Selwyn Kahn v Aspley Court Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 127/WC/17
Adjudicator: Adv. Dries du Toit
Date: 19 December 2017
Applicant: Selwyn Barry Kahn
Respondent: Aspley Court Body Corporate

PARTIES

[1] The applicant is the owner of Unit number 503 (Section 27) Aspley Court Body Corporate, Main Road, Green Point, Cape Town.

[2] The respondent is the Aspley Court Body Corporate Sectional Title Scheme, represented by Mr EJ Braun in his capacity as Chairperson of the Trustees. Aspley Court Body Corporate is a "community scheme" as contemplated in the CSOS Act of 2011. The definition of "community scheme" means any scheme or arrangement in terms of which there is shared use of and responsibility for parts of land and buildings.

INTRODUCTION

[3] This is an application for dispute resolution in terms of Section 38 of the Community Schemes Ombud Services Act No.9 of 2011. The application was made in the prescribed form and lodged with the Western Cape Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.

[4] This adjudication hearing took place on 12 December 2017. This application is before me as a result of a referral sent by the Western Cape Provincial Ombud in terms of section 48 of the Act, which 'Notice of Referral' was communicated to both parties.

APPLICABLE PROVISIONS OF THE ACT

[5] The application was submitted in terms of section 38 of the CSOS Act No,9 of 2011 which provides that -

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

[6] Section 39 provides that -

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

(3) In respect of scheme governance issues - (d) an order declaring that the scheme governance provision, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable, and requiring the association to approve and record a new scheme governance provision -

(i) to remove the provision;
(iii) to amend the provision or
(iv) to substitute a new provision.

(7) In respect of general and other issues -

(b) any other order proposed by the chief ombud."

[7] Section 47 provides that -

"on acceptance of an application and after receipt of any submissions from affected persons or responses from the applicant, if the ombud considers that there is a reasonable prospect of a negotiated settlement of the disputes set out in the application, the ombud must refer the matter to conciliation."

[8] Section 48 provides that -

"If conciliation contemplated in section 47 fails, the ombud must refer the application together with any submissions and responses thereto to an adjudicator."

SUMMARY OF DISPUTE

[9] Applicant alleges that the raising of special levies relating to improvements to common property (as per the "Mitchell Report") are not reasonably necessary and should rather be implemented over a period of time.

APPLICANT'S VERSION

[10] Applicant avers that he was a trustee for ten years and chairman of the Body Corporate for nine years since 2001. Regular meetings were held during that period where not only trustees were invited to these meetings and it was transparent, which is not the case anymore.

[11] Applicant contests that specifications from THC Building Consultants (obtained in July 2016) regarding proposed maintenance work amounting to R 1 million was distributed

to owners in September 2016, prior to the Annual General Meeting (held on 6 December 2016), which did not contain the necessary figures (financial breakdown). There was further also no discussion regarding the proposed upgrades amongst the owners and trustees.

[12] Applicant avers that notwithstanding above circumstances and the fact that these figures only became known during the 2016 AGM meeting, a vote was called for (as he put it "bulldozed") on the matter. One of the trustees Mr R de Jager's requests were "shouted down" also. The chairperson therefore unduly influenced the members at the meeting.

[13] Applicant contests that the proposed upgrade is essentially luxurious, unessential and prohibitively expensive which consequently requires a special levy. The monies should rather be used for the aged lilt which might become inoperative in the near future.

[14] Applicant concedes that it was agreed between the parties at the CSOS Conciliation Meeting (held on 20 April 2017) that an independent building consultant would be appointed, alter which applicant proposed Mr Jonathan Mitchell, who was then appointed. He further concedes (when asked) that he does not dispute the content of the Mitchell Report, although some items were not dealt with therein (i.e. the lift).

[15] Mr de Jager also obtained a legal opinion from Paddocks (dated 9 August 2017) in this regard, which will be referred to in the evaluation hereof below.

[16] The special levy will adversely affect many owners, especially the retirees and pensioners.

APPLICANT'S PRAYERS

[16.1] To set aside the imposed Special Levy.

[16.2] To institute selective maintenance regarding matters which are unavoidable and essential over a period of time.

RESPONDENT'S VERSION

[17] Mr E Braun (chairperson and representative of the body corporate) states that he has been the chairperson since 2010 and refute any undue influence or shutting down of any arguments about these reservations at any of the meetings.

[18] Mr E Braun further states that Mr de Jager has since resigned as trustee in June 2017 and that repair and maintenance work to the lift is determined by the agreement ente1·ed into with Schindler's.

[19] It was agreed at the 2015 AGM that quotes and specifications must be obtained for the upgrade of the complex which would necessitate a special levy. Subsequently a letter was sent to all owners in September 2016 (inclusive of a levy schedule to wit costs will be raised) advising them of the project and special levy to be further discussed at the upcoming AGM. No objection was filed hereto within the prescribed thirty day time period as well.

[20] All members were advised at the 2016 AGM that an informal meeting will be held between the owners and the consultant who dra ed the specification and costing to address any possible concerns from the owners. The raising of a special levy as adopted by a majority vote of 31% versus 17% where the necessary approval required was 22. 72% of the owners present in person or by proxy. A subsequent letter from Coastal Property to all owners dated 9 December 2017 indicating that it was agreed that a special levy of R1000 000 will be raised with effect from 1 January 2017 payable over 18 months.

[21] Mr J Maree (as independent chairperson) chaired the 2017 AGM where the pending CSOS dispute was discussed and pointed out by Mr E Braun that it was agreed at the CSOS Conciliation Meeting that Mr Mitchell would be appointed to do an assessment and indicate whether the maintenance work to be perfo1·med can be regarded as "luxurious or non-luxurious" work.

[22] An informal meeting whe1·e six members were present further took place in February 2017. The Mitchell Report

only contains essential work and the entrance hall does not form part of the report.

[23] The fire fighting equipment (fire extinguishers) which were all out of date and regarded as extremely urgent according to the Mitchell Report, have been rectified in the meanwhile.

EVALUATION OF EVIDENCE SUBMITTED

[24] The Mitchell Report and content thereof was agreed to between the parties (at the Conciliation Meeting) and therefore not in dispute. The terms of reference in the Mitchell Report (inspection date noted as 17 October 2017) is also noted and indicated as; "...To peruse the 'Tender for Rehabilitation of Aspley Court Analysis', prepared by THC Building Consultants and for the Building Consultant to prioritize the remedial work which is required to be undertaken relatively imminently ....The purpose of the report is to guide the Trustees and Managing Agents in being able to make an informed decision as to which remedial work is more urgent than other remedial work and non-luxurious improvements to portions of the building." The Report categorise the different kind of remedial work into categories of; "absolutely urgent", a "second category of urgent works", a "third category of relatively urgent remedial work" and lastly "items of lessor urgency." The Report also deals with the elevator where it is note that the servicing of the lift should merely continue in accordance with the requirements of the Occupational Health and Safety Act Regulations. The findings in the Report seems reasonable in the circumstances and is accepted.

[25] It is also noted that the 2016 AGM Minutes indicate that Mr de Jager was provided the opportunity to raise his concerns, which is also noted in the minutes. The allegation by Applicant of undue influence is therefore found to be without any substance and rejected.

[26] Prescribed Management Rule 29(2) of the Sectional Titles Schemes Management Regulations 2016 prescribes that the body corporate (the trustees) may propose to make alterations or improvements to the common property that are reasonably necessary ...." The term "reasonably necessary" is however neither defined in the Sectional Title Schemes Management Act nor the Rules in which case it is interpreted in accordance with the accepted principles of interpretation as determined by the Law of Interpretation and the ordinary meaning attach thereto.

[27] I have perused the Opinion from Paddocks (as compiled by Ms Z van der Merwe dated 9 August 2017) in this regard and concur with their point of view on p5 par. 17 where she states that; "In our view, the fact that proposed improvements may be beneficial to the use and enjoyment of the common property, the increased market value and desirability of the units within the scheme and the associated reputation of the scheme, may deem that the proposed improvements are reasonably necessary ...." Further in par. 18 also that; "Our view is that an improvement to the common property does not have to be incontrovertibly 'essential' or an 'absolute necessity', in order to qualify as being reasonably necessary in nature for the purposes of Prescribed Management Rule 29(2) of the Sectional Title Schemes Management Act, authorised by special resolution of the members of the body corporate, following compliance with the provisions of the PMR 29(2) of the STSMA.

[28] Cognisance is also taken of the requirements stated in Section 3(1) of the STSMA which prescribes that the body corporate (the trustees) must perform the functions entrusted to it under the STSMA, including the function (l) to maintain all the common property, and to keep it in a state of good and serviceable repair, and (q) to maintain any plant, machinery, fixtures and fittings used in connection with the common property and sections, and to keep them in a state of good and serviceable repair.

ADJUDICATION ORDER

[29] In the circumstances, the following order is made in terms of Section 54(1)(a) of the Community Schemes Ombud Service Act No.9 of 2011; Applicant's relief sought in this instance is refused and his claim is accordingly dismissed.

No order is made as to costs herein.

RIGHT TO APPEAL

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

(1) An applicant, the association or any affected person who is dissatisfied by an adjudicator's order, may appeal to the High Court, but only on a question of law.

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

(3) A person who appeals against an order, may also apply to the High Court to stay the operation of the order appealed against to secure the effectiveness of the appeal.