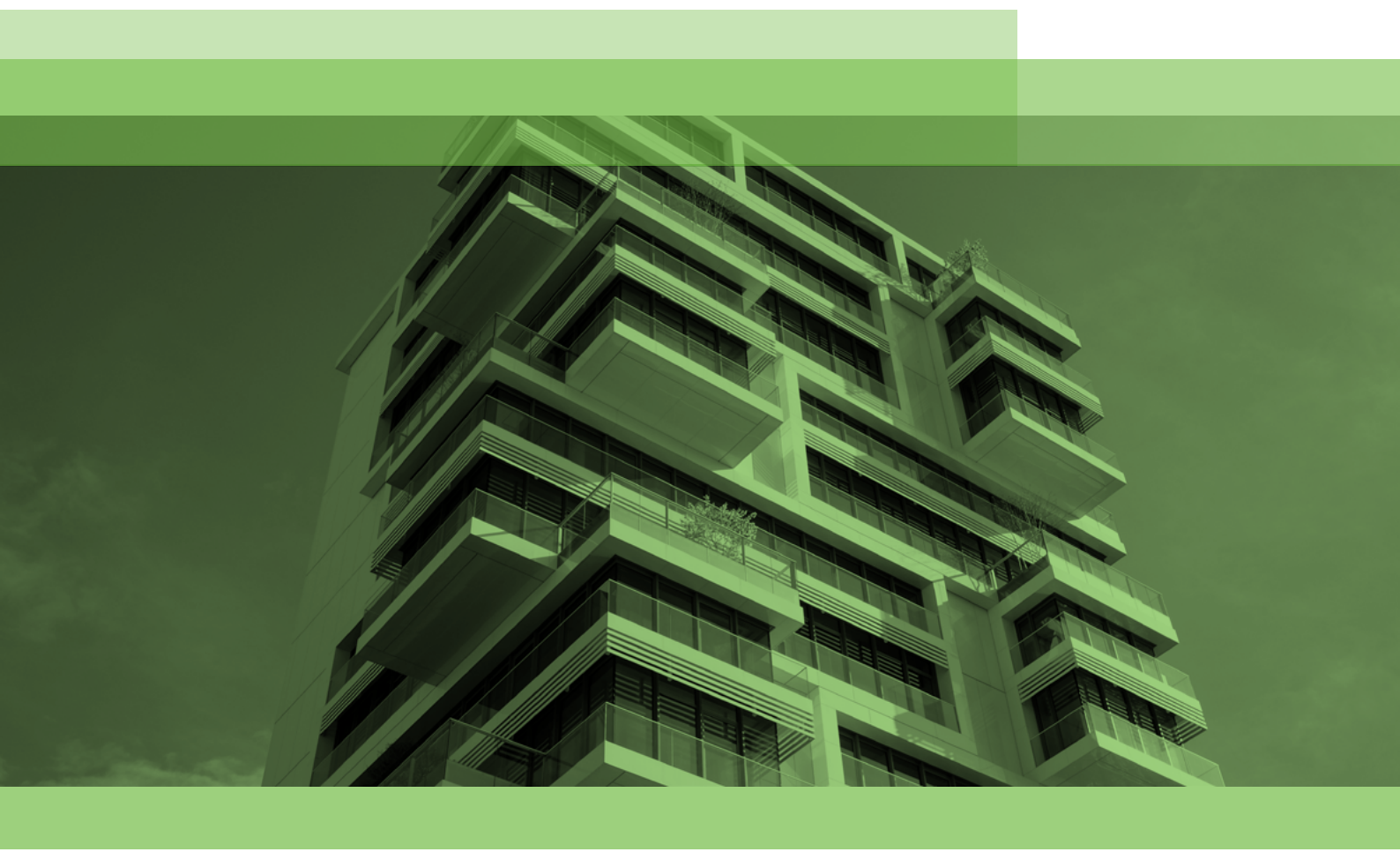


Regina Lamoral v Leisure Bay Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 94/WC/17 and 7/WC/17
Adjudicator: H E Louw
Date: 8 July 2017
Applicant: Regina Lamoral
Respondent: Trustees of the Leisure Bay Body Corporate,
Grant Eglin and Faircape Managing Services



ORDER

[1] This adjudication is made pursuant to two requests for adjudication made by the Applicant under Section 38 of the Community Scheme Ombud Services Act, number 9 of 2011 ("CSOSA") which came into force on 7 October 2016. The Parties indicated that a conciliation attempt did not succeed, hence the referral to adjudication. The two applications were joined.

[2] The Applicant is Regina Lamoral, the registered owner of Units 124 and 224, units in the Leisure Bay sectional title scheme.

[3] The Respondents are:

3.1 the Body Corporate of the Leisure Bay sectional title scheme, situated in Milnerton (the "Scheme");

3.2 the Managing Agent of the Scheme;

3.3 Mr Grant Eglin, the registered owner, alternatively the occupant, of Unit 230, Leisure Bay.

[4] The dispute between the Parties arose on account of the cat kept as a pet by Mr Eglin. It is the contention of the Applicant that the cat causes a nuisance and that no or insufficient action has been taken by the trustees, acting on behalf of the Body Corporate and/or the Managing Agent to enforce the rules of the Scheme insofar as the presence and movements of the cat are concerned. The relief sought by the Applicant is enforcement of the Scheme rules against Mr Eglin, which may include an order to Mr Eglin to remove the cat.

[5] The legal framework wherein the matter is to be adjudicated is that of the Sectional Titles Schemes Management Act, no 8 of 2011 ("the Act") which came into force on 7 October 2016. The Act is aimed at ensuring, inter alia, the proper functioning of sectional title schemes, transparency and prevention of the abuse of power.

[6] One of the significant duties and powers of a body corporate in terms of Section 4 of the Act is "to do all things reasonably necessary for the enforcement of the rules and

for the management and administration of the common property."

[7] The other relevant statutory provisions are:

7.1 Section 39 (2) (b) of CSOSA which reads as follows: "(An application made in terms of section 38 must include one or more of the following orders) ...if satisfied that an animal kept in a private area or on common areas is causing a nuisance or a hazard or is unduly interfering with someone's peaceful use and enjoyment of his or her private area or common area, an order requiring the owner or occupier in charge of an animal - (i) to take specified action to remedy the nuisance, hazard or interference; or (ii) to remove the animal."

7.2 The Conduct Rules of the Scheme ("the Rules") as a whole;

7.3 Rule 7.2 of the Conduct Rules of the Scheme which reads as follows:

"Any owner/occupier who has been granted authority to keep or harbor any animal, reptile or pet shall ensure that such animal, reptile or pet does not foul any part of the common property or otherwise cause any nuisance (my emphasis). Owners/occupiers concerned will be responsible for cleaning up any fouled common property."

[8] The facts in this dispute can be summarized as follows:

8.1 It is common cause that Mr Eglin has been granted permission in terms of Rule 7.1 to keep a cat as a pet;

8.2 There is no dispute between the Parties that the cat has on more than one occasion entered the section owned by the Applicant and was also seen in the pool area;

8.3 The extensive email correspondences between Dr Sheena Fraser, the Managing Agent and other trustees clearly indicate that:

8.3.1 the Trustees engaged with each other and the managing agent earnestly in their attempts to address complaints about animals and to uphold the Rules of

the Scheme;

8.3.2 the cat belonging to Mr Eglin has been the subject of complaints by owners other than the Applicant (mention is made of complaints by one Gildenhuys and also the general manager of the hotel);

8.4 A number of owners in the Scheme have been granted permission to keep animals and the Scheme is generally described as “pet friendly;”

8.5 Whilst there is some confusion around the so-called “pet schedules” kept by the Managing Agent, it is clear that at least two “warning” letters have been issued to Mr Eglin with respect to the cat (I will refer to the reference to Section 7.1 instead of 7.2 of the Rules in these letters below).

[9] The interpretation of “nuisance” is always problematic: it is often in the eye of the beholder, but that does not imply that any behaviour should not also be judged, as far as one is able to do so objectively, for its reasonableness. The particular ethos in any scheme is certainly also relevant - what is considered reasonable or acceptable behaviour in one scheme is not necessarily so in another. Further, the question of animals always invoke emotion as people, understandably, are attached to their pets and any order to have a pet removed should be carefully considered and implies a weighing up of the rights of the pet owner against that of those that complain.

[10] With reference to the facts in this matter and the powers and duties of trustees to enforce the Rules, I conclude as follows:

10.1 I am satisfied that the behaviour of Mr Eglin's cat stipulated in the complaints lodged with the Body Corporate does in fact, objectively seen, constitute a nuisance and that the behaviour amounts to a transgression of Rule 7 (2). The fact that cats are likely, by nature, to roam and that the Scheme is seen as pet friendly does not detract from the fact that an owner cannot be expected to welcome somebody else's unwanted cat in his or her section or exclusive use area and that, on weighing up the rights of the owners, the complainant deserves

protection. The fact that Mr Eglin's genuine attempts to prevent his cat from roaming or entering other units have not been successful, is not the Applicant's problem. Rule 13.11 also clearly states that animals are not allowed in the pool area;

10.2 The debate around the validity or not of the pet schedule and the discrepancy between the version handed in at the hearing and the one that later transpired is largely academic and not relevant. There is no stipulated duty on the Trustees to keep a pet schedule. The same applies to the warning letter allegedly issued (or not) on the complaint of the Applicant on 23 November 2016. The question is whether or not the Trustees, as represented by the Managing Agent, did all things reasonably necessary for the enforcement of the Rules. I have no reason to believe that the Trustees acted mala fide or tried to falsify evidence or documentation. The extensive email correspondence between the members of the Trustee committee, the Managing Agent and Dr Fraser in January 2017 clearly indicates that the complaint about Mr Eglin's cat was not ignored. I found no evidence to indicate that Mr Eglin was protected by the Trustees or received special treatment. The Rules do not stipulate a certain procedure to be followed in the case of a complaint about non-compliance with any rule and the notion that three valid warnings are required before an owner may be forced to remove an animal is nothing more than custom or practice by the Body Corporate. More to the point, the Rules do not specify what remedial action are to be imposed by Trustees in the case of a transgression of Rule 7 (2) and the provisions of Section 15 (“Imposition of Penalties”) place no obligation on Trustees to levy a fine in the case of a breach, disregard or disobedience of the Rules. This Section merely requires that any imposition of a fine has to be preceded by “a written notice” which notice is to set out the contravention and must contain a warning of a fine in the case of continued transgression;

10.3 In the absence of specific rules stipulating remedial or punitive action in the case of disobedience of a Rule, one has to ask what is reasonable and what can be expected of Trustees in the circumstances to ensure that they comply with the requirements of the Act. At the very least, one would expect the Trustees to investigate

the matter (including hearing such evidence as may be necessary), amongst themselves resolve whether or not a transgression has (as far as possible objectively seen) taken place, to discuss and decide on the appropriate remedial action (bearing in mind that all owners are to be treated equally and that precedent is important) and; should they be satisfied that the complaint is valid, issue an appropriate warning to the transgressing owner, unless the transgression is of such a serious or urgent nature that a warning is not required. In this regard and in the case of this Scheme, one has to take cognizance of the contents of Rule 15, given that this is the only section in the Rules addressing remedial/punitive action. It is also furthermore relevant that, although one does not want to make light of the complaint, the complaint about the cat is not a matter of life or death. As such, an appropriately worded warning should have been issued to Mr Eglin on receipt of the complaint(s). The warning(s) indeed issued to Mr Eglin (on the version of the Trustees, two valid warnings were issued) refers to Section 7 (7) of the Rules (there is no such section) and quotes Section 7.1, whereas the relevant section is quite clearly Section 7 (2). The warning(s) also do not contain any warning of the (potential) action which will be instituted by the Trustees on disregard of the warning. As such, the warnings are in my view not adequate, given that the ultimate remedy that the Trustees will have to impose if they are to do "all things reasonably necessary for the enforcement of the Rules" as stipulated by the Act, is quite severe, namely the removal of the cat.

appeal to the High Court on a question of law.

[11] On the basis of the above, I order that:

11.1 as there has been a disregard of or disobedience of Rule 7 (2) by Mr Eglin, the Trustees are to issue an appropriately worded warning letter to Mr Eglin, stipulating that, in the case of any transgression of Rule 7 (2) within six months of the warning letter, the Trustees will order the removal of the cat which removal is to take place within a further one month.

11.2 the Body Corporate is to pay the costs of the hearing.

[12] The Applicant, the Body Corporate, the Managing Agent, Mr Eglin or any person affected by the order may