Mineur v Baydunes Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 614/WC/17
Adjudicator: Adv. Block
Date: 23 May 2018
Applicant: Maretha Mineur
Respondent: Baydunes Body Corporate

Before Adjudication at 9:00am on the 23rd of March 2017 at the CSOS Offices, at 124 Adderley Street, 8th Floor Constitution House, Cape Town, Western Cape and at 09:00 on the 08th of May 2018 at the Department of Human Settlements, York Park Building, 2nd Floor, c/o York and Progress Streets, George, Western Cape.

1. INTRODUCTION

[1.1] The application was set down for adjudication on 23rd of March 2018 and 08 May 2018 in terms of Section 38 of the Community Schemes Ombud Service Act, Act No 9 of 2011(hereafter referred to as the "CSOS Act") after the matter failed to be resolved through conciliation, and after determining that all the prescribed requirements of Section 38 have been met, by mutual agreement of the parties. The dispute was lodged on 01 October 2017 with the Western Cape Provincial Ombud, 8th Floor Constitution House, Adderley Street, Cape Town;

[2.2] The application includes a statement of facts which sets out the grounds for the dispute and the relief sought by the Applicant which relief is within the scope of prayers for relief contemplated in Section 39 of the CSOS Act, as will be more fully described in the submissions made;

[2.3] This application is before me as a result and pursuant to Section 48 of the CSOS Act and meets all provisions of Section 48 including that of Section 48(4) of the Act. On the 7th of March 2018 the matter was then set down for adjudication at the offices of the Department of Human Settlements, York Park Building, 2nd Floor, c/o York and Progress Streets, George, Western Cape at 9h00; and

[2.4] The Respondent was duly served with the Notice of Set down with applicable proof of service.

3. THE PARTIES

[3.1] The Applicant is the owner of Unit 59, Baydunes Sectional Title Scheme, SS297/93, situated at Hannes Pienaar Street, Mosselbay, Western Cape, and is herein represented by Mrs Maretha Mineur with *domicilium citandi et executandi* 4 Mc Innes, Belgravia, Kimberley, 8301.

[3.2] The Respondent is the trustees of the Baydunes Body Corporate (hereinafter referred to as the "Body Corporate"), Hannes Pienaar Street, Mosselbay, Western Cape, hereinafter represented by Mr Freek Meyer, the chairperson of the Body Corporate to be served at domicilium citandi et executandi of Status Mark, 11 Meyer Street, Mosselbay, and Dr Johan Swart, a trustee of the Body Corporate.

4. SUBMISSIONS BY APPLICANT

Applicant submitted that-

[4.1] Certain owners in the scheme have converted the garages of their units into bedrooms/living quarters, without having obtained any prior consent or authority from the Body Corporate and/or the Municipality to do so. The trustees of the Body Corporate, three of which had converted the garages of the units owned by them, expressed an intention to ratify/regularize past conversions and to approve future conversions that other owners may wish to make;

[4.2] It was proposed that new exclusive use areas be allocated to units, the allocation of which Applicant believe is not fair and in contravention of the law and the rules applicable to Baydunes Body Corporate;

[4.3] At an Annual General Meeting ("AGM") on 18 December 2017, the issues highlighted above were, notwithstanding Applicant's referral of these issues to CSOS, proposed and voted on (see copy of the agenda, and minutes of the meeting are annexed as **Annexure "A" and "B"**, respectively) and a copy of the opinion obtained from Zerlinda van der Merwe of Paddocks Consulting declaring the resolutions, as proposed per the AGM Agenda as unlawful;

[4.4] The aforementioned opinion was sent to all owners by Status Mark (on Applicant's request) before the meeting, but with the trustees' interpretations to owners (see **Annexure "C"**);

[4.5] The following two resolutions were proposed and ostensibly passed at the AGM, i.e. a special resolution, purportedly passed in terms of PMR 29(2) (hereafter referred to as "Resolution 8.1") and a special resolution in terms of section 10(2) (b) of the Sectional Titles Schemes Management

Act, 2011 ("STSMA") (hereafter referred to as "Resolution 8.3") to approve Conduct Rule 10 of the Baydunes Body Corporate Conduct Rules as follows, respectively set out below:

"The members of the body corporate hereby by special resolution (with or without amendments at the general meeting) approve the existing alterations and improvements to the following sections and the common property which were done by owners at their own cost to convert their garages (which are registered as part of their sections) into habitable space and hereby further authorise all the other owners of sections who have not yet converted their garages to make alterations and improvements to their sections and the common property at their own costs to enable their garages to be converted into habitable space. [. ..]"

"The members of the body corporate hereby by special resolution (without or without amendments at the general meeting) approve the attached Conduct Rule 10 conferring exclusive use areas (yards) to members of the body corporate in terms of section 10(7) of the Sectional Titles Schemes Management Act, 2011. The trustees are hereby authorised and instructed to amend the Pro-plan (plan to scale of the exclusive use areas), if necessary. The trustees are hereby authorised and instructed to submit the Conduct Rule 10 to the chief ombud for approval. The trustees are further authorised to make such reasonable amendments to the Conduct Rule as may be required by the chief ombud";

[4.6] In respect of the conversion of the garages to bedrooms or another "habitable space", Applicant contended that this constitutes a change of use as envisaged by Section 13(1)(g) of the STSMA read with PMR 30(f) requiring the consent of all the owners at Baydunes before said conversions may be permitted;

[4.7] PMR 29(2), relied on by the trustees as ostensibly authorising the proposing and passing of first Resolution above, is not applicable and that the blanket ratification and pre-approval of garage conversions without the submission of building plans and/or making any or proper provision for alternative parking to owners is in breach of the Mossel Bay Municipality Zoning Scheme By-Laws;

[4.8] In respect of the allocation of new exclusive use areas, Applicant contended that it is unlawful for failing to comply with Section 10(8) of the STSMA and that it results in non-compliance with the applicable zoning scheme in that certain units now no longer have access to more than one parking bay and therefore unlawful and/or invalid in that allocating the purported exclusive use areas, certain sections (e.g. section 7), has been deprived of any off-street parking, contravening the right not to be deprived of property under Section 25 of the Constitution and certain other provisions of the STSMA and the applicable rules dealt with more fully below;

[4.9] Respondent erroneously relied on the incorrect opinion expressed by Ilze Kotze ("Kotze") of Tertius Maree, dated 8 March 2017 and 10 May 2017 (See **Annexure "D"**), who was of the opinion that as the conversion of a garage into a bedroom I living space is only converting a part of a section, and not the whole section, it does not constitute a change of use within the ambit of section 13(1)(g) of the STSMA as ruled in *Cuje-Jackoby and Another v Kaschub and Another* 2007 (3) SA 345 (C), and *Bonthuys and others v Scheepers CA 303/2006*, and which opinion was consequently used by the trustees to proceed in terms of PMR 29(2) to obtain approval of the past and future conversions of the garages to bedrooms;

[4.10] Kotze's further advice that the applications for the conversions of the garages be submitted to the members of the body corporate for approval by special resolution in terms of PMR 29(2), was incorrect, on the basis that PMR 29 deals with alterations or improvements to the common property, and not to alterations or improvements by owners to their individual sections, and, even where the proposed alterations may concern the common property, PMR 29(2) only concerns alterations or improvements to the common property that "*are reasonably necessary*' with the converting of garages to living quarters not regarded as reasonably "necessary" within the meaning of PMR 29(2) and which therefore requires the authority of a unanimous resolution, which has not been obtained;

[4.11] Kotze failed to consider the building plans for each unit, which, if considered, expressly indicated that the garage is to be used for the parking of a vehicle which is

in contradiction of Kotze's statement in paragraph 2 of her memorandum, providing that written consent of all owners of sections are required to enable an owner to use a section for a purpose other than for its intended use "*as shown on the sectional plan, or the approved building plan, or inferred from the planning by-laws or the rules, or is obvious from its construction, layout and available amenities*." (emphasis added) and which applicable planning by-laws (zoning scheme), in this case, required that each unit must have two off-street parking bays (the garage constituting one such bay);

[4.12] Therefore, the fact that the construction of a garage, its layout and the lack of alternative parking in the scheme clearly supports an interpretation that the garage is to be used for parking only, and that any change of that use, would amount to a change of use, it is submitted, that on a proper interpretation of Section 13(1)(g), the conversion of a garage from parking to a bedroom or similar use, constitutes a change of use in terms of the section, requiring the consent of all owners before it is permitted;

[4.13] The impact of the change of use will affect all other owners in the scheme, as the change of use will require that alternative parking be made available, elsewhere in the complex (with no such provision currently nor any provision been proposed), as per municipality requirement which requires that there be two parking spaces available per section, thus resulting in 146(one hundred and forty six) parking bays within the scheme to be made available if all owners decided to convert their garages;

[4.14] The proposed alteration of the garages and change of use is also in contravention of PMR 30(d) in that their conversion is likely to interfere with the use and enjoyment of other sections, the common property or exclusive use areas; and

[4.15] The Body Corporate, therefore, acted incompetently and irrationally in granting blanket consent tor past and future conversions of garages in the scheme in the absence of any details (e.g. building plans or provision of alternative parking) in respect of such conversions having been provided and that the Body Corporate in making the decision did not act it in a manner consistent with being prudent and reasonable, and using sound business judgment, and avoiding arbitrary or capricious actions.

Now, therefore, Applicant seeks the following relief:

[5.1] That an Order be made that Section 13(1)(g) of the Sectional Management Schemes Management Act ("STSMA") applies to the proposed conversions of garages to living quarters;

[5.2] That the purported adoption of Conduct rule 1O be declared unlawful and therefore invalid; and

[5.3] That an Order be made that Resolutions 8.1 and 8.3 are invalid and/or void.

6. SUBMISSIONS BY RESPONDENT

Respondent submitted that -

[6.1] In order to give clarity regarding the resolution passed by the Annual General Meeting of Baydunes Body Corporate on 18 December 2017 the background to these conversions is critical as these conversions of garages into living spaces (bedrooms) were common practise for the past 12 - 14 (twelve to fourteen) years;

[6.2] It needs to be mentioned and noted that along with said conversions of garages several owners extended the living space of their units by altering their stoep areas in such a way that it now forms part of the living space of their units;

[6.3] The conversion of the garages took place with the consent of the owners although not in writing but by silent consent and that during the past 12 - 14 (twelve to fourteen) years not less than 28 (twenty eight) garages were converted by the owners without any objection being raised by the members of the Body Corporate;

[6.4] The conversion of garages was part of the agenda of several General Meetings and an aggrieved owner could therefore raise his/her objection against the conversions, but to date no objection had been raised;

[6.5] During September 2016 owners who undertook construction and improvements at their unit was in logger head with an ex-employee, an ex gardener, who also converted 8(eight) garages into habitable spaces for owners, where after all of a sudden 13 (thirteen) building inspectors conducted an inspection on the Baydunes premises.

[6.6] The aforementioned ex- employee, despite having conducted the conversions on behalf of the owners and who was paid by said owners, pointed out to the building inspectors all garages converted, but conveniently skipped the two garages of the then trustees;

[6.7] After the conclusion of the inspection some owners were issued with notices from the Municipality, instructing them to submit building plans for approval or to revert the conversion back to garages and upon submission of said plans for approval, the municipality, after discussions, indicated that they do not have a problem, provided that there be enough parking at Baydunes, and that the conversions comply with the relevant Municipal By-Laws as well as National Building Regulations etc,and that the affected owners obtain approval from the Body Corporate;

[6.8] During the 2016 Annual General Meeting the conversion of garages was discussed whereby the AGM instructed the incoming trustees for 2017 to set a process in motion for the conversion of garages into habitable space and for the trustees to obtain a legal opinion regarding the conversion of garages in terms of the applicable legislation and also investigate the number of parking bays required per unit, in terms of the Municipal Regulations, etc.

[6.9] The legal opinion sought from Dr Tertius Maree had the purpose of "

> *… Duidelikheid te verkry oor watter stappe gevolg moet word ten einde Baydunes se bestaande garages by wooneenhede te verander in slaapkamers."*

[6.10] After the opinion was obtained it was sent out to all members of the Body Corporate and, the trustees after considering the opinion, instructed Tertius Maree Associates to prepare an item for submission to the Annual General Meeting that was to be held on 18 December 2017 whilst the Chairperson at the same time entered into discussions with the Municipal Manager, Town Planner and Senior Management of the Municipality of Mossel Bay with the Body Corporate being granted extension to deal with the regularization of the conversions until after the AGM of Dec 2017.

[6.11] The item as prepared on the agenda of the AGM submitted by Tertius Maree read as follows: *"Special resolution, item 8. (1) of the agenda in terms of management rule 29 (2) to approve the alterations and improvements to parts of sections and the common property which had already been done by owners of sections to enable their garages which are registered as part of their residential sections to be converted into habitable space and to authorise all other owners who have not altered their garages, to make alterations and improvements to their sections and the common property to enable their garages to be converted into habitable space, was taken to the owners at the AGM 2017'.*

[6.12] The owners then voted on the item with the outcome of 49 (83.63%) in favour and 9 (16.37%) against;

[6.13] During this period at least 3(three) building plans, Unit 33, 49 and 70 were approved by the Mossel bay Municipality in terms of the above resolution;

[6.14] The Applicant, who conceded that her garage conversion was approved in terms of the "canton system", on 27 February 2017 in an e-mail send to the Managing agent stated the following: -

"Geagte Mev Barratt

Ek het 'n firm aangestel in Mosselbaai en 'n agent gestuur om na hierdie plan op die Munisipale rekords le gaan kyk. Die vervanging van die garage deur met 'n wit epoksieskuifdeur is in 2015 deur die Munisipaliteit goedgekeur. En in elk geval kan 'n vertrek nie meer as 'n garage gebruik word as die deur 'n skuifdeur word nie! Op die plan dui di/ duidelik aan dat die garage nie meer bestaan nie, maar 'n vergrote s/aapkamer is. Die Munisipaliteit het dit sander navraag goedgekeur. Ek het nog altyd verstaan (ons laat die Oeeltitelwet nou eers hieruit) dat 'n mens Jou garage kan verander sander Munisipale toestemming as jy reeds bestaande riool en water-aansluitings het. Wat by al Baydunes se garages die geval is. By mnr van Papendorp se eenheid beweer die Munisipaliteit hul/e kannie die goedkeuring terugtrek nie. Deeltilelwet ofte nie. Dit lei dan daarvandaan dat hulle ook hier nie toestemming kan terugtrek nie, en wat by die een geld, geld by die ander. Hoogstens kan hulle vereis almal moet planne indien. ";

[6.15] During 2012 the Land Surveyor were instructed for the "Opstel van wysigings deelplan vir die uitbreiding van skema." which culminated in a report dated 14 December 2012 by Baily & Le Roux Land Surveyors reflecting the exact boundaries of the erf of Baydunes Sectional Titles Scheme and the floor area of each unit which pointed to all owners being aware of the exclusive use areas, as well as the floor area - square meters (sqm) of their unit and further corroborated by the report dated 14 December 2012 by Baily & Le Roux Land Surveyors reflecting the exact boundaries of the erf of Baydunes Sectional Titles Scheme and the floor area of each unit:

[6.16] Aforementioned exclusive use areas were once again discussed and reconfirmed at a special meeting of 28 March 2013 which is clear evidence that the improvements as spelled out above had now become common practice with a rough estimate now showing that over 90% of owners did indeed pave their exclusive use areas and erected shade ports etc,.as per the special resolution on 28 March 2013 with many examples where owners who installed the white epoxy frame windows and doors in the garage, and also installed/ build or converted the toilet area into a bathroom, and utilized the garage as a bedroom (e.g. Unit 31);

[6.17] The behaviour of the Applicant escalated to such an extent that the trustees had to approach Oosthuizen, Marais & Pretorius Inc Attorneys to put the Applicant on terms regarding her behaviour towards the trustees with the arrogance of the Applicant appearing to have no boundaries with Applicant even attacking and threatening the Attorney;

[6.18] The Respondent also appointed Mr. Zietsman from Dekker Attorneys who issued the Applicant with a final written warning to refrain from disrupting the management of the body corporate and from further interfering with the activities of the trustees and the managing agent who perform their duties under the supervision of the trustees and in all respects comply with the contents of their contract and failing which further action, i.e. to approach the High Court to stop any further interference was intended to be taken; and

[6.19] Therefore that the Respondent obtained the legal opinion to legalise the conversion in terms of the Municipal By-Laws, Building Regulations etc. (the surface area of Baydunes Body Corporate erf constitute 28,863 sqm and the footprint of buildings, balcony's, roofed areas is only 8,785 sqm.), with members of the Body Corporate being well aware of the practise over the last 12-14(twelve to fourteen) years and that those members of the Body Corporate who were in disagreement with the practice could disassociate themselves from the practise to convert garages into habitable space;

[6.20] Respondent's 1st Witness, Dr Johan Swart, a trustee of the Baydunes Body Corporate, was sworn in, and he submitted that-

6.20.1 He bought his unit No. 49 in 1994 and that extension of the unit onto common property applied for, was only approved 5(five) years later as the extension he sought was governed by the provisions of Act 95 of 1986 and in terms of which written consent of all the other owners had to be obtained;

6.20.2 The "canton system", a system introduced to obtain approvals easier, which the Applicant accedes to have been used in the approval of her extensions, was only introduced in and around 1999, after the extensions by 1st Witness was finalised;

6.20.3 Not one extension effected after 1999 were done in compliance with the provisions of Act 95 of 1986;

6.20.4 The courtyards as indicated on the plans of the sectional schemes plan SS 297/1993 approved by the Surveyor General (S.G.No. D 120/1991) on 13 May 1991, was an exclusive use area, but only included in the participation quota of the levies of the relevant owner where and when such owner erected a roof over such courtyard;

6.20.5 The paving in front of the sections of the owners was permitted, subject to said sections remaining common property and the owners being responsible for the maintenance of said paved areas;

6.20.6 Only 6 -8 units have residents throughout the year whilst most units are occupied over the December periods which results in a shortage of parking at Baydunes;

6.20.7 The 1st Witness acknowledges the significant investment value of Baydunes which is approximately R 180,000,000 and that the decision of the trustees is

aimed at protecting this investments in the interest of all owners; and

6.20.8 The resolution to allocate the use of certain sections to owners was approved at the SGM on 28 March 2013 and, that therefore, all owners had been aware of the allocation of sections adjacent to exclusive use areas, subject and in line with Section 27A of Act 95 and subject to the following improvements-

"(a) Bou van 'n stoep/ patio,
(b) Oprig van skeidingsmure op die grens tussen wooneenhede,
(c) Bou van braaigeriewe,
(d) Geplaveide parkeer area te skep,
(e) Skadunet afdak op te rig, en
(f) Die agterplase van eenhede, Eenheid 66-73 is jare gelede reeds toegebou met 'n muur en vergadering aanvaar dit so. Daar sal voorts nie meer huur betaal word op hierdie gedeeltes indien die voorstel goedgekeur word nie."

7. EVALUATION OF SUBMISSIONS AND EVIDENCE ADDUCED

This issue of whether the decision by Body Corporate to regularize and legalise the conversion of garages into living units are lawful or not. It is common cause that with the registration of the development the sectional title schemes plans would have included a draft sectional plan to the Surveyor-General for approval. Furthermore, Section 5 (3) (e) of the Act, Act 95 of 1986 provides that the sectional title plan must show the floor area to the median line of the boundary walls of each section, correct to the nearest square metre, and the total of the floor areas of all the sections.

Section 5 (4) also provides that the common boundary between any section and another section or common property shall be the median line of the dividing floor, wall or ceiling, as the case may be. It is common cause that if the alterations or additions change the use to which the garage is put, the written consent of all the other owners will be required. This, however, presupposes that before an owner or a body corporate can even consider an application to make an extension or addition, the Sectional Title plan approved by the Surveyor General and the Rules filed with the Registrar of Deeds will need to be consulted to determine its status. It is therefore common cause that many garages are included in the area of the section of a unit, but that certain balconies and patios are not included in the 'bulk' or 'FAR' (floor to area ratio) of the building. In such cases and in spite of the sectional title requirements having been met, the local authority may decline consent. If the enclosure changes the use to which the area to be enclosed is put, the written consent of all the other owners will be required. With the current, rather chaotic, situation of many municipalities and the lack of enforcement of by-laws, home seekers may be inadvertently buying a future problem. Buyers need to ensure that what they are buying is the same as what is documented with the local Municipality. Buyers should nevertheless make an effort to demand or obtain a copy of the approved plans from the local authorities. With the current lack of control by local municipality planning departments it is not uncommon to come across illegal structures on properties more often. These take a number of forms and include extensions built without plans, buildings that do not comply with the plans that have been submitted and additional buildings, especially flats and second homes that have been added without application for removal of restrictions on the title deeds.

In the first case these extensions may not always comply with municipal requirements and national building regulations while changes that have been made not in accordance with the submitted plans are often built over building lines. In both cases when this comes to the attention of the planning department, not only will expensive additional plans be required but it is possible that the buildings will not be approved at all and will have to be demolished.

A big problem that is raising its head is where people have built or converted existing buildings to second homes or flats. This may well be prohibited by the existing title deed of a property that allows only one residence per property. Unless this condition is uplifted a second residence cannot be approved by the local authority. In practice there are a number of problems that can arise. At some stage the illegal alterations will be discovered by the local authorities, as in the present case, with possible action against owners. The problem is that the owner at that time will be the one who is left with the problem. What may happen is that the municipality might refuse to allow you to keep the buildings that you have and get a court order for you to demolish them. The owner at that time has the most to lose because

they will be losing part of the property that they bought, but what about previous owners; who may be totally innocent as well? The current owner will be entitled to sue the previous owner that he bought from for all the costs that he incurred including damages for the loss of the portion of the property that had to be demolished. And so on down the line to the person who put up the illegal buildings. Obviously the difficulty would be if it was not possible to trace one of the owners or if the owner had died for example. A big issue that is already causing problems is that of changes to duet units without property procedure having been followed. A duet unit is a sectional title unit like any other townhouse or flat. Changes cannot be made at will.

Unfortunately many owners of duets think that they can deal with them like subdivided erven. Duets never seem to comply with the requirements of the Sectional Title Act. If an owner changes his or her property, even legally with municipal approved plans, he still needs to change the sectional title plans too. This can prove to be quite an expensive exercise and unfortunately is seldom done. In fact these changes are almost always done without permission of the Body Corporate (the other owner) and are thus in terms of the Sectional Title Act, illegal. The results of such changes are that it is quite likely that the seller of the unit where no changes were made will not be able to give transfer of the property that he/she sold, because the bank will require an amended copy of the sectional title plans.

Even if the non-selling owner agrees to go to the trouble and expense of updating the sectional plans this could take a considerable amount of time as the plans have to be redrawn, an attorney instructed to register the changed plans etc.

If the alterations do not have municipal approval then this will take even longer to achieve and could take as long as a year before transfer can take place. It also poses a problem where the other owner, who made the illegal changes, is not co operative. So it is a good idea to get a copy of the sectional title plans for a duet when you buy and make sure that your purchase can be registered. In an attempt to avoid the pitfalls illustrated above and to regularize the illegal conversions, the Baydunes Body Corporate who in terms of Section 2(7) of the STSMA " has perpetual succession", is now following the provisions of Section 10(7) and Section 10(8) of STSMA which provides that:

"A [. ..] body corporate may make management or conduct rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate." and

"The rules contemplated in subsection (7) must-

(a) Include a layout plan to scale on which is clearly indicated-

(i) the locality of the distinctively numbered exclusive use and enjoyment parts; and
(ii) the purposes for which such parts may be used; and

(b) include a schedule indicating to which owner each such part is allocated."

As the collective of owners annually approve the budget determining the levies payable by owners of individual sections in accordance to the participation quota (prorate portion in the scheme) for the financial year ahead it is the collective of owners that make the rules in accordance to which the trustees manage the affairs of the collective. The trustees get the annual financial statements produced and audited for tabling at the AGM. A substantial advantage of owning property in a sectional title scheme, in contrast to free-hold property where every1hing belongs to the owner, is that ownership of everything other than the your personal section is shared ownership. The title deed usually reads something to the effect of:

A unit consists of: (a) section and (b) an undivided share in the common property apportioned to the said section in accordance with the participation quota as endorsed on the said section plan. This reality is possibly the biggest problem of sectional title ownership, in that owners appear to perceive that some entity other than themselves are responsible. This 'b' part of the title deed encompasses membership of the body corporate of the scheme. The Sectional Titles Act (STA), No 95 of 1986, Section 36(1), as well as the Sectional Titles Schemes Management Act, No 8 of 2011-that would amend Section 36 of the STA-Section 2(1) reads:

"With effect from the date on which any person other than the developer becomes an owner of a unit in a scheme, there shall be deemed to be established for that scheme a body corporate of which the developer and such person are members, and any person who thereafter becomes an owner

of a unit in that scheme is a member of that body corporate." The aforementioned acts outline the responsibilities of the body corporate, which is elaborated upon in the prescribed management rules (PMRs). It is important to note that a body corporate may make use of the services of a managing agent, but is not obliged to as the owners may self administer.

Owners annually appoint trustees and entrust the management, administration and control to an elected few. The propriety rights which had come into existence with the registration of the first transfer or Certificate of Register Title of an erf in the Land Register of the Deeds registry in terms of the Deeds Registries Act, Act 47 of 1937 by the Applicant, therefore became restricted and limited on the Applicant entering, consciously and willingly, into the agreement with the Baydunes Body Corporate.

Furthermore, LAWSA: Associations Vol 1(2nd edition) at paragraph 620 states the following:

"The constitution of an association together with ail rules or regulations collectively constitute the agreement which is entered into by its members. This agreement is the crucial factor in the existence of an association. It not only determines the nature and scope of the association's existence and activities but also, where necessary, prescribes and demarcates the powers of, inter alia, the executive committee, secretary and general meeting, expresses and regulates the rights of members and provides for certain procedural aspects."

In *Willow Waters Homeowners Association (Pty) Ltd v Koka (768/13) [2014} ZASCA 220* (12 December 2014) the appellant, the Willow Waters Homeowners Association, (Pty) Ltd, (the association) was duly incorporated in terms of s 21 of the Companies Act 61 of 19731 in respect of the Willow Waters Estate (the estate) in the estate of Van Riebeeckpark, Extension 26. In this case the membership comprised registered owners of property in the estate and all owners who automatically assumed that status were bound by the association's Articles of Association and Rules until such ownership ceases. Aforementioned estate consisted of 13 full title erven and one erf with communal facilities. The association owned the communal facilities and operated the estate's infrastructure including its roads, water, electricity, sanitation, telecommunications network and security services as well as ingress and egress to the development for the members' benefit. In terms of Article.6.3.1 of the Constitution which provides that "*a person who is entitled to obtain a certificate of registered title to any such erf shall be deemed to be registered owner thereof … " who ceases to be the registered owner shall ipso facto cease to be a member of the Association*. "With respect to the averment by Applicant that the Body Corporate an therefore all the owners were incompetent and irrational to have granted blanket consent for past and future conversions of garages in the scheme Moeng AJ in the case of *Van Rooyen v Hillandale Homeowners Association (1603/2014) [2014] ZAFSHC 226*, held on p.39 that " *It is trite law that parties are free to contract as they please. The law permits perfect freedom of contract. Parties are left to make their own agreements, and whatever the agreements are, the law will enforce them provided they contain nothing illegal or immoral or against public policy.*"

It is also important to note that in the ***Wilds Home Owners Association & Others v Van Eeden & Others, Case No. 53643/09 Murphy*** J ruled that the amending of rules should be guarded against, i.e. "*... a court should be loath to re-write the bargain struck between the members with each other, especially where the impetus to do so is at the instance of a minority who think that the terms of the agreement are unfair or no longer in their interests.*"

Legislative framework for conversions of garages into bedrooms:

In respect of Section 37(1)(n) the body corporate must ensure compliance with any law that affects the common property or improvements to the land. This obligation covers its own activities and the activities of all owners and occupiers. Laws that apply to the common property and improvements would include the local municipality's bylaws and zoning scheme, which would in turn apply to the use of both sections and common property. Section 44(1)(g) furthermore restricts owners use of their sections or exclusive use area to any purpose indicated or even implied on the sectional plan. Section 44(1)(g) states that:

"*An owner shall when the purpose for which a section or an exclusive use area is intended to be used is shown expressly or by implication on or by a registered sectional plan, not use nor permit such section or exclusive use area to be used for any other purpose: Provided that with the written consent of all owners such section or exclusive use area may be used for another purpose.*" Modern sectional plans are less specific regarding sections than the plans that were prepared for

older schemes, usually merely describing them as sections. Older plans, on the Title sheet, usually described the use of the parts of the buildings. Common specifications were: flats, garages, courtyards, servant's quarters and so on. Portions of the common property subject to registered exclusive use rights are clearly demarcated on the sectional plan and their use always specified. As modern sectional plans are less specific than they use to be regarding use, prescribed management rule 68(1)(v) was changed to counter the problem. This rule extends the provision of section 37(1)(g) by saying that not only is a statement or implication of use on the sectional plan significant, but if the use of the section or EUA is shown on the building plan, can be inferred from the scheme's rules or is obvious from its construction, layout or amenities, then it may not be used for any other purpose. In addition Section 44(1)(g), however, provide a mechanism for changing the use of a section or exclusive use area. Acknowledging the importance of the use restrictions, the mechanism provided is one of the most onerous of all authorisations in the Act: a change of use requires the written consent of all the owners in the scheme. But the provision goes on to say that an owner applying for a change of use may apply to court for relief if he or she considers the refusal of another member to provide written consent to be unfair or otherwise prejudicial. In the unreported case of *Bonthuys and Others v Scheepers CA 303/2006 [2007} ZAECHEC (17 Sept 2007*), the High Court of the Eastern Cape reversed the decision of the Magistrate's Court, granting consent to the owner of a unit in a residential sectional title scheme to run her hairdressing salon. The court allowed the appeal because the lady started the business without obtaining the written consent of the owners in terms of section 44(1)(g), and because the refusal of 13(thirteen) of the owners to grant their consent was not unfairly prejudicial to the applicant. The court followed the court decision in *Cuje Jakoby & Another v Kaschub & Another 2007 3 SA 345* (C) in interpreting the word "unfairly" where the court found that the words "unfairly prejudicial, unjust or inequitable" denoted conduct which departed from the accepted standards of fair play and that the word "unfairly" should be equated with the word "unreasonably." The Court found that the prejudice suffered by the other owners, far outweighs the prejudice that may be suffered by the applicant. 11 was therefore decided that: (1) The hairdressing salon would affect the peace and tranquility associated with a residential scheme, (2) The fact that the applicant created a separate entrance for her clients would compromise the security of the other owners, (3) The evidence did not indicate any value added to the other owners, but rather suggested an adverse effect on the owners and (4) It was stressed that personal circumstances of the applicant namely that she lost her job because the salon she worked for closed down and that she struggles to support a four year old child, did not justify a departure from the established scheme. Therefore, a section or exclusive use area cannot be used for another purpose without the written consent of all the owners in terms of section 44(1)(g) of the Act and PMR 68(1)(v). The contention by Applicant that the case of Bonthuys and others was of no assistance in the current matter is incorrect. The fact that said case concerned the reasonableness or otherwise of certain owners refusing to consent to the respondent's proposed change of use is important in that the test, i.e. whether the withholding of consent by the trustees or any one owner would be unfairly prejudicial to the applicant or to the owners at large, is an important consideration, and in my view, the material prejudice that the affected owners or the Body Corporate stood to suffer, if not in compliance with the municipality by-laws, far outweighs the prejudice that may be suffered by the Applicant. 11 is also important to note that Applicant always knew that the garages formed part of the exclusive use areas of the sections of individual owners as denoted in the following: *"Ek het nog altyd verstaan (ons laat die Deeltitelwet nou eers hieruit) dat 'n mens jou garage kan verander sander Munisipale toestemming as jy reeds bestaande riool en water aansluitings het. Wat by al Baydunes se garages die geval is, By mnr van Papendorp se eenheid beweer die Munisipaliteit hulle kannie die goedkeuring terugtrek nie. Deeltitelwet ofte nie. Dit lei dan daarvandaan dat hulle ook hier nie toestemming kan terugtrek nie, en wat by die een geld, geld by die ander. Hoogstens kan hulle vereis almal moet planne indien."*

The irrational, aggressive and disruptive owner or tenant

The irrational, aggressive and disruptive "Nightmare Next Door" owner or tenant is regrettably a well-known and much-disliked feature of all too many residential complexes. They, the owner or tenant, make trouble at every opportunity, attacking other owners and the trustees of the bodies corporate with equal abandon. The fundamental question is how and what trustees should do about it. In sufficiently serious cases, our courts will come to the rescue, as a recent High Court decision in *Body Corporate of El Sol v De Waal* (69611/2014) [2015] ZAGPPHC 614] illustrates that "Harassment - it could be a ticket to prison ..... and costly".

In this matter the owner of a sectional title unit harassed the board of trustees in his complex to such an extent that they obtained a court order prohibiting him from raising complaints, objections and the like with the trustees in any way other than through written communication to the secretary of the body corporate. Undeterred, he breached this order on at least 3 occasions, threatening for example to remove the trustees' roof tiles (so that, he said, they could feel what it feels like to live in a unit with roof leaks), and aggressively objecting to the way a trustee was painting some plant pots. It couldn't have helped his case that the female trustees on the board seem to have borne the brunt of these attacks, and to have felt physically intimidated on at least one occasion - as evidenced in the quoted evidence above. Holding the owner to be clearly in contempt of the original court order, the Court sentenced him to 6 months' imprisonment. It suspended this sentence for 5 years on condition that the owner "*does not harass or contact any member of the Board of Trustees personally, but must address all communication regarding complaints, grievances, proposals or commentary to the secretary of the applicant in writing*'.

Because it was the owner's "irrational and acrimonious behaviour' that necessitated the court action, the Court also ordered him to pay the legal costs of the Body Corporate on the punitive attorney and client scale.

It is important to point out that Section 35(2) of the Sectional Titles Act (no 95 of 1986) specifies that Rules-not a constitution, mandate or founding statement- "... shall provide for the control, management, administration, use and enjoyment of the sections and the common property, and shall comprise-(a) management rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, to the extent prescribed by regulation, and which rules may be substituted, added to, amended or repealed from time to time by unanimous resolution of the body corporate as prescribed by regulation; (b) conduct rules, prescribed by regulation, which rules may be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, and which rules may be substituted, added to, amended or repealed from time to time by special resolution of the body corporate: Provided that any conduct rule substituted, added to or amended by the developer, or any substitution, addition to or amendment of the conduct rules by the body corporate, may not be irreconcilable with any prescribed management rule contemplated in paragraph (a). Many bodies corporate rely on managing agents to take care of everything. Some bodies corporate even experience difficulty at annual general meetings (AGMs) to get trustees elected. Many owners never attend AGMs and abdicate all responsibility.

In dealing with the Applicant's contention that the Body Corporate failed to act in a manner consistent with being prudent and reasonable, and using sound business judgment, and avoiding arbitrary or capricious actions, when it evaluated the problem it was faced with in terms of the financial impact to owners where they are found to be in contravention of municipal by-laws, the rationale for the measures used in the proposed legalisation of the conversions in the complex seem to far outweigh the interest of one individual owner or a minority of owners. These hardships would also manifest itself when the owners wants to sell and not be able to give transfer of the property that he/she sold, because the bank will require an amended copy of the sectional title plans.

It could not be proven by the Applicant that a motive existed to benefit any one trustees, but that the steps taken was in the interest of all owners affected by the illegal conversions. Could this therefore be regarded as being consistent with prudent and reasonable behaviour? Here it is imperative to look at the historic nature of the conversions which is critical as these illegal conversions of garages into living spaces (bedrooms) was common practise for the past 12 - 14 (twelve to fourteen) years at Baydunes with some owners even having extended the living space of their units by altering their steep areas in such a way that it now forms part of the living space of their units, which, in my opinion points to the fact that the decision of the trustees of the Body Corporate was consistent with being prudent and reasonable, and using sound business judgment, and avoiding arbitrary or capricious actions.

The Management Rules (Annexure 8 amended by GNR. 2653 OF 1991, by GNR. 1422 of 1997, by GN 830 OF 2000, by GNR.438 of 2005 and by GNR.1109 of 2005.)(Section 35(2)(a) of the Sectional Titles Act, 1986) provides under Clause 68 of the Management Rules, under Duties of Owners and Occupiers of Sections, that in addition to his obligations in terms of Section 44 of the Act, an owner shall not use his section, exclusive use area or any part of the common

property, or permit it to be used, in such a manner or for such purpose as shall be injurious to the reputation of the building; shall not contravene, or permit the contravention, of any law, by-law, ordinance, proclamation or statutory regulation, or the conditions of any licence, relating to or affecting the occupation of the building or the common property, or the carrying on of business in the building, or so contravene or permit the contravention of the conditions of title applicable to his section or any other section or to his exclusive use area or any other exclusive use area, or shall not make alterations which are likely to impair the stability of the building or the use and enjoyment of other sections, the common property or any exclusive use area, or shall not do anything to his section or exclusive use area which is likely to prejudice the harmonious appearance of the building. The owner is also obliged when the purpose for which an exclusive use area is intended to be used, is shown expressly or by implication on or by a registered sectional plan, not to use, nor permit such exclusive use area to be used, for any other purpose: Provided that with the written consent of all owners such exclusive use area may be used for another purpose. The owner is also prohibited from constructing or placing any structure or building improvement on his or her exclusive use area, without the prior written consent of the trustees, which shall not be unreasonably withheld and that the provisions of Section 24 and Section 25 or other relevant provisions of the Act or the rules, will not be contravened. It is noteworthy that the Sectional Tiles Management Schemes Act of 2016 (hereafter called the "STMSA") assigns the body corporate the responsibility for maintaining the utility infrastructure within a sectional titles scheme, which includes utility infrastructure includes, e.g. pipes, wires, cables and ducts; plant, machinery, fixtures and fittings and equipment used in connection with the common property and sections; and separate meters to record the consumption of electricity, water and gas; and utility services such as water reticulation or supply; gas reticulation or supply; electricity supply; air conditioning; telephone service; a computer data or television service; a sewer system; drainage; a system for the removal or disposal of garbage or waste; or another system or service designed to improve the amenity, or enhance the enjoyment, of sections or the common property.

In order to establish maintenance responsibilities, the common property and sections in a scheme must be accurately identified. The registered sectional plan for a sectional titles scheme must clearly show the boundaries of the common property and the sections in the scheme. The STSMA repeals and replaces the sections (mainly sections 36 to 48) of the Sectional Titles Act (STA) of 1986 that governed the administration and management of schemes. However, the STA has not been abolished; its sections on how sectional titles schemes must be established will remain in force. The STA required a body corporate to "establish a fund" (open a bank account) sufficient to pay for all the expenses incurred to administer and manage the common property (for example, municipal services, maintenance, insurance premiums and wages). Now, under the STSMA, a body corporate must establish two separate accounts: an "administrative fund", to cover its estimated annual operating costs (including maintenance and repairs), and a "reserve fund", to cover the cost of future maintenance and repairs. The aim of the reserve fund is to force bodies corporate to budget for ongoing maintenance and repairs. Many schemes draw up budgets and determine levies without making long-term provision for major maintenance and repairs; instead, they impose special levies whenever expensive repairs to the common property cannot be delayed any longer.

It is common cause that the Applicant did not proof on a balance of probability that the decision of Baydunes Body Corporate to permit owners to convert their garages was unreasonable or unfair, and in my view, therefore, the Applicant failed to discharge the onus that said decision did not legitimately carry the vote by the majority of the owners. It is trite law that a Body Corporate may be accorded, through its constitution, any of the rights and powers that may be accorded to any other corporate body, such as a company. Such powers will have to be exercised within the framework of the objects of the association, which are likewise set out in its constitution. The Body Corporate is legally required that to meet the duty of care, a trustee must make informed decisions, which might require a bit of research before he/she acts or votes on a matter. Trustees must also act in a prudent and reasonable manner, basically using sound business judgment, and avoiding arbitrary or capricious actions, The duty of loyalty requires that trustees act fairly, in good faith, in the interest of, and for the benefit of, the Body Corporate as a whole, rather than make decisions based on any personal interest or gain. Trustees should also avoid acting where there is a conflict of interest The duty of trust or fiduciary duty really means that the person responsible will exercise his powers in good faith and he will not act in his own interest or for another's gain, but

for the members (the owners of the Body Corporate) he/she represents. It is therefore my view that the Applicant failed to prove on a balance of probability that the trustees did not act in a manner consistent with being prudent and reasonable. In *North Global Properties (Pty) Ltd v Body Corporate of Sunrise Beach Scheme (2013] JOL 30400 (KZD) per Dhaya Pillay* J, the court held "*Trustees' decisions must be objectively reasonable; when they are not, they are reviewable under the common law read consistently with, in my respectful opinion, the STA, Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). As a statutory body performing not only commercial and regulatory functions but also administrative functions, it is implied from the STA that trustees must comply with the constitutional principle of just administrative action. As a juristic person taking administrative action, a body corporate is also an administrator as defined in the PAJA. What is just is determined in the context of the STA and PAJA*" It was also held that "*... the largest and most authoritative decision making forum is a general meeting of the members. A decision of the trustees cannot replace the decision of a general meeting of the body corporate without the concurrence or participation of the members*."

In respect of the Applicant's contentions that the decision by the trustees of the Body Corporate to convert the garages is devoid of reasonableness and being unfair due regard is also had to Section 252 of the Companies Act 61 of 1973 which provides, in relevant part, as follows:

"252. Member's remedy in case of oppressive or unfairly prejudicial conduct

> *Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of subsection (2) make an application to the Court tor an order under this section.*

Section 252 therefore provides a member or an owner, or part of the members or owners of a company, with the means of obtaining relief from unfairly prejudicial, unjust or inequitable acts or omissions of the company or conduct of its affairs. The emphasis is upon the unfairness of the conduct complained of. A member seeking relief must show that the conduct is "*unfairly prejudicial, unjust or inequitable*" to that member or to some part of the members. The conduct must not only be prejudicial, but unfairly so. Fairness is thus the criterion by which a court must decide whether it has jurisdiction to grant relief. The test of unfair prejudice is an objective one. Our courts have generally followed what is referred to as the "*reasonable bystander test*". This was articulated by Nourse J in *RA Noble & Sons (Clothing) Limited* [1983] BCLC 273 at 290-291.

"*The test of unfairness must, I think, be an objective, not subjective, one. In other words, it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test ... is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests*." Fairness is an elastic concept. What is fair or unfair will depend upon the context in which it is being used. In O'Neill In Re a company (No 00709 of 1992) O'Neill and another v Phillips and others [1999] 2 All ER 961 at 966H-967E), Lord Hoffmann put it thus:

"Although fairness is a notion which can be applied to all kinds of activities, its content will depend on the context in which it is being used. Conduct which is perfectly fair between competing businessmen will not be fair between members of the family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very impot1ant. In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, the company has developed seamlessly from the law of pat1nership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in cet1ain relationships in which it was considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law. The first of these two features leads to the conclusion

that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith"

What is evident from the above-quoted passage in *O'Neill* is that the notion of unfairness transcends the strict legal rights of the shareholders pointing to the fact that there may be cases where it would be unfair for the majority to exercise or take advantage of their legal rights or powers under the Articles of Association or agreements between them. The Court's jurisdiction to make an order does not arise until the statutory criteria have been satisfied. The Applicant, however, bears the onus of satisfying the Adjudicator that a particular act by the trustees of the Body Corporate had been committed, or that the affairs of Body Corporate are being conducted in the manner he alleges and that such act or omission or conduct of the affairs of the Body Corporate is unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company (*Bader & another v Weston and another* 1967 (1) SA 134 (C) at 139F-G); *Aspek Pipe Co (Ply) Ltd v Mauerberger* 1968 (1) SA 517 (C) at 525; *Louw v Nel* 2011 (2) SA 172 (SCA) para [23]; see also *Blackman et al, Commentary on the Companies Act* (Vol 2) p 9-44). It, therefore, had been recognised by our courts as unfairly prejudicial conduct entitling a majority voting power has been abused or unfairly used to the prejudice of shareholders or and where the majority shareholders use their greater voting power in a manner which does not enable the minority to enjoy a lair participation in the affairs of the company (*Elder v Elder & Watson Limited* (1952) SC 49 at 55 and 60; *Aspek Pipe* at 528D-H; *Donaldson Investments (Pty) Ltd and others v Anglo Transvaal Colliers Limited: SA Mutual Life Assurance Society and another intervening* 1979 (3) SA 713 (W); *Elgindata Limited* [1991] BCLC 959 at 984 and 1004). Lack of probity or lair dealing was described by Lord Cooper in Elder v Elder & Watson Ltd (at p 55), as -

"a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely"

Whilst the Respondent contended that Resolutions 8.1 and 8.3 conferred rights to owners which was unlawful and that the trustees decided to do this in their own discretion without considering the best interest of the owners of the Body Corporate, this decision in itself is not questionable as it was put to the vote by the members of the Body Corporate. The unfairness in said decisions may only lie in using the rules in a manner which equity would regard as contrary to good faith. In this manner, several uncertainties relating to matters that normally fall within the ambit of the powers and functions of the trustees may be resolved by referring the matter to the members in deference to democratic principles. Notwithstanding this, there will however be cases in which equitable considerations make it unfair for those conducting the affairs of the Body Corporate, i.e. trustees, to rely upon their strict legal powers. Trustees are therefore reminded that Section 36(4) specifies that "*the body corporate shall, subject to the provisions of the Act, be responsible for the enforcement of the rules referred to in Section 35, and for the control, administration and management of the common property for the benefit of all owners*", and Section 36(5) provides that "*the body corporate shall have perpetual succession*...".Trustees therefore remain duty bound to manage the affairs of the body corporate on a day-to day basis, subject to the limitations set by Section 39 (1) (read with management rule 30 prescribed under the regulations of the Act) of the Sectional Titles Act 95 of 1986 ("the Act"). Section 40 of the Act also states that each trustee of a body corporate stands in a general fiduciary relationship towards the body corporate which means that a trustee"... *shall in relation to the body corporate act honestly and in good faith, and in particular, shall exercise such powers as he may have to manage or represent the body corporate in the interest and for the benefit of the body corporate; and shall not act without or exceed the powers aforesaid*....". The Respondent therefore satisfactorily demonstrated that they acted in a manner consistent with being prudent and reasonable, and using sound business judgment, and avoiding arbitrary or capricious actions in correcting bona tides decisions taken by the Body Corporate over many years. Everything boils down to 'reasonableness' and to the ability of the complainants to persuade the adjudicator that no reasonable man under the circumstances should have had to consider the interventions by the Body Corporate to make good the illegal conversions or deal with the "inadequate" parking space emanating from said illegal conversions. Again, in making any determination on the dispute, cognisance must be taken of the fact that the interest of each party must be

weighed up, together with the best interests of the Body Corporate and that of the owners collectively. The bottom line is that any decision any one owner takes in how they live their life within a sectional title scheme must be measured and well considered. After careful consideration of the facts and the evidence adduced and the probity of said evidence, I had come to the conclusion that the Body Corporate came to this decision by having used sound business judgment in applying objective criteria in determining the financial and proprietary impact on the owners for being in contravention of the municipal by-laws, and that the trustees is in the process of taking such necessary steps to avoid an arbitrary or capricious action.

It is trite law that the trustees of the Body Corporate must at all times act in the best interest of all members of the Body Corporate In *Du Plooy v The Cascades Body Corporate and Another* (275/10) [2013} ZAWCHC 62 (12 March 2013) the court held that "... *it was clear from the provisions of the Act (see in general sections 36 and 37), that first defendant, as the body corporate, is legally responsible for the control, administration and management of the common property at the development. The Act expressly provides that a body corporate shall manage, control and administer the common property for the benefit of all owners. In view thereof, one cannot quarrel with plaintiff's submission that first defendant is in virtually the same position as a landlord, hotel owner or shopkeeper, who, by virtue of his or her control over property, has a legal duty to take reasonable steps in respect of maintenance and supervision to ensure that the property is in a safe condition with reference to the type of person who may normally and reasonably make use of it. See Beaven v Lansdown Hotel (Ply) Ltd1961 (4) (DCLD) SA 8; Buys and Another v Lennox Residential Hotel 1978 (3) SA 1037 (C) and Chartaprops 16 (Ply} Ltd v Silberman 2009 (1) SA 265 (SCA).*" .This duty has been extended in the Sectional Titles Schemes Management Act, No. 8 of 2011, which repeals Section 37 of the Sectional Titles Act, and replaces (Section 3) with, the /unctions of bodies corporate and their fiduciary duties to include *inter alia*, the approval of:

(i) the existing alterations and improvements to relevant sections and the common property which were done by owners at their own cost and to further authorise all the other owners of sections who have not yet converted their garages to make alterations and improvements to their sections and the common property at their own costs to enable their garages to be converted into habitable space. [...]"and

(ii) Conduct Rule 10 conferring exclusive use areas (yards) to members of the body corporate in terms of section 10(7) of the Sectional Titles Schemes Management Act, 2011.

It is common cause that trustees must always act in the utmost good faith when exercising their conferred administrative powers. It must nevertheless be added that in any hearing on these complaints, several factors had to be considered.

Everything, however, boiled down to 'reasonableness' and to the ability of the Applicant to persuade the adjudicator that no reasonable man under the circumstances should have had to accept the status quo, i.e. the blanket decision granting owners the right to convert garages into living areas and the limitation of the Applicant's propriety rights to available parking bays. It is not evident from the inspection in loco that the illegal conversions, over many years, had not always complied with municipal requirements and national building regulations while changes that have been made were not in accordance with the submitted plans and often built over building lines.

However, in making any determination on the dispute, cognisance must be taken of the fact that the interest of each party must be weighed up, together with the best interests of all the members of the Body Corporate. The bottom line is that any decision any one owner or more than one owner take in how they live their life within a sectional title scheme must be measured and well considered.

8. POWERS AND JURISDICTION OF THE ADJUDICATOR

In deciding on whether the point should succeed or be dismissed I had been guided by the Section 54 (3) of the Community Schemes Ombud Service Act, Act No. 9 of 2011 and the Regulations issued in terms of said Act, which provide that the adjudicator may make an order which order may contain such ancillary and ensuing provisions as the adjudicator considers necessary or appropriate.

9. ORDER

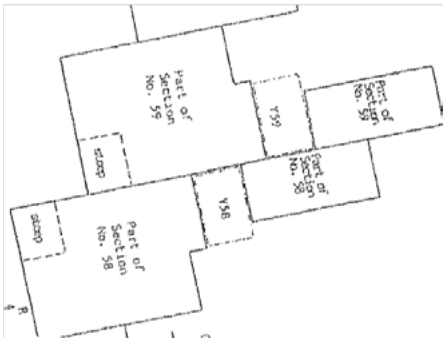
In coming to the final Order I have taken due cognisance of the provisions of Sections 37 & 38 of the CSOS Act, firstly, in respect of the functions entrusted to the trustees in respect of the PMR, whether the refusal to grant their consent to the

conversions would be unfairly prejudicial to the applicant or tot the owners at large, whether the trustees acted in the interest of, and for the benefit of, the Body Corporate as a whole, rather than making decisions based on any personal interest or gain, whether there are grounds for the Applicant to complain on the basis that there had been some breach of the terms on which Applicant agreed that the affairs of the Body Corporate should be conducted (bearing in mind that Applicant also had her garage coverted- see photographs of Unit 59 in **Bundle B** and also on verification through an inspection *in loco* on 08 May 2018), and the potential prejudice to commercial interests of the owners so affected.

It could therefore not be construed, as averred by Applicant, that the trustees Baydunes Body Corporate acted outside of its powers in purporting to give effect to the wishes of the members of Baydunes Body Corporate to grant permission tor the illegal conversions to be regularized. Ultimately, having regard to the evidence as a whole the Applicant tailed to make out a prima lacie case that the Body Corporate acted in a manner not consistent with being prudent and reasonable, and using sound business judgment, and avoiding arbitrary or capricious actions and therefore had the effect of the resolutions being taken being null and void. This finding is substantiated by the conduct of the trustees in their action in appointing a Land Surveyor to update and prepare a Sectional Titles Schemes Plan to regularize the illegal conversions in an attempt to protect the investment value of Baydunes which is approximately R 180,000,000 and that the decision of the trustees is aimed at protecting this investment in the interest of all owners of Baydunes Body Corporate. It also has to be recognized that the affected sections which were illegally paved or enclosed remain common property and the owners had become responsible for the maintenance of said paved areas or extensions. The Applicant could also not proof on a balance of probability that the conversions is or was likely to interfere with the use and enjoyment of other sections, as no objections to these conversions had ever been registered by owners.

In terms of **Section 54** of the CSOS Act the following order is hereby made by the Adjudicator:

9.1 That the relief sought in terms of paragraph 5.1 be dismissed on the basis that a change of use as envisaged by s 13(1)(g) of the STSMA read with PMR 30(/) requiring the consent of all the owners at Baydunes before same may be permitted, was not required for the conversions of the garages as the sectional title scheme plan below already demarcated the section as an exclusive use area:



9.2 That the relief sought in terms of paragraph 5.2, i.e. that the purported adoption of Conduct rule 1O be declared unlawful and therefore invalid, be dismissed;

9.3 That the relief sought in terms of paragraph 5.3, that Resolutions 8.1 and 8.3 be declared invalid and/or void, be dismissed; and

9.4 That the Respondent be ordered to ensure compliance with the conditions of the Municipal By-laws, i.e.

9.4.1 That all units should have the required parking bays with special attention to those owners whose units were built in such a way that no exclusive use area adjacent to their unit is available;

9.4.2 That the conversions comply with the relevant Municipal By-Laws as well as National Building Regulations etc, and

9.4.3 That the conversions are consented to by the Body Corporate.

9.5 That the Respondent be ordered to ensure that the corrective measures undertaken ensure equal and fair allocation of exclusive use areas to be reflected in the Sectional Titles Plan when submitted to the Chief Ombud for consideration/ approval and registration.

10. ENFORCEMENT OF ORDER

The parties' attention is drawn to-

Section 56 (1) of the CSOS Act which 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" and

Sub-section (2) which 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*."

11. RIGHT TO APPEAL

Parties are hereby reminded that in terms of Section 57 of the CSOS Act any Party or affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law. Said appeal against an order must be lodged within 30 days after the date of delivery of the order of the Adjudicator and the 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.