. The argument that short term tenants care less for the building and the harmony in a scheme is put forward by many owners in schemes where short term letting is allowed. These owners complain of compromised security, noisy parties on weekends, tenants overcrowding units, tenants not caring about water saving measures and the like. Whilst Airbnb is not a legal term, it is generally understood to be a platform that supports short term letting, mostly for holiday purposes.

With respect to the current case, it is not relevant for purposes of this order to comment on of the complaints by the Applicant in respect of the short term tenants of the Respondents in this Scheme as nothing turns on it. The dispute between the parties in this case relates to the

very concept of short term letting and not the experience thereof. Mr Maher refused to accept that his short term tenants cause any problems or any strain on the Scheme and, should they do so, there are, in his

view adequate measures to curtail that. It has to be stated that Mr Maher does not live in the Scheme. The Applicant, on the other hand, has a completely different view and experience. However, as I have stated above, the complaints by the Applicant and the Respondents' response thereto do not go the core of the question in this matter and I am not addressing those. It is not relevant for purposes hereof if the Respondents' short term tenants, for instance, indeed use more water or burdens the security of the Scheme. Suffice to say that I do not agree with Mr Maher that there is no difference between a long term tenant and a weekend holiday maker: whilst it may be true that a long term tenant is removed with difficulty, he or she must still live with the rest of the owners for a considerable period following any transgression whereas a short term tenant knows that he or she is going to leave in a day or two and may never have to face other owners in the scheme again. It is unlikely that the frustration expressed by the Applicant (and by permanent owners in various other schemes) are groundless.

Many schemes have either adopted rules to prohibit or restrict short term letting whereas others have introduced very stringent rules and penalties and, in some instances, increased levies to owners who let on a short term basis. How successful these measures are in other schemes to address the concerns of permanent owners is unknown.

If one accepts that the Body Corporate validly adopted the new set of Conduct Rules at its meeting of 10 October 2016 and that those rules were in fact approved by the Ombud, the question is twofold: are those rules (specifically Rule 13.1.5) in compliance with the STSMA, and, if so, are those rules applicable to and enforceable against the Respondents?

The relevant section here is Section 10 (3) of the STSMA which reads as follows: "The management or conduct rules contemplated in subsection (2) must be reasonable and apply equally to all owners of units." When looking at reasonableness, one has to weigh up the interests of individual owners vs that of the body of owners as a whole. One furthermore has to bear in mind that sectional titles schemes do not operate in a vacuum-one has to look at the rules in the light of the laws of the country and the intention of the legislature in the Sectional Titles Schemes Management Act of 2011. It is my view that bodies corporate, as far as reasonably possible and as far as the law allows them to, should be granted the freedom to regulate themselves in a democratic way. Owners in favour of short term letting (and other similar sectional title dilemmas) are quick to refer to their inherent proprietary rights. Whether or not short term letting can be regarded as an inherent proprietary right (which thus is by implication untouchable by decision of owners in the scheme) is not clear and in my view it will depend on the particular circumstances of each case. Owners in sectional title schemes buy into these schemes knowing that there are rules and knowing that rules

may be changed with the requisite majority. There are sectional title experts who argue that the right to let, short term or not, is so fundamental that it should be subject to the higher threshold for a change applicable to management rules. There has, however, been no formal ruling on this aspect and no precedent to follow.

I do not believe that the new rule 13.1.5 is unreasonable and I do not concur with the argument put forward by the Respondent that the fact that all owners need to agree to short term letting (should they wish to deviate from Rule 13.1.5) versus the special resolution required to impose or change a conduct rule makes it per se unreasonable. The new rule in this case does not prohibit short term letting, it places a restriction on it and I do not find the restriction unreasonable. The fact that the Ombud approved the rule, is not insignificant. One also cannot ignore the evidence of Mr Davies who bought into the Scheme specifically because of the existence of this rule. His rights (and those of the other owners who overwhelmingly voted in favour of the rule), must be respected.

If the rule is thus found to be reasonable and enforceable, does it apply to the Respondents? Mr Maher testified that he originally bought his unit in 2011 for personal use and only started using it for Airbnb purposes about 18 months ago. He thus did not acquire his unit with the specific purpose of using it to earn income from short term letting and no evidence was led to suggest that that is the position in the case of the other Respondents. In fact, on his own version, Mr Maher started using his unit for Airbnb purposes after

or just about the time that the rule was introduced - clearly because the opportunity arose with the introduction and increased popularity of Airbnb. However, the fact is that, when Mr Maher bought the unit, no formal restriction existed as the house rules prohibiting short term letting for periods shorter than 6 months were not registered and by all accounts not enforced-albeit because it was not necessary as short term letting was not a factor at the time.

If one holds the view that the Respondents should be allowed to short term let without the restriction of Rule 13.1.5, just because they were owners before Rule 13.1.5 was introduced it would mean that, until they, respectively, are no longer an owner/s, different rules will apply to owners in the Scheme. Some would be allowed to short term let in contravention of Rule 13.1.5 and others will have to abide by it. It is not a tenable situation in the long run, not lawful to have differing rules apply to owners and it undermines the democratic nature of sectional title schemes. The question is then what is fair and reasonable to the Respondents? The fact is that no evidence was brought to indicate that they bought their units or used their units for Airbnb purposes in any real way before the introduction of the new conduct rule and I do not believe their alleged rights to sub-let without restriction are untouchable. As such, I am of the view that all owners, including the Respondents should comply with the Rule, provided that the rule only becomes enforceable after a after fair and reasonable notice period (probably one year). This will allow owners the opportunity to sell their units (should they so choose) and take care of existing reservations.

Insofar as the nature of the Applicant's prayer for relief is concerned, the difficulty arises with the provisions of Section 39 of the Community Schemes Ombud Service Act as the section does not confer any jurisdiction on an adjudicator to make an order whereby a party (the Respondents in this case) can be instructed to cease his/her/their behaviour in contravention of the Rule. It furthermore does not confer jurisdiction on an adjudicator to declare a rule reasonable and enforceable. In order to achieve this, the Applicant requires a court order, alternatively an agreement with the Respondents. Having thus perused all written submissions and taken into consideration all submissions stated before me at the day of the hearing and notwithstanding my views as expressed above with regard to the reasonable and fairness of Rule 13.1.5, I must deny the relief sought by the Applicant. Given the uncertainty in schemes insofar as short term letting is concerned, a High Court ruling would be highly beneficial.

Pending any resolution in this Scheme, the Respondents have to bear in mind that they are subject to Sections 13 (e) and (f) of the STSMA which read as follows:

> 13 (e): "An owner must not use his or her section or exclusive use area, or permit it to be used, in a manner or for a purpose which may cause a nuisance to any occupier of a section."
>
> 13 (f): "An owner must notify the body corporate forthwith of any change in ownership or occupancy in his or her section…."

This order furthermore does not address the by-laws and other statutory provisions that may apply to short term letting from the local or other authorities to which the Respondents are subject. There seems to be some confusion as to the rules of the City of Cape Town with respect to short term/holiday letting and it is not clear whether or not a special zoning is required in respect of a property falling into the jurisdiction of the City for it to be used for short term/holiday letting purposes. No evidence in this regard was led by either party, although Mr Maher indicated that he believed that no special consent is required. There is potentially some tension between the desire of the City to market Cape Town as a holiday destination in order to promote tourism and the needs of residents, some of whom are not comfortable with short term letting on their doorsteps.

It should be noted, however, in this regard that prescribed Management Rule 30 of the STSMA does require a body corporate to at all times take reasonable steps to ensure that no owner acts in contravention of municipal regulations insofar as the use of his or her unit is concerned.

Insofar as the request by Mr Maher to be awarded costs for his attendance at the conciliation is concerned by reason of the fact that the Ombud had by then unbeknownst to him, approved the Conduct Rules (referring to the initial approval in January 2018) and he was thus unable to suspend the adoption. I do not quite follow his argument. Insofar as his argument is concerned, the adoption of the Conduct Rules by the Ombud (whenever that may have been) is irrelevant as he believes Rule 13.1.S per se to be unreasonable. The

adoption in May 2018 did not cause the Respondents to advise the Applicant that they are no longer disputing this case. It is also not the Applicant's problem that Mr Maher does not live in Cape Town and has to travel to his asset.

POWERS AND JURISDICTION OF THE ADJUDICATOR

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

Accordingly, the following order is made: The relief sought by the Applicant is denied. Each party to pay its own costs.

RIGHT TO 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"*