

Pauline Leith and Mullerhof Body Corporate v Merryck Griffiths

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 225/WC/17
Adjudicator: Nomonde Keswa
Date: 25 July 2017
1st Applicant: Pauline Leith
2nd Applicant: Trustees of Mullerhof Body Corporate
Respondent: Merryck Griffiths



INTRODUCTION

[1] After the parties failed to resolve the dispute amicably between themselves, the applicants lodged the matter for dispute resolution by the Community Schemes Ombud Services (CSOS) in terms of Section 38 of The Community Schemes Ombud Services Act, Act 9 of 2011. The matter was referred for adjudication in terms of Section 48 (4) of the said Act after the conciliation process failed.

The essence of the dispute is that a wooden deck was built in the common area without the authorisation of the Body Corporate and approval of the City Council. The wooden deck is said to have caused water ingress to the unit below which caused damage to its interior. The applicants want the wooden deck to be removed and the resultant damage repaired. The respondent disputes that the water damage in unit 6 is caused by the wooden deck and therefore contests its removal.

SUMMARY OF THE ISSUES IN DISPUTE

[2.1] Whether the wooden deck (deck) is illegal or not and whether the owner of unit 8 bought the property knowing that the deck was illegal;

[2.2] The advisability or otherwise of removing the deck;

[2.3] Whether the deck caused or contributed to the water damage in the structure and electricals of the unit below;

[2.4] Of the parties who should bear the costs of remedying the damage caused to unit 6.

PARTIES

[3.1] Pauline Leith is the owner of unit 6 of the Mullerhof Sectional Title Scheme. She is first applicant in this matter.

[3.2] The Trustees of the Mullerhof Body Corporate are the second applicants in the matter. They are represented by their chairperson, Shaida Ganie and another Trustee Tom Mclvor. They are assisted by one of the portfolio managers of the managing agent.

[3.3] Merryck Griffiths is the owner of unit 8 of the Mullerhof Sectional Title Scheme. He is the respondent in this matter.

CHALLENGE ON THE PROCESS BY THE RESPONDENT

[4] The respondent challenged the presence of two of the people attending the proceedings. He submitted that the First applicant was conflicted because she is not only a complainant in the matter but she is also a Trustee. He questioned the need for the presence of Tom Mclvor when the Chairperson of the Trustees, Ms Shaida Ganie is present while another Trustee is absent. He submitted that the Trustees' representatives were conflicted as Tom and Shaida are married.

He also questioned why his complaint to CSOS lodged earlier than this one has not been set down for hearing.

FACTUAL BACKGROUND

[5.1] In 2005 the First applicant purchased unit 6 of the said Sectional Title Scheme;

[5.2] In 2012 the respondent purchased unit 8 of the said scheme. At the time of purchase, Unit 8 had a wooden deck erected on the common property above one of unit 6's bedrooms. The deck is rested on parapet walls above the bedroom with a roof made of corrugated iron. The deck is not insulated.

[5.3] The deck was neither authorised by the Body Corporate nor approved by the City Council.

[5.4] The deck is built on common property. As a structure built on common area which is not approved for exclusive use, it should be open for access, use and enjoyment by all the owners. However, the deck cannot be enjoyed by all owners as it can only be accessed through unit 8.

EVIDENCE SUBMITTED

[6.1] First applicant submitted that from as far back as February 2012, she raised complaints with the Body Corporate on continual and ongoing structural damages in her unit and the costly repairs she had to make. She said

that the trustees did not investigate this matter at that time in spite of the undertaking made to do so. She left on an international work assignment in March 2013, leaving the property rented out. She submitted that the damage to the second bedroom meant that the rental income was reduced.

[6.2] In March 2016, she came back to South Africa. She submitted that on her return, she undertook major repairs to the second bedroom and the lounge of her unit due to water damage.

[6.3] Following the heavy rains in June 2016 and further water seepage into her flat, First applicant submitted that she again formally registered these problems with the Trustees and the Managing Agent.

[6.4] She submitted a copy of the report of the assessment conducted on electricals by Active Electric to show a serious risk to the electrical supply as the water pools in the wall area where the electrical sub board is located. She said this necessitates that the sub-board be relocated at a cost of about R8892. Reference is made to section 6A of the First applicant's bundle of evidence.

[6.5] She also submitted a copy of the report of the assessment conducted by a Master builder named Jerome O'Ryan from Top Deck Waterproofing and Restoration to determine the cause of the structural water damage in unit 6 and the extent thereof. She submitted that according to this assessment report the damage is as a result of the water ingress from the unit above. A copy of the assessment report and the scope of repair work to be done was submitted into evidence. Reference is made to section 6B of the First applicant's bundle of evidence.

[6.6] She submitted copies of photographs showing the water damage to various parts of her unit. Reference is made to section 5 of the First applicant's bundle of evidence.

[6.7] The respondent refuted that the water damage in Unit 6 is caused by water leaking from the deck in his unit. He submitted that water leaks do occur in any building all the time even in his unit he experiences such leaks from the roof from time-to-time. He emailed a document from ON

SITE BEST PRACTICE compiled by Jerome O'Ryan to rebut the assessment made by Jerome O'Ryan from Top Deck. Reference is made to document on file notated MG 1.

[6.8] The respondent submitted that when he purchased the flat the wooden deck was the main attraction. He said that he paid more for the unit because of the additional cost of the deck. He refuted the notion that he purchased the flat knowing that the deck was illegal. He submitted email correspondence dated 23 and 24 February 2012 between the attorney perceived to be the legal representative of the Body Corporate and the conveyancer engaged to process the transfer. The email does not say anything about the legal status of the deck but confirm that the deck is on common property. Reference is made to document on file notated MG 2.

[6.9] In support of the need for the deck to be removed, the First applicant submitted that the noise and litter emanating from the deck above is a nuisance and interferes with her enjoyment of her garden in violation of section 12.7 of the scheme rules of conduct. Reference is made to section 3 of the First applicant's bundle of evidence. She submitted some of the litter as exhibits. She further submitted that people do peep from the deck above thus invading her privacy. The respondent countered that this reason is not enough to justify the removal of the deck because screening could be erected to provide the unit below with privacy.

[6.10] The respondent opposed the removal of the deck as he contends that it has not contributed to the water damage in unit 6. He proposed instead to lift the deck once every five years to allow access to the roof of unit 6 so that leaks from the roof can be repaired and maintenance undertaken. The Trustees however rebuffed the idea that roof maintenance is only carried out in five yearly intervals. They submitted that maintenance work on the roofs is an annual undertaking for which lifting of the deck is not a realistic proposition.

[6.11] The respondent submitted that it would be a dereliction of the Trustees' fiduciary duty if they were to remove the wooden deck as the scheme would lose one of its assets that enhances the property's value. The Trustees countered this argument by submitting that the

money required to maintain this deck for the benefit of one owner is not cost-effective. They submitted that the repairs already done to the wooden deck to replace some of the planks cost R30,000, which would escalate if the entire deck was to be repaired. They contend that it would drain the Body Corporate's financial resources which they require to finance new projects such as installation of new lifts and to meet their financial obligations to meet the requirements as set out in the Community Schemes Ombuds Services Act and regulations. They said that keeping the deck will cause more damage to unit 6, repairs of which will add to the financial burden the Body Corporate should shoulder. The trustees submitted that for these reasons the deck should be removed.

[6.12] The Trustees submitted that the owner of unit 8 has been given several ultimata to remove the deck but has failed to do so. They are now applying for relief to get the deck removed as they say it is illegal, costly to maintain and they are convinced that it is the cause of the water ingress damaging unit 6.

FINDING

[7.1] Challenging the process

7.1.1 The presence of a conflict of interest in parties attending these proceedings

Conflict of interest is defined as a situation that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person's self-interest and professional interest or public interest.

I do not find that there are any of the parties conflicted in these proceedings because:

Pauline Leith has approached this tribunal to assert her constitutional rights to protect her property. It cannot be easily alienated. She is not an arbitrator in her own case. She is therefore not pitting her interests against those of the Body Corporate. The Body Corporate is being represented by other people. In the facts given there seems to be no attempts to have an unfair advantage over the Body Corporate because of her position as a Trustee.

Tom Mclvor and Shaida Gaines are attending the proceedings as representatives of the Trustees and the Body Corporate. Tom Mclvor is reported to be a Trustee responsible for maintenance of buildings/common area and Shaida Gaines is said to be the chairperson of the Trustees. They are attending to provide the perspective of the Trustees on these issues as they affect the Trustees and the Body Corporate and will be impacted by the decision of this tribunal. I do not find their presence conflictual. Their marital relationship is not found to have any material effect on their representation at this tribunal.

7.1.2 Earlier complaint not being heard

On enquiring on the management of these cases, the tribunal was advised that when the respondent received the notice of the adjudication hearing of this matter, he should have enquired about the hearing on his own matter and establish when it will be set for a hearing. It was indicated that the chronology of the lodgement of matters does not determine the chronology of their hearings. There are various factors which influence when a matter is set down for a hearing as prescribed in the Community Scheme Ombuds Service regulations. However, it is important that complainants are kept abreast of the progress of their matters to avoid creating perceptions of bias and delayed justice.

[7.2] The legal status of the deck

All the parties agreed that the construction of the deck by the previous owner of unit 8 did not comply with the rules of the Body Corporate and the City's By Laws. However, the current owner of unit 8 did not know about this when he purchased the property. The email correspondence between the attorney Everson and the conveyancer does not address this issue. He only became aware that the deck was illegally built when the issue of water damage was raised a couple of years later.

The approved Sectional Title Plans submitted into evidence do not include the wooden deck in unit 8. I find that the construction of the deck did not comply with the rules of the Scheme because no proof was submitted that the Body Corporate and its Trustees authorised the construction of

the deck. I also find that the deck is illegal as no proof was submitted that the deck was approved by the City Council.

[7.3] The cause of the water damage in unit 6

I did not find in the emailed document submitted into evidence by the respondent a rebuttal of the assessment by one building expert that there is:

“water ingress from unit 8 into unit 6 below and leak in the lounge through parapet walls”.

The parapet walls are the support structure for the wooden deck above. His verbal evidence that the damage in unit 6 must be as a result of roof leaks was not supported by expert opinion.

In the absence of such a rebuttal, the expert opinion stands unchallenged. Therefore, there is no other finding that can be made other than that the water ingress from unit 8 and the leak through parapet walls supporting the deck caused or contributed to the damage to unit 6 below.

[7.4] The removal or not of the deck

It has been established in paragraph 7.2 above that the construction of the deck was illegal. The logical next step is to either legalise the structure or remove it. The owner of the structure must determine what the best course of action should be. There is no contestation that the deck is built on common property and therefore belongs to the Body Corporate.

The Trustees submitted that common property must be for the enjoyment of all owners. In this instance, they submitted and the respondent did not challenge that he is the only one who has access to the deck and therefore enjoys its benefits. They further submitted that based on remedial and maintenance work done on the deck and the resultant cost already incurred by the owner of unit 8, retention of the deck would be costly to the Body Corporate without any benefit accruing to the rest of Body Corporate. In addition, the Trustees would have to remove the deck every time they want to carry out maintenance work on the roof of unit 6. For this reason, they do not want to legalise the structure and take on its maintenance. They want it removed.

The argument against its removal is based on the enhanced value the deck brings to the unit specifically and the entire complex generally. Proof of the cost benefit analysis was not submitted into evidence to rebut the argument that it would be costly to maintain for exclusive use of one owner. I conclude that in the absence of such rebuttal, there is no other finding that can be made but to accept the Trustee's argument for the removal of the deck.

The evidence submitted to prove littering cannot be accepted as conclusively coming from the deck above. There was no way of verifying that it indeed was litter from the deck and not from somewhere else.

[7.5] The responsibility for costs.

7.5.1 Cost of removing the deck:

It was submitted that the Trustees on behalf of the Body Corporate are responsible to maintain and repair any damages on the exterior walls, roofs and all common property of Mullerhof.

It has been established that the deck is common property. Therefore any costs related to the deck whether its cost of removal or its maintenance or remedying any damage caused by the deck should be the responsibility of the Trustees. The current owner of unit 8 cannot be held responsible for the cost of removing the deck or remedying the damage it has caused. It never was his from the day he purchased it. The Body Corporate and its Trustees should never have allowed the previous owner of unit 8 to retain the illegal deck and sell the decked unit to the current owner in the first place. The Trustees should acknowledge their failure to pursue this matter with the previous owner to its logical conclusion.

7.5.2 Cost of repairs to unit 6:

The First applicant claimed costs of repairing her unit to its original condition. The photographs submitted into evidence showed the extent of the water damage in unit 6. Reference is made to section 5 of the First applicant's bundle of evidence. The quotation she received to repair the damage was submitted into evidence. Reference is made to section 6B of the First applicant's bundle of evidence. It is established that the damage to unit 6 is as a result of water ingress from unit 5's deck. The responsibility for these

repairs should be borne by the Trustees.

7.5.3 Legal costs:

The First applicant indicated that although she incurred legal costs in the process of asserting her rights to protect her property, she was not claiming compensation for those costs.

7.5.4 Other costs

The First applicant submitted in section 9B of her bundle of evidence a bill of costs of the work that was done in her unit in March 2016. Of this cost, an amount of R8900 is said to be for painting the bedroom. Reference is made to email correspondence dated 10 March 2016 in which the applicant advises the Trustees on this repair work for which she claims compensation. Refer to section 9C of First applicant's bundle of evidence.

She submitted a cash invoice for the cost of an electrical cable to the value of R590 for which she did not claim for reimbursement. Refer to section 9A of First applicant's bundle of evidence.

ORDER

[8] It is hereby ordered that:

8.1 The Trustees remove the deck in unit 8 and restore this common area to its original condition within thirty days from the date of delivery of this order;

8.2 The Respondent provides reasonable access to the Trustees to remove the deck and undertake restoration work within the said period;

8.3 The Trustees, at their own expense, commission the relocation of the electrical sub-board within seven days of the delivery of this order;

8.4 The Trustees, at their own expense, repair the water damage to unit 6 and restore it to its original condition within six weeks of the delivery of this order;

8.5 The First applicant provides reasonable access to her unit in line with the needs of the construction.

8.6 The Trustees reimburse the First applicant an amount of R8,900 being the cost of repairing the damaged walls undertaken in March 2016.