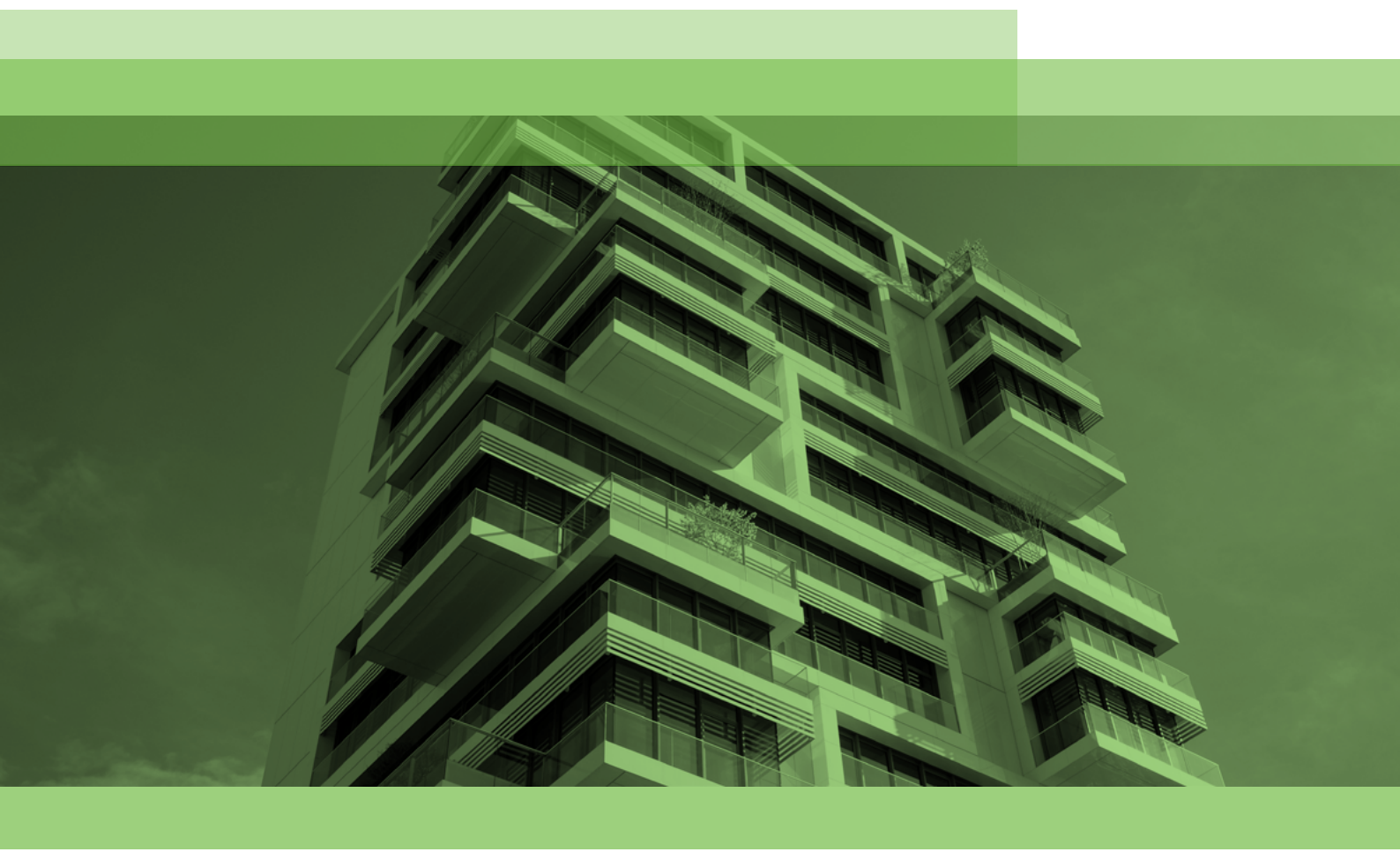


Mcinulty v The Lothians Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 177/WC/16
Adjudicator: Zama Matayi
Date: 12 September 2017
Applicant: Peter Mcinulty
Respondent: The Lothians Body Corporate



PARTIES

[1] 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.

[2] The Applicant in this matter is, Mr Peter McInulty, the registered owner of Unit 14 at The Lothians Sectional Scheme, Kenilworth, Cape Town.

[3] The Respondent is The Lothians Sectional Scheme (hereinafter referred to as the Scheme), is situated in 99 Rosemead Avenue, Kenilworth, Cape Town, and is registered as a Scheme at the Cape Town Deeds office under scheme number 55166/2009. The Scheme falls under the Jurisdiction of the Community Scheme Ombud Services, Cape Town, Western Cape. The Body Corporate was represented by Mr Mike Power, the Managing Agent as instructed by the Trustees.

INTRODUCTION

[4] The Adjudication hearing, came before me on the 22 May 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.

[5] This is an application by the Applicant against the Lothians Body Corporate for failing to act and or enforce the Conduct Rules against one Heidi Raizenberg of Unit 23 at the Lothians. Ms Reizenberg was also summonsed to appear today but failed to appear without any reason.

[6] A week before the hearing I received an email request from Angie Alexander, The chairperson of the Body Corporate to postpone the hearing and my response was that the Body Corporate needs to send a representative whether in the form of the Managing Agent or a trustee to either make such a request during such hearing or to continue with the hearing.

[7] During the hearing Mr Mike Power advised that he was instructed by the trustees to come and request a formal postponement of the hearing and the reason stated was

that the chairperson was not in a position to attend because she was out of the country.

[8] Mr Power advised that the chairperson left a week before the hearing and was due to return after the 26th of June 2017. And also advised that he as the Managing Agent has fairly broad knowledge of the issues but only as far as it relates to his period as Managing Agent.

[9] The Applicant objected to the postponement on the basis that it is this Managing Agent that advised Trustees not to act in this matter and that Mr Power has intimate knowledge of the issues and can competently represent to the Body Corporate. Applicant also alleged that Mr Power advised the trustees not to take any action against Ms Heidie Raizenberg as this is a private matter between the parties and that the previous Managing Agent took action against Ms Raizenberg.

[10] The application for a postponement was refused on the basis that the current Managing Agent and other trustees has intimate knowledge of the issue and could proceed with the matter in the absence of the Chairperson of the Body Corporate. The matter then stood down in order to allow Mr Power to take further instructions from the trustees.

APPLICABLE PROVISIONS

[11] The application was submitted in terms of section 38 of the CSOS Act No9, of 2011 which provides that -

"Any person may make an application if such a person is a party to or affected materially by a dispute"

[12] 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 dispute set out in the application, the ombud must refer the matter to conciliation"

[13] Section 48 provides that -

"If conciliation contemplated in section 47 fails, the ombud must refer the application together with any submission and

responses thereto to an adjudicator"

SUMMARY OF EVIDENCE

[14] The applicant alleged that the Body Corporate/ Managing Agent/ The Trustees failed and or neglected to enforce the Body Corporate Conduct Rules in that they failed to take any action against Ms Heidi Raizenberg for transgressing Conduct Rule 13 relating to noise, disturbance and nuisance.

[15] The Respondent conceded that no steps in the form of an investigation and or a hearing against Ms Raizenberg had been taken by the trustees past and present and by the Managing Agent past and present.

APPLICANT'S VERSION

[16] The applicant was sworn in and testified that he is the owner of Unit 14 since May 2014. The Scheme comprises of a three level building and the Applicant's unit is on the first floor. In October 2014 a new family moved into the Unit 23 the unit right above the Applicant's Unit. A lot of noise came out of the flat and applicant started sending complaints to the trustees complaining about the noise.

[17] The noise complained about was cause by children playing cricket inside the Unit above the Applicant, banging of furniture, mother shouting and screaming at children. The Applicant also testified that he had spoken to Ms Heidi Raizenberg at one stage when her children were making a terrible noise and she advised Applicant to move to an old age home if Applicant does not like noise. A meeting was also arranged by the previous trustees between the Applicant and Ms Raizenberg in order to resolve the issues between the parties. The Applicant testified that Ms Raizenberg refused to attend this meeting and trustees attempts failed to resolve the issues failed.

[18] According to the Applicant he reported this conduct to the trustees and current managing agent but nothing has been done to try and resolve this issue. The Applicant testified that the previous Managing Agent and trustees gave Ms Raizenberg final written warning but since the new trustees and new Managing Agent no action was ever taken

by the trustees and Managing Agent despite numerous complaints registered.

[19] The Applicant testified that the new Managing Agent apparently advised the current trustees not to get involved in this matter as this is a private matter between two owners.

[20] The Applicant relied on Rule 12(2) and Rule 13 of the conduct rules.

[21] Rule 12(a) states -

"An owner, lessee or occupier will be responsible for adequate supervision of his or her children, or children of their visitors, and shall foresee that no nuisance is caused or common property damaged".

[22] Rule 13(1) states-

"No owner, lessee or occupier may permit anything to be done in his or her section, exclusive use area or on the common property, which constitutes a nuisance or an unreasonable invasion of the privacy of the other occupiers of the buildings, or permit or cause any disturbance or allow his or her children or visitors to cause any disturbance which in the opinion of the trustees would constitute a nuisance or an invasion of the right to privacy of other occupiers."

Rule 13(2) states that -

"All owners shall maintain quietness between 23h00 and 07h00".

Rule 13(3) states that -

"At all times other than as referred to in sub-rule 2, all television, radio and other appliances emitting sound, including musical instruments, should be kept at audio levels which are reasonable in the discretion of the trustees"

[23] The evidence of the Applicant was not disputed during the cross examination.

RESPONDENT'S VERSION

[24] Mr Power was sworn in and testified that he was the Portfolio Manager of the Lothians since March 2016. He further testified that he was aware of the complaint and that every time he received a complaint about Unit 23 he would forward it to Ms Raizenberg so it was not correct to say that the trustees or Managing Agent is not doing anything about the complaint.

[25] Respondent further testified that letters written to Ms Raizenberg by the previous Managing agent advising her of the complaint and also drawing her attention to the conduct rules. A copy or extract of the conduct rules was also forwarded to Ms Raizenberg for her perusal and compliance. A copy of that email was accepted and marked exhibit "C".

[26] The Respondent alleged that this was a matter between two owners and that the parties must institute legal action. The Body Corporate viewed this as a private matter because there were no other complaints from other owners.

[27] Respondent also alleged that the trustees did not know how to resolve or to deal with the issue between the parties.

[28] Mr Power testified that only Unit 14 complained about the noise and no other owner ever complained hence the advice that the Applicant must seek legal advice as this is a private matter between the parties. The Respondent also testified that letters were written to the owner of Unit 23 regarding the complaints registered against her.

[29] Respondent also testified that for trustees to act, it has to be more than one person complaining about the noise otherwise trustees will not take action.

[30] The Respondent further testified that there has not been any investigation into the allegations made by the Applicant and no hearing was ever conducted. The reason so the Respondent testified was because of the blatant denial from the Raizenberg of any wrong doing.

[31] Ms Jene Benn, a trustee also testified under oath and stated that she is a current trustee and confirmed that

there has been numerous complaints registered by the Applicant and on each occasion the trustees have contacted the Raizenberg's and surrounding neighbours about the noise and were always advised by the neighbours that they don't hear any disturbing noise and they sometime hear children playing during the day and have no problem with that as children should be allowed to play. The witness also testified that she in her capacity as trustee has spoken to Ms Raizenberg about this issue and she denied the allegations. Ms Benn also testified that trustees sought legal advice on the matter and was told that matters between owners must be resolved between themselves.

[32] The witness also conceded that no other action was taken by the trustees based on the advice received from the Managing Agent that the Body Corporate does not have to get involved in matters between two owners. According to the witness Ms Raizenberg admitted at one point that her children were making noise but advised that her children were young energetic boys of six and ten years old.

EVALUATION OF EVIDENCE

[33] The issue to be decided is not whether nuisance did take place or not but rather whether the trustees failed to discharge their duty of enforcing the Conduct Rules.

[34] A more cautious approach would have been to first investigate the transgression and granting the respondent an audience before authorising the issuing of warning letters. The conduct complained about is noise made by children. In this regard it is important for everyone to understand that children are children and should be understood as such. It is also important to understand that playing forms an integral part of children's growth and development. Therefore children should be allowed to play and be afforded an opportunity to enjoy their childhood. This process of growth and development while playing also involves instilling good values, discipline and some sense of responsibility in children in an attempt to prepare them to become better people. A proper investigation of the complaints would have revealed whether the parties had a proper understanding of what they were dealing with rather than the noise versus the need to protect one's children which seemed to have dominated the thinking around the

issue. Parties should have risen above their personal issues and ego and should have been more matured in dealing with this issue.

[35] The attitude adopted by Ms Raizenberg by failing to attend proposed meetings by the trustees in order to discuss the issues, her failure to attend this adjudication hearing without any reason and her general attitude and conduct as described by the Applicant and the Respondents clearly shows a lack of understanding of the real issues involved. As a result of the attitude adopted by the parties the trustees also gave in and did not know how to deal with the matter which in actual fact was a simple issue which only required some level of maturity between the parties including the trustees. The conduct of the parties as a collective might have a negative impact on their investment in the scheme.

[36] The evidence before me is common cause. The parties seemed to have agreed that complaints were registered by the Applicant and that the action taken by the trustees was only limited to letters being written by the trustees or Managing Agent and no investigation or formal hearing ever took place. A formal investigation and a hearing would have created an opportunity to ventilate the real issues about the need to allow children to play in order to enhance their growth and development and the corresponding obligation placed on parents and or care givers.

[37]

THE LEGAL POSITION

[38] Section 38(j) of the Sectional Titles Act 95 of 1986 states that "The Body Corporate may exercise the powers conferred upon it by or upon it by or under this Act and such powers shall include the power to do "all things reasonably necessary for the enforcement of the rules and for the control, management and administration of the common property".

[39] The Body Corporate has a statutory obligation to enforce the Rules and the trustees must carry out this obligation. Conduct Rules must be reasonable and must apply equally to all owners and the responsibility of enforcing these rules rests squarely with the Body Corporate and the trustees. The question is how are these rules effectively enforced? The steps to be taken to ensure compliance by

the owners should be set out clearly in the Conduct Rules. Trustees should adhere strictly to these when informing the transgressors of the consequences that will face them if they continue to contravene them. Recalcitrant, non paying or unruly occupants have to be kept in line. Furthermore, if the offenders are tenants, the Body Corporate is obliged by law to deal with the unit owner, not the tenant to ensure compliance with the conduct rules.

[40] Firm action by the trustees is absolutely essential to ensure good conduct and is unquestionably crucial to the success of the Body Corporate. Lack of determination on the part of the trustees can result in the scheme losing their reputation and units then decrease in value. It also follows that if Body Corporate Rules are not being adhered to, the value of the property is at stake because of the lawlessness that may ensue in the scheme.

[41] When enforcing the Rules the trustees need to take into consideration that the rules must be applied consistently to all owners under the same circumstances and further it is important that the owners or occupiers get their first notification about being in breach of the rules from the trustees and not the Managing Agent so as to minimise any administration fees. The imposition of fines for breaches of the rules is also one option of enforcing the rules. Fines must be reasonable and clearly stipulated in the Rules. It also follows that the procedure to be followed in imposing fines must be fair and all relevant circumstances must be taken into consideration.

[42] The Scheme's Conduct Rules in particular Rules 12, 13, 17 & 18 specifically deals with the issue of noise and the imposition of fines. The trustees should have invoked these provisions and institute an investigation and depending on what the investigation reveals then convene a hearing against Ms Reizenberg.

[43] Owners must further understand that Rules provide for the control, management, administration, use and enjoyment of the sections and common property. In the circumstances I find that the current trustees failure to take decisive action in the form of investigation and or a hearing and imposition of penalties where necessary against Ms Raizenberg amounted to a failure to discharge their obligation to enforce the Conduct Rules of Lothians Sectional Scheme.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[44] The adjudicator is empowered to investigate, adjudicate and issue adjudication orders in terms of section 50, 51, 53, 54 and 55 of the Community Schemes Ombud Services Act. The CSOS Act enables residents of community schemes including sectional title schemes to take their disputes to a statutory dispute resolution services instead of a private arbitrator or the courts.

SECTION 56 (1) OF THE CSOS ACT, 2011

[45] The party's attention is drawn to -

Section 56 (1) 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 judgment of such Court and a clerk of such a Court must, on lodgement of a copy of the order, register it as an order in such Court.

Section 56 (2) provides that-

If an adjudicator's order is for the payment of an amount of money or any other relief which is beyond the jurisdiction of the magistrate's court, the order may be enforced as if it were a judgment of the High Court, and a registrar of such a Court must, on lodgement of a copy of the order, register it as an order in such Court.

RIGHT TO APPEAL

[46] Section 57 of the CSOS Act of 2011 states 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.

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

ORDER

1. The Lothians Body Corporate is ordered to take the necessary steps to ensure that the Conduct and Management Rules of the Scheme are equally applied and enforced to all owners and occupiers.

2. The Lothians Body Corporate is ordered to investigate all complaints registered against any owner, occupier or visitor of any owner or occupant irrespective whether the complaint is registered by a single person or by a number of people.

3. The Lothians Body Corporate is ordered to comply with Rule 17 & 18 of the Conduct Rules in order to effectively deal with transgression of the Conduct or Management Rules.

4. The Lothians Body Corporate is ordered to distribute / circulate a copy of this order to all owners/ occupiers within seven days of the order.