

Turner v Adderley Terraces Body Corporate

Community Scheme Ombud Service - Adjudication Order

Case Number: CSOS 41/WC/17
Adjudicator: Kamlesh Ker
Date: 15 October 2017
Applicant: Graham Turner
Respondent: Adderley Terraces Body Corporate



PARTIES

[1] The applicant is Graham Turner, a co-owner of Section LL1 as well as a Parking Bay at The Adderley Terraces.

[2] The Respondent is The Chairperson of the Adderley Terraces Body Corporate, a Community Scheme, which is defined as 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 Ombud Services Act No.9 of 2011. The application was made in the prescribed form and lodged with the Western Cape Provincial Ombud's Office. The application includes a statement of case which sets out the relief sought by the applicant.

[4] The adjudication hearing took place on 12 October, 2017. It had previously been set down for 4 August, 2017 but did not proceed as the Applicant was out of the Country. 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 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".

[6] 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"

[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 om/Jud 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 EVIDENCE

Applicant:

The Applicant presented his arguments together with his co-owner, Dr Brian Savage and submitted documentary evidence in support thereof. These are summarised below:

1. In terms of Rule 9(e) of the Regulations promulgated under the Sectional Title Schemes Management Act, the Trustees are obliged to "compile minutes of each Trustee and General Meeting in accordance with rule 27 (2) (a) and distribute these to the persons entitled to notice of the meeting concerned as soon as possible, but not later than 7 days after the date of the meeting."
2. He has requested same from the Trustees but the minutes were furnished after- the subsequent Trustee meeting, where the minutes had been adopted by the Trustees present at such subsequent meeting.
3. This means that the members of the body Corporate will need to wait until the following meeting to raise any concerns regarding matters discussed at the first meeting.
4. Dr Savage cited an example of a loan which had been granted by the Trustees, to an employee, which the members would have challenged, had they known about it earlier. That loan was granted prior to the enactment of the Sectional Title Schemes Management Act, when the current regulations were not applicable, as this was

regulated by the Sectional Titles Act.

5. The members do not have any grievance regarding the manner in which the Trustees have discharged their duties.

6. They wanted the minutes in the interests of transparency.

7. They believed that they were entitled to receive the minutes in terms of Regulation 9(e) quoted above.

8. In terms of Regulation 11(4), if a member makes a written request for notices of Trustee meetings, the Trustees must deliver to that person a copy of a notice of such meeting.

9. In terms of Prescribed Management Rule 11(3) promulgated in terms of the Regulations to the Sectional Title Schemes Management Act, members may attend Trustee Meetings and speak but not vote.

10. In terms of Prescribed Management Rule 27(2)(a), the minutes should be distributed not later than 7 days after the date of the Trustee Meeting to anyone entitled to Notice of the meeting, and owners are entitled to Notice in terms of Rule 11(3).

11. The relief sought was for an order compelling the Trustees to furnish the minutes of Trustee Meetings to those owners who have requested Notice, within 7 days after a Trustee Meeting. There were five owners who have made such a request. He did not name the other owners.

12. This matter was accepted by the regional Ombud in terms of Section 39(7)

(b) of the Community Schemes Ombud Service Act 9 of 2011.

Respondent's version:

The Respondent was represented by the Chairman of the Trustees of the Adderley Terraces Body Corporate, George Wolvaardt. The Managing Agent, Permanent Trust, was also

represented by Derrick De Reuk who provided information regarding the day to day running of the affairs of the Body Corporate by the managing Agent. Their arguments and evidence is summarised below.

1. Notices of all the Trustee meetings for each year are posted on the website of the Body Corporate. These meetings are held on a monthly basis and the date of each monthly meeting for the year is stipulated in advance.

2. The Trustees have no intention of withholding minutes.

3. The reason why they cannot comply with the Applicant's request is that the requested time frame of 7 days is too short to enable the Trustees to check the draft minutes, correct them, adopt the minutes and circulate them to members.

4. In practice the minutes are usually circulated shortly after they have been compiled by Derek De Reuk for approval at the next Trustee Meeting. This practice has been in place in terms of the Sectional Titles Act. The applicable section has since been repealed.

5. The Trustees allocate one day every month for Trustee meetings. They are not full time Trustees, and most of them have day jobs. To meet again within 7 days of each Trustee meeting to amend the draft minutes, if necessary, to check any amendments and to adopt same, then circulate to members within 7 days would impose a huge burden on their time.

6. Apart from the practical difficulties to comply with the requested minutes, lie argued that the Trustees are not obliged to furnish minutes of the meetings to the owners within the given time frame.

7. He argued that the wording of Prescribed Rule 9(e) clearly states that the minutes are to be distributed to the persons entitled to notice of the meeting concerned as soon as reasonably possible, but not later than 7 days after the date of such meeting.

8. He argued that the meaning of "persons entitled to Notice" refers to the Trustees, in the case of a Trustee

Meeting, and members in the case of General Meetings.

9. He argued that the wording of the Rules and the Act refers to the word “members” throughout when this was the intention, but that the intention in this situation is to distinguish between Trustee meetings and General Meetings. If the intention was that minutes should be sent to members, it would have used the word members.

10. He went on to argue that the rules deal with notices of Trustee Meetings in Rule 11(1), where it states, “A trustee may at any time call a meeting of Trustees by giving not less than 7 days’ written notice of the time and place of the meeting and by setting out an agenda for the meeting.”

11. It goes on to add exceptions in cases of urgency and when a trustee is not in the Republic of South Africa

12. This, he argued, meant that the manner and timeline of Trustee Meetings are clearly set out under the Heading of Trustee Meetings and decisions.

13. Rule 27(2)(a) deals with the manner in which records are to be kept.

14. It should not be read as an entitlement to minutes by those who have requested notices in writing.

15. He therefore believed that the members are not entitled to minutes of Trustee Meetings.

16. Members are entitled to minutes of General Meetings as soon as possible but not later than 7 days after the meeting.

17. Derrick de Reuck stated that he would have no problem circulating the unapproved minutes. However he has often found that the minutes he had compiled were flawed, and Trustees have come back to him as he had not accurately understood or recorded what was said.

18. He could circulate the un-adopted minutes to the members at the same time as he sends it to the Trustees.

19. He could circulate the minutes to the Trustees via email, round robin style, and will be in a position to have the minutes adopted and sent to the members about three weeks after the meeting.

20. George Wollfaardt added that as Chairperson of the Trustees of the Body Corporate, he is reluctant to send out draft minutes of meetings which have not been checked and adopted as this could pose a risk of misunderstandings amongst members and lead to unnecessary confusion and communication to set the record straight.

21. Even if a disclaimer were to be added to the effect that the minutes had not yet been adopted, people don’t always note this, and react to the draft minutes as if they had already been checked and adopted.

22. He had no problem in recommending to the trustees at the next Trustee meeting, that the minutes be distributed to members as soon as possible.

23. He had every intention of being transparent.

24. The members who are interested have every right to attend and they are aware of the dates and agendas of the meeting.

25. The agendas are pretty standard as the Trustees usually deal with the standard matters which they are required to perform in terms of their duties as prescribed by the Rules.

26. If there is any matter which concerns the owners, a Special General Meeting would be called over and above the mandatory AGM.

EVALUATION OF EVIDENCE AND ARGUMENTS SUBMITTED

1. There is no jurisprudence that I could draw on at this early stage of the implementation of the CSOS Act. I am aware of one interpretation by a scholar which favours the interpretation of the Applicant.

2. I am inclined to agree with the Interpretation of the Chairperson of the Body Corporate, George Wolfaardt, for the reasons stated below.

3. One would have to wait and see what Jurisprudence emerges and whether the Rules are clarified in certain grey areas such as this one after the first submissions have been considered by the Rules Board.

4. In the meantime, I will deal with the concerns of the applicant on a pragmatic basis rather than on a legally rational basis, as this could pose problems for Trustees of Bodies Corporate and at the same time I will make an order which I believe is what the drafters of the rules had intended.

5. The Golden Rule for the Interpretation of Statutes is that of the Intention of the Legislature.

6. As far as possible, words must be given the same meaning throughout the rules and the Act.

7. The Regulations and the Prescribed Management Rules annexed thereto are in terms of the Sectional Titles Schemes Management Act 8 of 2011 (STSMA) which states in Section 10(3) that the rules must be reasonable.

8. Where the intention is not clear from the text, additional rules, guidelines, principles, prescriptions or interpretations can be used and there is no established hierarchy of principles.

9. Section 19 the STSMA states that the Minister may make regulations on any matter that is necessary or expedient to prescribe for the proper implementation of this Act.

10. In terms of the Regulations promulgated in terms of 111e STSMA, "member" means a member of the Body Corporate, in other words, an owner. The rules of Interpretation require that general language used must be construed to include all instances within its scope.

11. Rule 11(1) prescribes the manner in which meetings are to be called by Trustees. This is dealt with in Part Two of the Regulations under the Heading Trustees and under the sub-heading "Calling and attendance of Meetings." The Rules clearly distinguish Trustee Meetings from General Meetings which are dealt with under Part

4 headed Owner Meetings. The manner in which notices must be served for owner meetings is dealt with, in Rule 15.

12. If the drafters intended that the minutes should be distributed to all members, rule 9 (e) would not have stated "to the persons entitled to notice". It could simply have stated to members etc.

13. It is clear that a distinction was being drawn between Trustee and Owner, meetings, The exact wording reads as follows: "The Trustees must (inter alia) compile minutes of each trustee and general meeting in accordance with rule 27(2)(a) and distribute these to the persons entitled to notice of the meeting concerned as soon as reasonably possible, but not later than 7 days after the date of the meeting,'

14. The use of the word concerned implies that a distinction is being drawn between trustee and general meetings and that the minutes must be distributed to the persons concerned in each case,

15. The use of the definite article the further indicates that the drafters were not referring to meetings in general but to different classes of meetings,

16. The members are not entitled to notice of Trustee meetings. They are entitled to same upon written request

17. Rule 27(2) (a) falls under Part Six of the Annexure to the regulations under the heading Administrative Management and under the sub-heading "Governance Documents and records", It states as follows, "The Body Corporate must prepare and update the following records- (a) minutes of general and trustee meetings, including the following information- (i) the date, time and place of such meeting, (ii) the names and role of the persons present including details of the authorisation of proxies or other representatives (iii) the text of all resolutions and (iv) the results of the voting on all motions,

18. It is clear that this rule really regulates the form in which the minutes must be compiled by the Trustees to ensure that the date, time, place, names of those present, their source of authorisation if proxied or acting as representatives, the text of the resolutions and the results of the voting on all motions, etc so that anyone reading

the minutes can clearly see when, where, by whom, what etc transpired at the meeting in question. It is a record and that is why the word record is used.

19. Rule 27(2)(a) does not confer a right to members by the more fact that they had made a written request to be served with a notice. To make a connection between the two is to read more into the intention of the drafters.

20. Rule 11(2) states that "The Trustees may by written resolution set the dates of and a standard agenda for their future meetings and delivery of a copy of this resolution is considered adequate notice of all such future meetings."

21. This is exactly what the Trustees have done by posting all those details on their website. This dispenses with the need to notify the members of each meeting.

22. Rule 11(4) states as follows, "If a member, a registered mortgagee or the holder of a future development right in writing requests notice of trustee meetings, the trustees must deliver to that person a copy of the notice of a meeting referred to in sub-rule (2) and a notice of any adjournment of such a meeting; provided that the Body Corporate may recover from the person concerned the costs of delivery of such documents." This is a further indication that the law regards the Trustee meetings to be of an administrative nature and if any person requires notice, they must do so in writing and bear the costs thereof. If they had a right to same, why would they be required to pay for it.

23. The manner in which Trustee Meetings are to be called are prescribed differently to the manner in which General meetings are to be called and regulated by different parts of the rules under different headings.

24. The purpose of Trustee meetings is really to deal with the day to day, run of the mill stuff. Whilst members are allowed to attend these meetings, they are not allowed to speak or vote. They are also not entitled to participate in discussions on certain items on the agenda. If there are items which need consultation with the owners, a Special Meeting must be called. Trustee meetings can become protracted and unnecessarily onerous for Trustees if they are required to furnish minutes to all members within the 7 day timeframe. One of the presumptions for Interpretation of Statutes

is the presumption against harsh, onerous, unjust or inequitable outcomes. The Chairperson has provided credible reasons for not wanting to send out un-adopted draft minutes to the general members. The risk of misunderstandings is unduly onerous for trustees who give up a lot of their personal time to perform their duties for which they are not remunerated.

25. It seems clear that the provisions regarding notice are merely to allow members, bondholders or holders of future development rights an opportunity to be notified of Trustee meetings should they be interested in attending same for any reason and if they are interested, they should make a request in writing with cost implications for themselves, another indication that Trustee meetings are really meant for matters that do not usually concern the interests of the members and that other meetings are prescribed for such other matters.

26. The Powers and Duties of Trustees are clearly defined and the fiduciary duties are very onerous so Trustees would be foolish to breach the rules governing the manner in which they conduct their duties.

27. Presumably, they have been placed in that position because the people who nominated and voted for them have trust in them.

28. In conclusion, I am of the view that the Trustees are not required to furnish minutes of meetings to members or any persons requesting notices of their meetings, within the seven-day timeframe and that this timeframe applies to trustees only.

29. However, I can see no reason why the Trustees cannot furnish the adopted minutes to the members prior to the next meeting, as they will in any case need to furnish same to the Trustees within 7 days.

30. It will be in the interests of transparency and promote trust in the Trustees by those who feel anxious about the potential abuse of powers of Trustees.

31. Dereck de Reuk has indicated that he could do so within three weeks after the Trustee meeting if he circulated the draft minutes to trustees via email round robin style rather than wait for the next Trustee meeting,

POWERS AND JURISDICTION OF THE ADJUDICATOR

[9] 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

In the circumstances, the following order is made -

[10] Section 39 (7) of the Community Schemes Ombud Service Act No.9 of 2011 provides that -

"An application made in terms of section 38 must include one or more of the following orders (a) an order declaring that the applicant has been wrongfully denied access to information or documents, and requiring the association to make such documents available within a specified time; or (b) any other order proposed by the chief ombud."

[11] Accordingly, I make the following order:

(1) The Applicant has **not** been wrongfully denied access to the minutes of Trustee meetings.

(2) It is however recommended that the Trustees furnish those members who have requested notice of Trustee meetings, with a copy of the adopted minutes of Trustee meetings prior to the next Trustee meeting, in the interests of transparency and promoting trust. This may be sent via electronic mail to the email address used for all correspondence with the member concerned.

RIGHT TO APPEAL

Any party aggrieved by this order has a right to appeal in terms of Section 57 of the CSOS Act, within 30 days of delivery of the Order of the adjudicator but only on a question of law.

Dated at Cape Town on 15 October 2017.