Lewis Callaghan v Kelston Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 110/WC/16
Adjudicator: Adv. Dries du Toit
Date: 29 November 2017
Applicant: Lewis Errol Albert Callaghan
Respondent: Kelston Body Corporate

PARTIES

[1] The applicant is the joint owner and representative of the other two joint owners in equal shares (being Janet Casey and Michael Callaghan) of Section 10 (unit 11) more fully described in Sectional Plan No SS 28/1990 Kelston Kenilworth Cape Town.

[2] The respondent is Kelston Body Corporate duly represented by Ms C Sasson (from Clyde & Co Attorneys) as instructed by AIG Insurers herein and Mr T Bentley and D Woolley - trustees and duly represented by Ms Z van der Merwe (from Paddocks). Kelston Body Corporate is a "community scheme" as contemplated in the CSOS Act of 2011. The definition of "community scheme" means any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings.

INTRODUCTION

[3] This is an application for dispute resolution in terms of Section 38 of the Community Schemes 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 on 20 June 2017, 22 August 2017, 10 October 2017 (Conciliation) and 23 November 2017. This application is before me as a result of a referral sent by the Western Cape Provincial Ombud in tern1s of section 48 of the Act, which 'Notice of Referral' was communicated to both parties.

APPLICABLE PROVISIONS OF THE ACT

[5] The application was submitted 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".

[6] Section 39 provides that -

"An application made in terms of section 38 must include one or more of the following orders - in this instance:

(1) In respect of financial issues - (e) an order for the payment or re payment of a contribution or any other amount, and

(2) In respect of general and other issues - (b) any other order proposed by the chief ombud."

[7] 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'.

[8] 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".

PROCEDURAL BACKGROUND

[9] The application for dispute resolution was submitted by Applicant in his personal capacity as joint owner and representative of the other two joint owners of Section 10 (unit 11) against the sectional title trustees and the managing agent, Milward & King.

[10] The application(s) for legal representation was granted in terms of Section 52 of the CSOS Act 9 of 2011 on behalf of Kelston Body Corporate and the trustees respectively. Applicant elected to proceed in his personal capacity (and duly representing the co-owners of Section 10) in the matter. It was further decided that the matter be reverted back and subjected to a formal Conciliation process, because due process was not followed herein. It was also decided to invite DE & AL Woolley as interested parties to these proceedings, as requested. Also that previous files (402/HC/2015 D Innes and 490/HO/2015) concerning relevant claims to this matter be added. File "490" could however not be retrieved from archives.

[11] Applicant failed to attend the adjudication hearing on 23 November 2017, after conciliation proceedings (on 10 October 2017), was duly postponed to said date in applicant's presence. It was consequently decided to proceed with the matter on 23 November 2017 in the absence of applicant, alter his failure to attend, without good reason shown. Applicant also failed to respond to the settlement proposals made by the respondent and interested parties at the Conciliation hearing by no later than 24 October 2017, as directed. The matter proceeded in applicant's absence in order to reach finality, and as elected by the respondents as well.

APPLICANT'S VERSION

[12] Applicant's claim when the matter was initially set down for Adjudication and subsequently during Conciliation process was;

(a) Encroachment of Sections 3 and 9 owned by two trustees (Bentley and Woolley) onto common property of the sectional title development in contravention of section 25(1) of the Constitution and sections 17 and 1(3)(c) of the Sectional Titles Act, 1986 (**the STA**), resulting in consequent enrichment of these two trustees of around RS00 000.00;

(b) The levying of sectional title levies not in accordance with the registered participation quotas of the sections of the scheme;

(c) Failure to raise and collect levies from the owner of Section 28; and

(d) Failure to enforce compliance with Regulation 68(1) of the Sectional Title Rules insofar as maintaining a uniformly harmonious appearance is concerned.

APPLICANT'S PRAYERS

[13.1] The removal of the encroachments at the cost of the two owners, Woolley and Bentley;

[13.2] Payment by Woolley and Bentley of all costs incurred by the objectors (referring to the Applicant and the other joint owners of Section 10, as well as the Applicant's brother-in-law);

[13.3] The purchase by Woolley and Bentley of the encroaching areas at market value; and

[13.4] Allowing changes to be effected to the units situated around Section 9 (which would include the Applicant's section) for the appearance of these sections to be in line with Section 9, with Woolley and Bentley to pay the cost of the resurvey and registration of the amended sectional title plan that would be required in connection with the proposed changes to the surrounding sections.

[13.5] The relief sought by applicant changed by way of further submissions to CSOS to include the following;

[13.6] Correction of the incorrectly determined / unreasonable levy contributions prior to 1998;

[13.7] Recalculation of the levy contributions in line with the registered participation quota of the scheme;

[13.8] Directing Woolley and Bentley to stop "claiming ownership" of common property;

[13.9] Directing Woolley and Bentley to restore Sections 3 and 9 by removing/demolishing the extensions and/or directing Woolley and Bentley to restore common property;

[13.10] Directing the trustees to adhere to the Sectional Titles Act;

[13.11] Directing that an executive managing agent or administrator be appointed;

[13.12] Directing for an annual general meeting or special general meeting to be held to pass a unanimous resolution to alienate the relevant common property;

[13.13] Directing the trustees to pay the Applicant's legal costs and the legal costs incurred by the body corporate; and

[13.14] Disqualification of the trustees from serving as trustees for a period of five years.

RESPONDENT'S VERSION

Kelston sectional scheme consists of seven townhouses, a block of flats and a number of servants' quarters/storage units (a total of 28 sections), as well as common property and exclusive use areas. The current owner of Section 3 is Theo Bentley, who took transfer in July 1998 and the owners of Section 9 are Deryck Woolley and Annette Louise Woolley, who took transfer in February 2000. The Applicant is one third owner (together with his brother and sister) of Section 10. They took transfer in June 2012. Before that Section 10 was owned by The Callaghan Trust and the trustees were Mrs Callaghan (the Applicant's mother) and Absa Trust. The Callaghan Trust dissolved upon Mrs Callaghan's death, resulting in the transfer of Section 10 to her three children in undivided shares.

[14] As far as the extension of Section 3 is concerned, it was recorded in the minutes of the trustees' meeting of 25 March 1995 that a request was made by one Mr A Johnson, the then owner of the section, on 9 November 1991 and that the trustees at that time approved the plans. The section was extended onto the exclusive use area registered to Section 3. The ongoing alterations to extend the section are mentioned in the minutes of the trustees' meetings of 21 May 1993, 14 August 1993, 25 March 1995, 17 June 1995, 6 July 1996, 12 October 1996, 8 February 1997, 8 March 1997, 10 May 1997 and 7 February 1998 (when it was recorded that Mr Johnson had moved in). On 6 June 1998 it was recorded that the section had been sold to Theo Bentley.

[15] It appears from the minute books that approval for the extension to Section 9 was granted to the then owner, Mrs Edwards, by the trustees at a trustees' meeting on 23 September 1992. The section was extended onto the exclusive use area registered to Section 9.

[16] From the time that approval had been given to the owners of the units to extend their sections onto their exclusive use areas, the participation quota percentage of all 28 sections were adjusted by the trustees at the time (although not formally updated by the Surveyor General) to reflect the extension of the sections, and levies were charged accordingly. This meant that the levies in respect of Sections 3 and 9 increased while the levies of the other sections decreased proportionately. The levies in respect of the exclusive use areas were adjusted similarly to take into account the reduction in size of the exclusive use areas of Sections 3 and 9.

[17] During 2009 the Applicant raised certain concerns regarding the process that had been followed to extend Sections 3 and 9. Investigation commenced and the trustees at the time endeavoured to formalise the extensions that had been implemented since 1992. In doing so the trustees considered section 24 of the STA and called for a special general meeting in order for a special resolution to be taken. This meeting took place on 19 May 2011 and all the owners were present either in person or by proxy. Except for one abstention, all the owners voted in favour of ratifying the extensions to Sections 3 and 9.

[18] On 15 June 2011 the Surveyor General approved an Amending Section Plan of Extension of Section 3, with the updated participation quota.

[19] On 21 April 2011 the Surveyor General approved an Amending Section Plan of Extension of Section 9, with the updated participation quota.

[20] Due to ongoing complaints raised by the Applicant regarding the extension of the sections, a special general meeting was called for 29 June 2015 so that the owners could once again vote on whether to retrospectively condone the extension of Sections 3 and 9 and allow the owners of these sections to comply with the procedures set out in section 24 of the STA. Except for the Applicant, who voted against the proposed resolutions, all owners present in person or by proxy voted in favour of the retrospective condonation of the extension of Sections 3 and 9.

[21] Immediately before the special general meeting on 29 June 2015, the Applicant launched an urgent application in the Cape High Court to stop the meeting. The application was dismissed and the Applicant was ordered to pay the

cost of the respondents, being the chairman and trustees of the Kelston body corporate. In the meantime the Applicant persisted with his objection to the formalisation of the extensions to Sections 3 and 9.

[22] The Applicant failed to make payment of the taxed costs and the trustees eventually caused a warrant of execution to be issued against the Applicant. On 18 August 2016 JL Casey (the Applicant's sister and joint owner of Section 10) advised the chairman and trustees (via the managing agents) that, provided the body corporate drops all claims for costs arising out of the urgent application in the High Court against the Applicant, the joint owners of Section 10 (represented by Ms Casey, who advised that she was duly authorised thereto) will consent to the rectification and registration of the extensions to Sections 3 and 9.

[23] Following correspondence from the body corporate's legal representatives to Ms Casey on 21 August 2016, she asked the managing agents on 24 August 2016 to convey to the trustees the removal by the owners of Section 10 of all objections to the extensions of Sections 3 and 9.

[24] At a trustees meeting on 29 August 2016 the withdrawal by Ms Casey (on behalf of the joint owners of Section 10) of the objection to the extensions lodged by the Applicant at the special general meeting on 29 June 2015 was recorded, and the trustees unanimously passed a resolution granting permission to the owners of Sections 3 and 9 to proceed with the registration of the extensions to their sections at the Deeds Office.

[25] The extension to Section 3 was registered on 28 October 2016. The section was extended from 144 square meters to 150 square meters and the exclusive use area of the patio (PT3) was reduced from 38 square meters to 33 square meters.

[26] The extension to Section 9 was registered on 30 May 2017. The section was extended from 93 square meters to 108 square meters and the exclusive use are of the patio (PT109) was reduced from 34 square meters to 19 square meters.

EVALUATION OF EVIDENCE SUBMITTED

[27] Applicant has failed to state his case and adduce evidence under oath when the matter was set down for adjudication on 23 November 2013. Respondents on the other hand presented their respective cases with supporting documentation. In essence respondents' version is therefore undisputed on record.

[28] The various claims as raised by Applicant will now be dealt with briefly;

[28.1] Sections 3 and 9 were extended as provided for in section 24 of the STA (a law of general application), and as the extensions have been duly registered, there is no basis to conclude that there had been any unlawful or arbitrary deprivation of property. Such a finding would in any event fall outside the scope of relief that can be sought in terms of section 39 of the Community Schemes Ombud Service Act, 2011 (CSOS Act).

[28.2] A unanimous resolution as required in terms of Section 17 of the Sectional Titles Act 95 of 1986 (relating to the alienation and letting of common property) was not required in the circumstances. I am in agreement with the submissions from both legal representatives that the correct procedures were followed, as prescribed by sections 24 and 27(5) of the Sectional Titles Act in conjunction with sections 5(1)(h) and (f) of the Sectional Titles Schemes Management Act 8 of 2011. Special General Meetings were further held on 19 May 2011 and 29 June 2015 where the required resolutions were properly tabled and obtained in this instance as confirmed per Kelston records. Ms Casey's (joint owner with Applicant) withdrawal of their objection to the ratification of the extensions to both sections herein on 24 August 2016, resulted in a unanimous resolution in favour of the extensions, in support of respondents' case.

[28.3] The allegation of enrichment is unfounded as the owners of Sections 3 and 9 purchased the extended sections for consideration and furthermore paid levies based on the extended size of the sections and in respect of the exclusive use areas associated with their sections. Furthermore, there is nothing in the STA or the management rules entitling or requiring the body corporate or trustees to demand or obtain consideration (other than applicable levies) when sections are extended. The applicable levies were in fact raised prior to the registration of the respective extensions.

[28.4] It is conceded by respondents that the amended

participation quotas were not registered until fairly recently and consequently that the levies were not raised in accordance with the previously registered participation quotas. However since 1992 when permission was granted to the previous owners to extend Sections 3 and 9, the levies were raised based on the extended sections and concomitantly smaller exclusive use areas of Sections 3 and 9 - evidence which is undisputed. Accordingly, given the particular history and circumstances applicable to Kelston, the contributions that were levied on owners were not incorrectly determined or unreasonable. Levy contributions have since the registration of the updated participation quotas been calculated and raised in accordance with the registered participation quotas.

[28.5] The appointment of an administrator by the Magistrate's Court in terms of Section 16 of the Sectional Titles Schemes Management Act, 2011 in case of evidence of serious financial or administrative mismanagement of the body corporate falls outside the jurisdiction of this application and will therefore not be further entertained.

[28.6] Milward and King have further terminated their services apparently due to applicant's conduct.

[28.7] There is no basis, legal or otherwise, for the relief sought in that the trustees should be disqualified to serve as trustees for a certain period. Furthermore, the disqualification of persons from serving as trustees falls outside the scope of relief that can be sought, granted or ordered in terms of section 39 of the CSOS Act.

[28.8] There seems to be no evidence to suggest that the trustees ever failed to comply with their fiduciary duties, acted in bad faith or gross negligence as far as the performance of their duties in the interest of the body corporate was concerned.

[28.9] The evidence in respect of Section 28, (a store room utilised by the body corporate), which was never registered in the name of the body corporate by the developer, Mallard Investments (Pty) Limited is accepted. Even though no levies have been collected from the owner (the trustees were under the impression that the store room was registered to the body corporate), the monthly rental in respect of the store room that would have been payable by the body corporate to Mallard, would in all likelihood in any event have exceeded the levies that would have been payable by Mallard. The body corporate has accordingly not been prejudiced by any failure to collect levies from Mallard. The trustees are further in the process of rectifying the situation to register Section 28 in the name of the body corporate.

[28.10] The owners have agreed to a schedule of finishes at the general meeting held on 30 June 2014. Prior to this date no formal architectural guidelines with regard to general appearance of the building existed. It is the obligation of the trustees to monitor the compliance to such guidelines.

Lastly - the comprehensive submissions filed by both legal representatives have proved to be very useful in this regard and is appreciated.

ADJUDICATION ORDER

[29] In the circumstances, the following order is made in terms of Section 53(1)(a) of the Community Schemes Ombud Service Act No.9 of 2011; Applicant's relief sought in this instance is misconceived and without substance and accordingly dismissed.

The following cost order is made in terms of sub section (2);

Applicant, together with the two other joint owners of Section 10, are jointly and severally responsible for costs on a party and party scale, Magistrates Court tariff as taxed or agreed to between the parties in respect of the Conciliation process of 10 October 2017 and subsequent Adjudication held on 23 November 2017.

SECTIONS 56 (1) OF THE CSOS ACT, 2011

[30] The parties' attention is drawn to 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 order in such Court '.

RIGHT TO APPEAL

Section 57 of the CSOS Act of 2011, also determines that;

(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.

(2) An appeal against an order must be lodged within 30 days after the date of delivery of the order of the adjudicator.

(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.