Jacque Vivier v The Baronetcy Estate Home Owners' Association

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 174/WC/16
Adjudicator: Zama Matayi
Date: 30 August 2017
Applicant: Jacque Vivier
Respondent: The Baronetcy Estate Home Owners' Association

BEFORE ADJUDICATOR: ZAMA MATAYI

The matter that is before me, is an application for dispute resolution in terms of Section 38 of the Community Schemes Ombud Services Act No. 9 of 2011.

The Applicant in this matter is, Mr Jacque Vivier, the registered owner of erf 23840 Baronetcy Estate, Plattekloof, Cape Town. The Respondent is the Baronetcy Home Owners Association, An Association incorporated in terms of its Articles of Association.

The Baronetcy Estate, is situated in Plattekloof, Cape Town and is registered as a Township at the City Of Cape Town Municipal Offices. The Scheme falls under the Jurisdiction of the Community Scheme Ombud Services, Western Cape, The Home Owners Association was represented by Mr Illaria Orlandi who is the Managing Agent of the Home Owners Association. Mr Orlandi has been the Managing Agent for the HOA since December 2009.

The Adjudication hearing, came before me on the 14 March 2017 and 20 March 2017 at the Cape Town offices of the Community Scheme Ombud Services, where all parties were sworn in and indicated that they had no objection to me Adjudicating the matter.

This is an application by the Applicant for an order declaring that the provisions of the Baronetcy Home Owners Association`s amended constitution of 2010 not to apply to his pre-existing condition. The Applicant purchased his property in 2005 and during the same year planted five palm trees on his property. It is common cause that the said palm trees are non-indigenous plants. The applicant relied on the November 2004 constitution and the architectural guidelines of the Estate. A copy of the constitution was received as evidence and marked Exhibit "A". Paragraph 4.8 of the guideline state:

> *"...Landscaping in indigenous planting is to be encouraged. Plant list are obtainable from the developers landscapers...."*

The Applicant alleged that the planting of indigenous plants was only encouraged and not mandatory as stated in the amended constitution. The Applicant further relied on the fact that when he submitted his building plans and landscaping plans the palm trees were specified and visible in the plans and were approved as such. The applicant further relied on the fact that his palm trees were not the only non-indigenous plants on the estate. It was also common cause between the parties that the lawn planted in the common area by the developer is non-indigenous ie *kikuyu* grass. The applicant commenced construction on his property about seven years after the trees were planted. The Applicant also testified that the plans were also approved by the Home Owners Association with the trees clearly specified and visible from the plans. According to the Applicant there is a variety of non-indigenous plants on the estate raging from shrubs, trees and lawn. The Applicant further relied on the fact that when he planted the palm trees in 2005 the HOA did not stop him nor did he receive any communication instructing him to remove the trees and no penalties were levied against his levy account for transgressing the rules. This point was seriously challenged by the Respondent even though no evidence was presented as to the Respondents intervention when the trees were planted. The Applicant also submitted an email from one Marcelino Dos Ramos who is the contractor who transported and planted the five palm trees. This email stated that there was no resistance or any request not to plant the trees on that day. Copy of the email was marked Exhibit "N". The applicant testified that in 2009 he was advised to remove the trees as they are not indigenous. On the 21 January 2010, at the Annual General meeting it was resolved that *"The Baronetcy Home Owners Association intends not to take any action against past transgression with regard to vegetation, specifically in respect of palm trees, unless the HOA receives a formal complaint or if an owner`s right has been infringed if an palm tree exceeds the maximum height of 7.5 meters"*

The HOA constitution was also amended in 2010 to reflect the sentiments expressed at the Annual General Meeting. The new constitution made it mandatory for indigenous plants and trees to be planted on the estate. Applicant testified that on the 8 March 2016 he received notification from the Home Owners Association to the effect that his palm trees at that stage exceeded the maximum allowed height of 7.5m and that he needs to either remove the trees, alternatively trim it to below the height of 7.5 meters. The Applicant also submitted the revised architectural rules

for the estate effective from 01 September 2016. This document was marked Exhibit "E". Paragraph 28 of this document states that:

28.1 " All plants to be utilised in landscaping shall be of an indigenous nature and water wise..."

28.2. ....

28.3 ....

28.4 Landscaping plan to be submitted and approved by the Estate Landscaping Architecture for all grade 1 applications as well as applications where existing garden is disturbed."

The Applicant was then given 21 days to comply with the instruction to trim and or remove the trees. The Applicant argued that the height restriction of 7.5 meters is unfair on him as it only applies to his palm trees and not to any other trees or vegetation on the estate. If any other tree exceeds this height restriction and obstructs other owner`s view, it would be allowed so the Applicant argued because the restriction was only on palm trees. The Applicant also submitted that there are more than thirty houses with plus minus one hundred palm trees in the estate that are in excess of the height restriction but have not received any notice to trim or remove the trees. The reason for this approach is that so the Applicant argued is because there has not been any complaints of obstruction. It was common cause between the parties that the HOA received a formal complaint about the Applicant`s palm trees obstructing the view of one owner in the Estate. The Applicant offered to remove the trees and be reimbursed an amount of five thousand rand per tree. This offer was made to the developer who refused to accept the offer. The Applicant also conceded that he did not go through the plant list when he planted the palm trees. The Respondent testified that the Applicant was the first to introduce alien trees to the estate. The evidence by the Respondent also reflected that the chairman, portfolio manager and estate manager tried to stop the Applicant when he planted the trees but no evidence was provided to this effect. Respondent also confirmed that the old palm trees now fell into the 7.5 meters clause and has to be trimmed if they exceed. The HOA requested the lowering or removal of the palm trees due to a complaint received. The complaint was received on 09 November 2014 whereby the complainant stated that the trees be measured and kept within the limit. The committee then measured the Applicants trees and found that they were still within the limit and no action was taken. On the 29th March 2016 another correspondence was received by the HOA from the same complainant complaining about the trees obstructing her view. The decision was taken retrospectively only in respect of complaints received in other words members will only be requested to trim if there was a complaint against their palm trees as was in this case. The Respondent also confirmed that the Applicant offered to remove the trees at HOA`s costs. The Home Owners Association did not accept the Applicant`s offer to remove the palm trees at HOA expense for fear of creating a bad precedent. It was also confirmed by the Respondent that the Committee knew the fact that these palm trees can grow very high and yet decided on 7.5 meters maximum height. The Applicant disputed the allegation that he was the first person to introduce non-indigenous plants on the estate. The respondent could not tender any explanation as to why the issue of the palm trees was not dealt with decisively in the form of either allowing or disallowing the palm trees.

One of the applications of the rule of law is that a person should be able to know the law in order to be able to arrange his actions accordingly. In this regard Mokgoro J, in her concurring judgment in the case of **President of the Republic of South Africa v Hugo 1997 (4)(SA 1 (CC),** held that:

"The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law."

A law with retrospective application seems by its very nature incapable of being known and complied with. In addition a person cannot know of and comply with a law that does not yet exist. retrospective laws are in most cases inexpedient and unjust. It is for this reason a Court will not interpret a law as having retrospective application unless the law's retrospective application is unambiguously clear. Any provision that is unreasonable will not constitute a

valid rule. It is important to note the requirement that the rule must be reasonable, should be based on the particular circumstances of the scheme and members of the Home Owners Association. There needs to be a rational basis for the interpretation - the decision should be founded on what is appropriate and fair in the circumstances.

A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past. The elementary considerations of fairness (which) dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. The legal culture is leaning against retrospectivity where there is unfairness. A person should be able to know of the law, and be able to conform his or her conduct according to the law. Where provision is expressly stated to be retrospective, the accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation. Retrospectivity will not be afforded to a law merely because it confers 'special favours" it has to be stated unambiguously clear.

The Baronetcy Estate is a residential development the landscape planning for the development is based on the interplay of the environmentally sensitive area behind the estate. The estate was designed to draw the Tygerberg Reserve down into itself and create corridors that encouraged flora and fauna from the reserve above and come down in to the estate. The constitution of the Estate relied upon by the Applicant only encouraged the planting of plants of indigenous nature. The Applicant relied on the 2004 constitution which only encouraged landscaping of indigenous nature. As correctly submitted by the Applicant this constitution did not make it mandatory to plant indigenous trees but that members were encouraged to do so. This was also conceded by the respondent and confirmed by the Respondent`s actions taken in 2010 when the constitution was amended to make it mandatory to plant indigenous plants and to set height restrictions on palm trees. This action by the Respondent suggest that prior to the amendment of the constitution it was not an offence to plant non-indigenous plants in the estate. I accept that the intention was to maintain an eco-estate. The question that one must answer in this regard was whether the founding documents ie the 2004 Constitution and Guidelines of the Home Owners Association supported this noble intention. I find that this particular document did not support the intention to keep the estate an eco-estate based on the fact that indigenous plants were only encouraged and not compulsory. The conduct of the HOA also supports this contention as they tried to rescue the situation by passing the resolution and amending the constitution to reflect this intention and by making it compulsory to plant only indigenous plants.

In order to remedy the situation the Home Owners Association resolved in the at the Annual General Meeting of the January 2010 that no palm trees were to be planted and also set a height restriction of 7.5 meters on old or pre-existing trees and also undertook to take action only when a formal complaint is lodged. It is common cause that the Applicant`s palm trees fall into the pre-existing category. One also needs to answer the question whether the Home Owners Association effectively dealt with the problem by passing a partial retrospective resolution ie by saying that action will only be taken if a formal complaint is lodged. This action by the HOA is not in line with the intention to maintain an eco-estate as was intended by the developer and as made out by the Respondent in its submissions because the evidence that was led was that there are more than thirty houses on the estate with palm trees and if no complaint is lodged those trees will remain on the estate as non-indigenous as they are even if they are restricted in terms of height. Instead of focusing on the indigenous nature of the plants the HOA focused on whether formal complaints will be lodged or not.

Another issue that was raised during the trial was the existence of other non-indigenous plants and vegetation on the estate. The lawn on the estate was conceded to be non-indigenous type of grass, can this be indicative of the intention to maintain an eco-estate with only indigenous plant, I don't think so. The suggestion was made by the Respondent that the Applicant was the first to introduce non-indigenous plants on the estate. I find this statement to be exaggerated in the extreme especially in light of the concessions made by the Respondent about the existence

of other non-indigenous plants and vegetation on the estate and the fact that when the Applicant bought into the estate there were already other house build on the estate with palm trees as stated by the Applicant. I therefore find that the allegation that the Applicant was to first to introduce non-indigenous plants on the estate very hard to believe.

The approach adopted by the HOA in the January 2010 Annual General Meeting is not providing a permanent solution to the problem. With the change or transfer of ownership in property the fact that one owner does not have a problem with the palm trees today, does not mean the next owner in the next twenty years or so to come would not lodge a complaint. Likewise today members of the HOA could have a neighbourly relation without any problems about the palm tree and the following day the relationship could be something else. This is surely not the type relationship the Home Owners Association wishes to manage and sustain. Therefore this problem would be on going and members would be at the mercy of their neighbours not to lodge complaints. The HOA should have decisively dealt with the palm tree issue by either allowing the retrospective application of the resolution without any conditions of complaints lodged and height restrictions or not allowing the retrospective application at all. The HOA had the majority at the AGM and should have dealt with the issue decisively, unfortunately the committee cannot have a second bite of the cherry at this stage as they failed to decisively deal with the problem. The manner in which the Respondent dealt with this issue suggest to me that the committee realised that the 2004 constitution did not make it mandatory to plant indigenous trees only and in order to benefit both parties, resolved as they did but in the process just suspended the problem until someone lodges a formal complaint. If this problem is not decisively dealt with it will be alive for as long as those pre-existing palm trees are on the estate. I therefore intend to decisively deal with this issue and the must deal with the consequences.

Dealing with the height restrictions, it is common cause that palm trees are in their very nature very tall trees. The tallest palm tree can grow up to 197 feet tall. The King Palm can grow to heights of 40-60 feet. The reasonableness of the restriction of 7.5 meters was not argued by both parties and was not an issue. The Home Owners Association in its wisdom decided on the 7.5 meter height restriction. I will not deal with this particular issue as the net effect of my order would address this issue in respect of the pre-existing palm trees.

In the circumstances and for the reasons stated above the following order is made:

ORDER

1. The Applicant`s five palm trees planted in 2004 are not subject to the resolution taken at the Annual General Meeting of 21 January 2010 and the amended Constitution of the Baronetcy Home Owners Association.

2. To avoid an influx of dispute resolution applications from other owners, it is ordered that all pre-existing palm trees on the estate are not subject to the resolution taken at the Annual General Meeting of 21 January 2010 and the amended constitution of the Home Owners Association.

3. The retrospective application of the January 2010 Annual General meeting resolution and the amended Constitution of the Baronetcy Estate is found to be unfair on the pre-existing owners of palm trees on the estate.