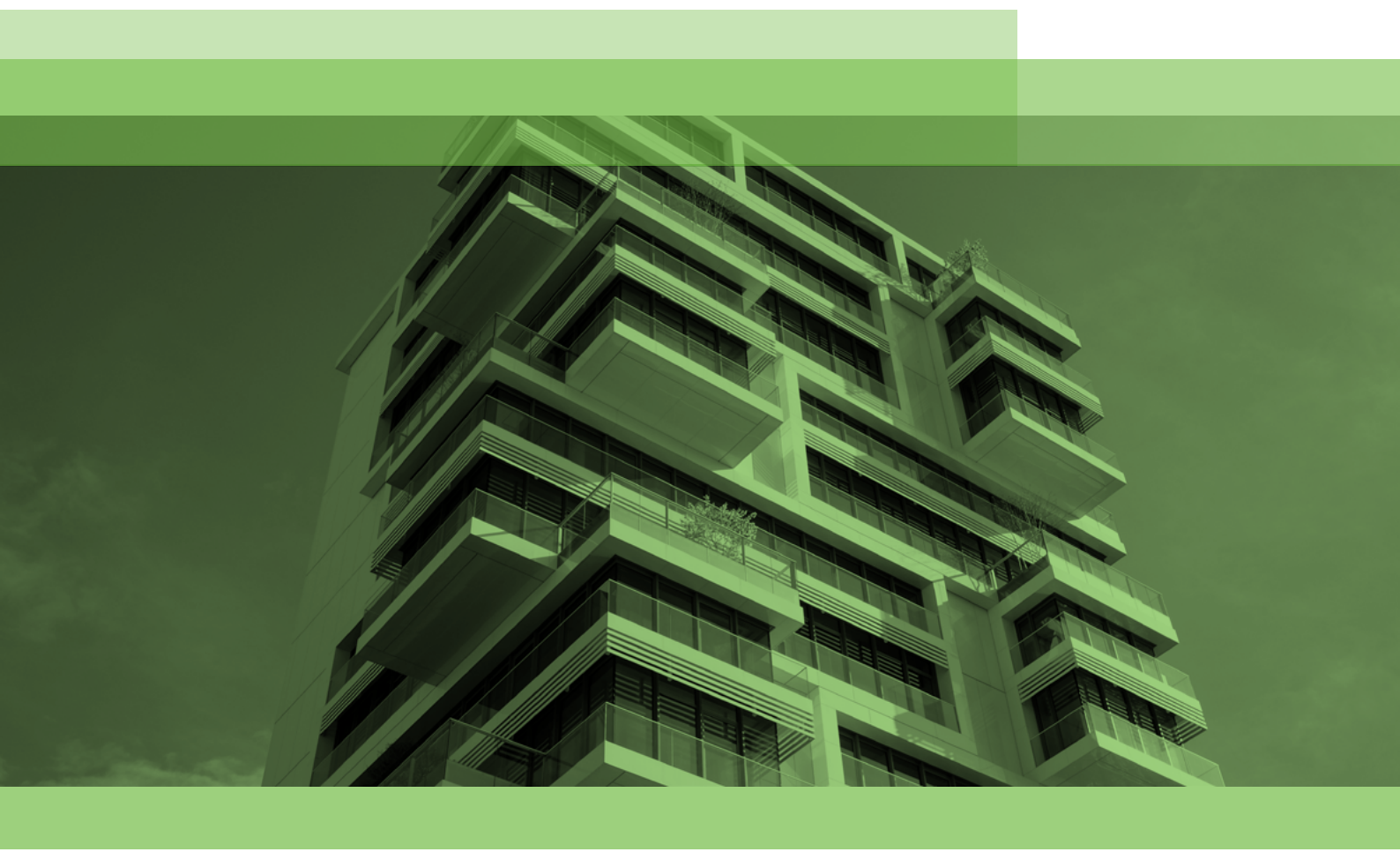


Marinda Siems v Zeechicht Sectional Title Scheme

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 124/WC/18
Adjudicator: Adv. GPC De Kock
Date: 22 October 2018
Applicant: Marinda Siems
Respondent: Zeechicht Sectional Title Scheme



EXECUTIVE SUMMARY

*Category(ies) of dispute {financial, behavioural, schemes governance, meetings, management services): **Governance.***

In terms of the Summary of Dispute the Applicant is seeking an order in terms of section 39(3)(d)(i) of the Community Schemes Ombud Service Act No.9 of 2011 ("the CSOS Act") declaring that a scheme governance provision, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable and must be removed, and requiring the association to approve and record a new scheme governance provision.

On behalf of the Applicant it was submitted that Conduct Rule 15(8) of the scheme whereby no section may be let or be made available for occupation for a period of less than 90 (ninety) successive days was unreasonable and that the rule arbitrarily limits the Applicant's right to the full use and enjoyment of its property.

On behalf of the Respondent it was submitted that the relevant Conduct Rule was not unreasonable and was supported by the majority of the owners and that the Conduct Rule limiting short-term letting was already in place at the time that the Applicant bought the units in the name of the companies.

Finding: *In terms of section 39(3)(d)(i) of the CSOS Act it is found that the scheme governance provision as contained in Conduct Rule 15(8) of the scheme, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable and must be removed.*

No order as to costs is made in this application and each party will have to bear their own costs.

In order to limit the rental period of a unit the Respondent (Body Corporate) will have to go through the process of adopting a new Management Rule that will require a unanimous resolution.

INTRODUCTION

[1] The Applicant is **MARINDA SIEMS**, in her capacity as the sole director of Autumn Storm Investments 357 (Pty) Ltd, which owns Unit 402 (comprising Sections 8 and 48

and which were purchased on 6 May 2016), Scarlet Ibis Investments 357 (Pty) Ltd, which owns Unit 403 (comprising Sections 33 and 42 and which were purchased on 19 April 2016) and Desert Wind Properties 72 (Pty) Ltd which owns Unit 404 (comprising Sections 34 and 39 and which were purchased on 7 August 2017).

[2] The Respondent is **ZEECHICHT SECTIONAL TITLE SCHEME**, a sectional title scheme ("the scheme") and duly registered as such with a total of twenty four (24) units.

[3] This is an application for dispute resolution in terms of Section 38 of the Community 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] The adjudication hearing took place on 9 October 2018. This application is before me because 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.

[5] On 9 October 2018 the Applicant was excused from being present and was represented by Mr C Snyders (attorney). Ms Z van der Merwe (attorney), Mr B Bezuidenhout (Chairperson and trustee), Ms N Nel (trustee), Ms M Compaan (trustee) and Ms L Germishuys (managing agent) were present for the Respondent. The parties entered an appearance in terms of the Notice of Set Down which was sent out to them on 13 September 2018.

APPLICABLE PROVISIONS OF THE ACT

[6] The hearing was conducted 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".

[7] Section 45(1) provides that -

"The ombud has a discretion to grant or deny permission to amend the application or to grant permission subject to

specified conditions at any time before the ombud refers the application to an adjudicator"

[8] Section 47 provides that -

"on acceptance of on 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".

[9] 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".

[10] Accordingly, a certificate of Non-Resolution was issued in terms of Section 48(4) of the CSOS Act No.9 of 2011. The Ombud therefore, referred the matter to adjudication, in terms of Section 47 of the Act.

SUMMARY OF EVIDENCE

APPLICANT'S SUBMISSIONS

[11] On behalf of the Applicant it was submitted that Conduct Rule 15(8) of the scheme whereby no section may be let or be made available for occupation for a period of less than 90 (ninety) successive days was unreasonable and that the rule arbitrarily limits the Applicant's right to the full use and enjoyment of its property.

APPLICANT'S PRAYERS

[12] The Applicants sought the following relevant relief: *"For Conduct Rule 15(8) to be declared unreasonable in terms of section 39(3)(d)(i) of the Community Schemes Ombud Service Act 9 of 2011 and for the scheme to be ordered to remove the Conduct Rule."*

RESPONDENT'S SUBMISSIONS

[13] It was submitted on behalf of the Respondent that

the relevant Conduct Rule was not unreasonable and was supported by the majority of the owners and that the Conduct Rule limiting short-term letting was already in place at the time that the Applicant bought the units in the name of the companies.

RESPONDENT'S PRAYERS

[14] The Respondent sought an order that the application be dismissed.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

[15] I have perused all written submissions and taken into consideration all submissions stated before me at the day of the hearing.

[16] Mr Snyders handed in written Heads of Argument and Ms van der Merwe handed in a copy of her Master of Laws thesis titled "Constitutionality of the rules governing sectional title schemes" (December 2010) with the relevant sections marked. Both of these have been most helpful.

[17] While I appreciate the comprehensiveness of Ms van der Merwe thesis and the authority referred to therein I still have to decide each CSOS case on its own merits.

[18] While it was not specifically raised before me in this case, I dealt with a similar case last year where it was submitted that the Conduct Rules are provided for in the Sectional Titles Schemes Management Act (8 of 2011) ("the STSM Act") to regulate the behaviour of owners and occupiers and that any changes to the rights and the use of a property should be regulated in terms of the Management Rules.

[19] In the case referred to in the previous paragraph I had the benefit of an opinion dated 25 April 2017 by Dr Carryn Durham from Paddocks that had greatly assisted in me in that matter.

[20] As stated in that opinion, the important question is whether a ban or a limit on short-term letting falls within the ambit of a Conduct Rule amendment. A ban or a limit on short-term letting is an amendment on how a property

is used and this has an effect on constitutional rights and property rights of an owner. This is a matter that should be dealt with at town planning and/or zoning use level. It was stated that restricting short-term letting should, at the very least, be dealt with as an amendment to the Scheme's Management Rules, which would require a unanimous resolution of the Body Corporate.

[21] In my view the rule in this matter is unreasonable as a Conduct Rule but my finding would not have been the same had it been a Management Rule.

[22] To obtain a unanimous resolution might be very difficult, but in that event section 6(9) of the STSM Act can be used and this section provides as follows:

"6(9) A body corporate or an owner who is unable to obtain a special or unanimous resolution may approach the chief ombud for relief."

[23] I agree with the view that the passing of a special resolution to amend the Conduct Rules is insufficient to allow for a fundamental departure from currently existing and enjoyed zoning and user rights.

[24] It remains the duty of an owner to ensure that his or her tenants and other occupiers, including employees, guests and their family members, comply with the rules.

[25] The STSM Act gives the owners certain duties when letting the unit, for example, section 13(1)(f) of the STSM Act imposes an obligation on the owner of a unit to notify the body corporate when they let out the units. Furthermore, the Rental Housing act 50 of 1999 states that a copy of the scheme's conduct rules must be attached as an annexure to a lease. Furthermore, the landlord must ensure that the tenant receives a set of these rules.

[26] Section 10(3) of the STSM Act states that: *"the management or conduct rules must be reasonable and apply equally to all owners of units"*. It is important that the rights of both owner occupiers and investment owners are protected, and that any proposed amendment to the Scheme's rules, be it Management or Conduct Rules, be balanced, reasonable and fair.

Any negative implications of short-term letting need to be addressed through the application of Conduct Rules. The Conduct Rules should be applied where short-term tenants are in breach of these rules, and in circumstances where the Conduct Rules are inadequate, they can be supplemented. The proprietary rights of investment owners and resident owners should be balanced, and the property rights of both parties should be equally protected.

[27] Rules that unfairly restrict tenants are inherently discriminatory, and in conflict with the spirit and purpose of the Constitution of the Republic of South Africa.

[28] As pointed out by Mr Snyders the scheme (Respondent) in this matter already has Conduct Rules in place that regulate the behaviour of owners and occupiers, for example:

a. Conduct Rule 23 already has extensive prescriptions in place that apply to all owners and occupiers and which make it clear to the owners or occupiers what the requirements are with regard to granting access and the use of remotes

b. Rule 23 also states that it is the owner or occupier's responsibility to bring the provisions of Rule 23 to the attention of all visitors, guests, contractors and workers;

c. Rules 15(2) to 15(6) requires all owners to notify the trustees in writing of who the lessee(s) of a section are as well as provide their contact details to the trustees, to ensure that lessees are suitable persons and are informed to comply with the Conduct Rules;

d. Furthermore, the contravention of any of the Conduct Rules can lead to penalisation in terms of Conduct Rules 26 and 27.

[29] For the content of special conduct rules applicable to short-term tenants see the article: **Should short-term letting be allowed in sectional title schemes? by CG van der Merwe 2018 TSAR 507.**

[30] I have dealt with two similar cases so far this year and for the sake of consistency the outcome of this case will be

the same as in those.

[31] This type of case remains contentious and leads to many discussions among adjudicators. We will ultimately be guided by the High Court in a case that will be decided on appeal. Until then, I am satisfied that we follow the decision in this matter and that is supported by the opinion referred to above.

[32] It is to be noted that sections 39(4)(c) and 39(4)(e) of the CSOS Act could also have been applied here.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[33] The Adjudicator is empowered to investigate, adjudicate and issue an adjudication order in terms of sections 50, 51, 53, 54 and 55 of the Community Schemes Ombud Act. The CSOS Act enables residents of community schemes including sectional title schemes to take their disputes to a statutory dispute resolution service instead of a private arbitrator or the courts. The purpose of this order is to bring closure to the case brought by the applicant to the CSOS.

ADJUDICATION ORDER

[34] I accordingly make the following order:

a. In terms of section 39(3)(d)(i) of the CSOS Act it is found that the scheme governance provision as contained in Conduct Rule 15(8) of the scheme, having regard to the interests of all owners and occupiers in the community scheme, is unreasonable and must be removed;

b. No order as to costs is made in this application and each party will have to bear their own costs.

RIGHT OF APPEAL

[35] In terms of section 57 of the Community Schemes Ombud Service Act, 2011 (Act 9 of 2011) a person who is dissatisfied with an adjudicator's order is entitled to appeal to the High Court, but only on a question of law. The appeal must be lodged within 30 days after delivery of the order.

Signed at Cape Town on the 22nd day of October 2018.