Swan v Sentosa Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 001159/KZN/17
Adjudicator: Prof. Bonke Dumisa
Date: 4 August 2018
Applicant: Ann Swan
Respondent: Trustees of Sentosa Body Corporate

EXECUTIVE SUMMARY

This application was made in terms of Sections 38 and 39.

The Applicant sought an order for the Respondents to refund her for expenses incurred fixing damage related to storm water problems within her exclusive areas.

This order is line with provision 39(1)(c) of the CSOS Act which provides for the adjustment of contribution to be done in a different way.

The Applicant's property was affected storm water, and she complained to the Respondents to fix the problem, as this problem was affecting the entire complex; but the Respondents did not fix the problem at the time the Applicant wanted it fixed. The Applicant thus decided to fix the problem on her own at the cost of R40 000. She wanted to be refunded for this expense.

The Respondents said they wanted to establish the actual cause of the storm water problem before acting; but that the Applicant chose to jump the gun by fixing the problem on her own without the permission of the Respondents.

The matter was dismissed in terms of Section 53, on grounds that the application was without substance, mainly because the Applicant chose to attend to the problem without the permission of the Respondents, who were still trying to find a long term solution to the problem.

PARTIES

[1] The Applicant is **ANN SWAN**, hereunder to be referred to simply as "**the Applicant**", who resides at Unit 10, Sentosa, situated at 1289 Marine Drive (Off R620), in Shelly Beach, in the Lower South Coast of the Province of KwaZulu Natal.

[2] The Respondents are **THE TRUSTEES OF SENTOSA BODY CORPORATE**, hereunder to be simply referred to as "**the Respondents**", who are an elected body of unit owners at the SENTOSA, situated at 1289 Marine Drive (Off R620), Shelly Beach, in the Lower South Coast, in the Lower South Coast of the Province of KwaZulu-Natal.

[3] SENTOSA is a registered community scheme, as per Sectional Plan SG3109/2002 and SGD532/2003 "Sentosa", in respect of the land and buildings situate in Erf 1289 Shelly Beach (off R620), Marine Drive, Shelly Beach, in the Lower South Coast of the Province of KwaZulu-Natal.

INTRODUCTION

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

[5] This dispute relates mainly to the applicant's demand that the Sentosa Body Corporate must refund her about R40 000 she spent on her property that is purportedly to fix problems related to storm water damage.

[6] The matter was initially set down for Conciliation, in terms of Section 47 of the Act. The Conciliation was however not successful; it is not clear from the records whether the actual conciliation meeting did take place, suffice to mention that the matter was formally referred to adjudication in terms of Section 48 of the Act.

[7] The adjudication hearing took place on the 2nd of July 2018. This application is before me as a result of a referral sent by the KwaZulu-Natal Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated both parties.

[8] Both parties, namely the Applicant and the Respondent, were in attendance at the adjudication hearing, as per the Notice of Set Down which was sent out to them as contemplated in Section 48(4) of the Community Schemes Ombud Service Act No.9 of 2011.

[9] The Applicant was represented by her friend John Lloyd

[10] The Respondents were represented by two of their Trustees, Jim di Mambro and Dave Martin.

APPLICABLE PROVISIONS OF THE ACT

[11] 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".

[12] 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"

[13] 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'.

[14] 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 EVIDENCE

[15] The Applicant complained that the Respondents had repeatedly ignored her complaints about damage to her property due to storm water related problems.

[16] The Applicant ultimately decided to spend about R40 000 fixing those problems; they want to be refunded that money when a proposed R1 million special levy is implemented to sort out the storm water problem for the entire complex.

[17] The Respondents' position is that no unit owner was allowed to spend their money on this problem until the underlying cause of the whole storm water problem had been actually established .

APPLICANT'S VERSION

[18] The Applicant has been an owner of Unit 10 at Sentosa since 2003.

[19] She complained there was shoddy workmanship by the developers from the very onset;

[20] She claimed that it was that shoddy workmanship that ultimately culminated in major damages to the storm water drain pipe.

[21] She claimed that this caused additional damage to her swimming pool, paving, underground pipework, and large sink holes.

[22] She complained that she regularly complained about this to the Respondents, but she was consistently ignored.

[23] She ultimately had to spend about R40 000 to fix the problem on her own, despite maintaining that this was actually the responsibility of the Respondents.

[24] Now that the Respondents had proposed to spend about R1 million on fixing this storm water problem, and that a special levy could be imposed on all the unit owners in order to cover this cost; the Applicant thus feels entitled to demand she deserves a refund for her R40 000.

APPLICANT'S PRAYERS

[25] The Applicant wanted to be refunded her R40 000, either by direct refund, or from any future levies.

[26] The Applicant's position was that this R40 000 had to be deducted from the proposed R1 million special levy which was to be imposed on all the unit 22 unit owners after the storm water solution had been implemented.

RESPONDENT'S VERSION

[27] The Respondents disagreed with the Applicant's version of events, arguing that

27.1 Sinkholes were a regular feature of the Shelly Beach area, presumably because of its proximity to the beach;

27.2 They argued that most unit owners experienced these problems, and simply attended to these problems on their own without expecting the Respondents to take care of their exclusive areas.

27.3 They further argued that it took them time to get the engineers to finally confirm that there was a general storm water challenge.

27.4 They complained that the Shelly Beach local municipality had taken time to sort out the issue.

27.5 They also needed to make some serious decisions about rerouting the storm water drain through a different area; but this entailed extra challenges, including even trying the "Admiralty" which entailed having to get special permission of the Department of Environmental Affairs, geotechnical reports, and environmental impact assessments (EIAs).

[28] On the Applicant's prayer for a refund of R40 000, the Respondents held a firm position that

28.1 All the unit owners had been expressly informed that no remedial work had to be undertaken by the unit owners until the actual cause of the sinkholes and other property damage had been established.

28.2 The Unit owners were not allowed to spend money prior to submitting the quote; and added that the Applicant had not submitted any quote prior Lu effecting the repairs she claimed to have effected to her property.

28.3 Other unit owners had spent their own money on fixing these problems, without expecting the Respondents to refund them.

28.4 The Respondents went to an extent of challenging the Applicant's assertion that she spent R40 000 on fixing the problems in her exclusive area, arguing that

28.4.1 Contrary to the Applicant's assertions that they engaged the services of an external contractor in fixing those problems, the Respondents had not seen any contractor on site to fix those problems;

28.4.2 The Respondents' gardener had actually made an affidavit where he stated, under oath, that he and the Applicants had actually done the work at the Applicant's property;

28.4.3 The gardener went on to state that he had been made to fetch sand from Unit# 12, without the express permission of the Respondents.

28.4.4 The Respondents went on to challenge the Applicant's "quote", dismissing as neither a quote nor an invoice, describing it as "just a piece of paper".

RESPONDENT'S PRAYERS

[29] The Respondents' position was that the Application had to be dismissed as frivolous, on grounds that the Applicant wanted to treated differently from other unit owners who were equally affected by the storm water problems.

[30] The Respondents also emphasised that the area where the complex is located is next to the beach, and hence all unit owners had to accept that issues of storm water and sinkholes effectively come with the territory.

EVALUATION OF EVIDENCE SUBMITTED

[31] The Applicant did actually have a serious problem with some of the storm water related challenges;

[32] The Applicant did supply many photos of the damages to the property, in general, and to the Applicant's exclusive property, in particular.

[33] The Applicant did not, however, challenge the Respondents' assertions that other unit owners were equally affected without expecting the Respondents to carry the costs.

[34] The Applicant equally failed to counter the Respondents'

counter-allegations that there was something irregular about the "quote" or "invoice" he supplied, and that it was being disputed that there was any external contractor who had been used by the Applicant to fix the problem at her property.

[35] The Respondents' position makes logical sense that they had to establish the actual cause of the storm water problems before coming up with the long term solution to the problem.

[36] The mere fact that the entire storm water had to be rerouted is a fair reason why all the unit owners had to wait for this long term solution, instead of each unit owner coming with what could prove to be short term solutions to this long term problem.

[37] Therefore, when the Applicant chose to fix this problem on her own, without waiting for the Respondents lo implement their proposed long term solution, the Applicant was indeed acting at her own risk.

[38] It would be unfair to allow the Applicant to demand a refund for work she chose to do without permission, and which other unit owners simply did without expecting the Respondent to refund them for.

POWERS AND JURISDICTION OF THE ADJUDICATOR

[39] 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

[40] Accordingly, the following order is made: The Applicant's application is dismissed, in terms of Section 53(1)(a), on grounds that this application was without substance.

RIGHT OF APPEAL (SEC 57)

[41] All parties are hereby informed about their Right of Appeal in terms of Section 57 of the Act, which says -

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

[42] All parties are warned of the legal consequences that may follow in case any of them, consciously and/ or unconsciously, do not adhere to the spirit and letter of this adjudication order.