

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT

OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 30916/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED.

2/08/2021

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DATE

SIGNATURE

IN THE MATTER BETWEEN :-

THE BODY CORPORATE OF CENTRAL SQUARE
SS 661/2917

APPLICANT

And

PENELOPE BECK-PAXTON N.O

FIRST RESPONDENT

ANDRE ANDREAS N.O

SECOND RESPONDENT

THE CHIEF OMBUD OF THE COMMUNITY
SCHEMES OMBUD SERVICE

THIRD RESPONDENT

PHILIP IAN TILLMAN

FOURTH RESPONDENT

DATE OF HEARING: This matter was enrolled for hearing on 20 JULY 2021, with appearance on Microsoft teams. DATE OF JUDGMENT: This judgment was hand down electronically by circulation to parties by email/caselines. The date of hand-down is deemed to be.

JUDGMENT

Kollapen J

Introduction and an overview of the relief sought

[1] These are opposed proceedings in which the main protagonists are the applicant and the fourth respondent and in which proceedings the applicant seeks by way of urgency relief in the following terms:-

“(a) Granting leave to the applicant to move this Part A of the application as one of urgency, dispensing, insofar as needs be, with the forms and service provided for in the Rules of the above Honourable Court and disposing of this application at such time and place, in such manner and according to such procedure as the above Honourable Court may deem meet in terms of Rule 6 (12);

(b) Ordering, in terms of section 57(3) of the Community Schemes Ombud Services Act 9 of 2011 (“the CSOS Act”), that the operation of the following adjudication orders granted against the Applicant in terms of section of the Act (“the Adjudication Orders” be stayed pending the outcome of the final relief sought in Part B of this notice of motion;

(c) the adjudication order granted by the first respondent against the applicant on 15 June 2021 under case number CSOS 00/301 7/GP/19 (“the First Adjudication Order”); and

(d) the adjudication order granted by the second respondent against the applicant on 17 June 2021 under case number CSOS 824/GP/20 (other Second Adjudication Order");

(e) Interdicting and restraining the fourth respondent, pending the outcome of the final relief sought in Part B of this notice of motion;

(f) from taking any steps whatsoever pursuant to, in reliance on or in the enforcement of the Adjudication Orders; and

(g) from approaching any High Court in terms of section 56(1) of the CSOS Act and/or any Magistrates Court in terms of section 56(2) of that Act, to obtain the registration of either of the Adjudication Orders as an order of any such Court."

[2] In part B of the Application the applicant seeks an order setting aside the Adjudication Orders to which reference has been made and further relief confirming the validity of the Management Rules of the Scheme as well as the determination of the value of the votes of residential and non- residential owners in the Scheme and their respective liability to make contributions to the Scheme.

[3] The applicant is the Body Corporate of a Sectional Title Scheme known as Central Square SS ('the scheme') established in terms of the Sectional Titles Schemes Management Act No 8 Of 2011 ("STMSA).

[4] The fourth respondent is the owner of a unit in the Scheme and has over time challenged features of the scheme and the rules in place to the extent that he says they conflict with his rights and those of other owners of units in the scheme.

[5] To that end the fourth respondent was aggrieved by what he says is the unlawful Management Rules of the scheme including the value of votes and the extent of the liability of owners of residential units in the scheme to make contributions to levies.

[6] He submitted written complaints in terms of the Community Schemes Ombud Services Act 9 of 2011 ("the CSOS Act") and those complaints came before the first and the second respondents who after considering the content of the complaints as

well as the views of the applicant, made determinations in both complaints which are described in these proceedings as adjudication orders.

[7] The first adjudication order was made by the first respondent on the 15 June 2021 while the second adjudication order was made on the 17 June 2021 by the second respondent. It is these orders that the applicant seeks to have reviewed in Part B of the application but for now seeks an order that would effectively suspend the implementation of those orders pending the outcome of Part B.

The background facts

[8] The scheme is a mixed scheme consisting of both residential and non-residential units and was developed by Lushaka Investments (Pty) Ltd ("Lushaka") and at the heart of this dispute is the manner in which voting rights and the liability of owners to make contributions towards the expenses of the scheme have been determined and allocated between residential and non-residential owners of units in the scheme as part of the applicants levy budget.

[9] In the complaints which came before the first and second respondents, the fourth respondent objected to the manner in which voting rights are allocated to owners in the separate components of the Scheme and to the manner in which the expenses of the Scheme are apportioned to the owners of units in its separate components. He contended that the management rules which provide for that structure were not put in place lawfully and that they are unfair and benefit Lushaka as owner of the non- residential units, at the expense of the owners of residential units.

[10] Both adjudicators found in favour of the fourth respondent and the effect of the orders made are as follows:-

The First Adjudication order

The following relief was sought

“an order declaring that a scheme governance provision is invalid and requiring the association to approve and record a new scheme governance provision to remove the invalid provision; and (d) an order declaring that a 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; (ii) if appropriate, to restore an earlier provision; (iii) to amend the provision; or (iv) to substitute a new provision."

The adjudicator made the following finding:

77.1 the Applicant's prior written consent was not obtained prior to the amendment to the management rules as required by section 11(a) of the STSMA;

77.2 the Applicant is adversely affected by the 2017 amendment to the management rules; and

77.3 The composition of the Respondent is in contravention of section 2 of the STSMA.

The adjudicator however found that because the complaint had been lodged out of the time period required by the CSOS Act she could not, despite the finding made grant the relief sought and accordingly made an order in the following terms:-

"80.1 The application to declare the 2017 amendment to the management rules invalid and unenforceable is dismissed.

80.2 The association must within 30 days of the issuing of this order call a general meeting of its members to deal with the specified business of:

80.2.1 the 2017 amendment to the management rules in so far as it relates to the PQ and voting rights; and the composition of the Respondent.

81.3 There is no order as to costs."

[11] The effect of this order is that the applicant is obliged to call a general meeting within 30 days of the order to deal with and address the management rules of the

applicant. There is no prescription as to how this is to be done and it is left largely to the applicant to deal with that in the meeting to be called.

The Second Adjudication order

[12] In these proceedings the relief sought was described in the following terms:-

“Section 39(1)(c) (1) In respect of financial issues — (c) an order declaring that a contribution levied on owners or occupiers, or the way it is to be paid, is incorrectly determined or unreasonable, and an order for the adjustment of the contribution to a correct or reasonable amount or an order for its payment in a different way;

and then later in the order and the reasons it was summarised as follows by the second respondent :-

The relief sought by the applicant is for an order directing the respondent to abandon the concocted budget and to apportion levies of the scheme in accordance with the prescribed management rules of the STSMA as amended by the 2017 amended Management Rules.

[13] The adjudicator upheld the complaint of the fourth respondent and the effect of the order is to declare that the contribution levied on owners by the applicant is unlawful and should be adjusted in accordance with the 2017 Management Rules of the Scheme.

The appeal / review

[14] Section 57 of the CSOS Act provides as follows in respect of appeal rights:-

“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”.

[15] In addition this Court in ***Turley Manor Body Corporate v Pillay and Others 2020 JDR 0430 (GJ)*** held that such orders beyond being appealable were also open to being challenged on review in terms of the Promotion of Administrative Justice Act No 3 of 2000 (PAJA).

[16] Thus the applicant has established at least in principle the right to appeal and/or review the adjudication order and in addition in terms of Section 57(3) of the CSOS Act may apply to this Court to stay the operation of the order to secure the effectiveness of the appeal.

[17] The applicant has argued that the decisions of the adjudicators are wrong in law as well as open to being challenged on review on various grounds set out in PAJA including that the adjudicators took into account irrelevant information and failed to consider relevant information. In particular, the applicant says that the adjudicators failed to bring a proper understanding to the proceedings the legal framework that is applicable to both the adoption and the amendment of the rules of the scheme.

[18] It appears that apart from the intention of the applicant to review both orders, the fourth respondent has also lodged an appeal against the First Adjudication order even though the scope and basis of that appeal is not before the Court. At the very least it appears that both the applicant as well as the fourth respondent take issue with the First Adjudication order. – this is matter to be considered in the grant or otherwise of the relief sought.

[19] The requirements for the grant of interim relief was set out in ***Setlogelo v Setlogelo 1914 AD 221*** and they are as follows :-

“(a) a prima facie right;

(a) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(b) a balance of convenience in favour of the granting of the interim relief; and

(c) the absence of any other satisfactory remedy.”

The relief in respect of the first order

[20] Before considering the requirements for interim relief I pause to consider the 2 orders both in terms of what they require as well as their relationship with each other. The first order dismisses the relief sought but nevertheless orders the applicant to convene a meeting to consider the amendment to the 2017 Management Rules. There is a finding that suggests those rules are in need of amendment but no order to that effect. What then is the applicant required to do? Reconsider the rules in the light of the findings or regard the rules as valid as there is no order otherwise and the application to have the 2017 rules declared invalid was expressly dismissed? If the Rules have not been declared invalid, then what is the basis from which the general meeting is to proceed? A finding which was not made an order? This is an area of some uncertainty and may not provide clear guidance to the applicant as to what is required of it. It is for this reason that the rights of the parties may require further clarity and the appeal/review may provide the opportunity for that to happen. It is significant that both parties seek to challenge the First Adjudication order, even though for different reasons I must assume. Under those circumstances a *prima facie* right (even one open to some doubt) would have been established.

[21] The other requirements for the grant of interim relief would find application in that the uncertain nature of the order is likely to result in harm in that the applicant and its members will find difficulty in giving effect to the order for the reasons I have already given. The balance of convenience does not require that issue to be dealt

with at this stage especially in the light of the uncertainty of the order; there is also no other remedy available.

[22] I am in the circumstances inclined to grant the relief in respect of this order.

The relief in respect of the second order

[23] The applicant argues that it has good prospects of success in its intended review and has established a prima facie right. That assertion needs to be considered against the facts and the law as well as the adjudication order and the reasons advanced for it.

[24] In the First Adjudication order it was found that the 2017 Management Rules were changed to the extent that the Rules registered when the sectional title register was opened and that dealt with voting rights and participation quotas differed from what was contained in the purchase agreement entered into between the developer and the fourth respondent and to that extent that change was not permissible unless the consent of the owner was obtained and that absent such consent the purported change was invalid.

[25] The first respondent however did not make any order in this regard as the complaint was lodged out of time.

[26] The Second Adjudication order relates to the period after the opening of the Sectional Title register in 2017 and when the scheme became a mixed use scheme with the addition of a non-residential section.

[27] The fourth respondent says that the prescribed management rules which were in force were further amended by the 2019 Amended Management Rules, which resulted in the scheme becoming mixed-use, consisting of a residential section and a commercial section.

[28] His complaint was that the applicant was not adhering to the STSMA as well as the Management and Conduct Rules of the scheme and alleges that in July 2020, a new managing agent was appointed to manage the financial affairs of the applicant, which resulted in the finances of the scheme being split into 2 sections, being the residential section and the commercial section.

[29] It was the fourth respondent's case that the manner in which levies were apportioned departed from the 2017 Amended Management Rules with the new apportionment method overwhelmingly benefitting the owner of the commercial section, who is the developer.

[30] It was on this basis that the fourth respondent sought relief that would in effect set aside the budget approved for 2020 /21 and an order requiring the revision of the budget along the basis of the 2017 Rules.

[31] The stance of the of the applicant was to place reliance on the Sectional Titles Act (section 32(2) and 11(2) which permits a developer to structure the participation quotas and to amend the Rules in a manner which distinguishes between residential and non-residential units in respect of voting rights as well as the liability of owners to make payment of levies.

[32] The applicant further submitted that a certificate was lodged on behalf of the developer in terms of the section 3(1)(d) when the sectional title register in respect of the scheme was initially opened and brought about an amendment to the voting rights and to the liability to make contributions to the levy fund of the owners of units in the residential component and the non-residential component.

[33] The adjudicator in finding in favour of the fourth respondent found that notwithstanding the provisions of Section 32(2) and 11(2) what was in issue was the amendment of the rules of the scheme and that in this regard Section 10(2)(a) of the STSMA was applicable and provided:-

"management rules, as prescribed, which rules may subject to the approval of the chief ombud, be substituted, added to, amended or repealed by the developer when submitting an application for the opening of a sectional title register, to the extent prescribed by regulation, and which rules may be substituted, added to, amended or repealed by unanimous resolution of the body corporate as prescribed".

[34] The adjudicator also relied on Section 11(2)(b) of the STSMA which provides that –

"Where an owner is adversely affected by such a decision of the body corporate, his or her prior written consent must be obtained."

[35] It was found that the purported amendment of the Rules was not effected by a unanimous resolution as is required in Section 10(2)(a) of the STSMA and further that the purported amendment had an adverse effect on the interests of the fourth respondent and that his prior written consent was not obtained.

[36] It was on this basis and for these reasons that the adjudicator upheld the complaint and granted the relief that was sought.

[37] While the applicant has a right of appeal and seeks to exercise that right, my view is that the reasoning of the second respondent and the reliance on the applicable legal provisions as well as the applicable case law appears sound. In this regard the second respondent relied in part on the decision of the Supreme Court of Appeal in ***Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd (1082/2018) [2019] ZASCA 161;2020 (2) SA 61 (SCA) (28 November 2019)***,

"The high court approached the matter on the basis that the result of the resolution was fair, and therefore the consent of the appellant was not required. This approach, which ostensibly imports a further proviso that is not expressed in the Act, is clearly wrong. If that had been the intention of the legislature, one imagines, that it would have said so. Such an approach, resting as it does on nebulous notions of fairness, brings uncertainty into the Act. What is more, it disregards the carefully crafted scheme of the Act. It also ignores the plain meaning of the expression and therefore could hardly have been intended by the legislature. Moreover, it assumes that it is unfair for the participation quota not to accord with floor area ratio, yet section 32(2) expressly provides for this in the case of non-residential sections. In the context of a resolution to modify an owner's liability for levies, it seems a simple matter of logic that an owner whose liability for levies increases is adversely affected thereby. It is impossible to conceive of any other meaning of those words. That being so, the clear intention of the legislature is that the written consent of such

a member must be obtained, so as to observe the audi alteram partem rule and to prevent a diminution of property rights being imposed on a minority by the majority. I therefore conclude that the respondent was 'adversely affected within the meaning of that expression by the resolution and that its written consent was required. It follows that the resolution is ultra vires the Act and void".

[38] In *casu* there appears to have been a compelling case for the second respondent to conclude that there was a change in the rules that would have warranted a unanimous resolution of the applicant (which was not obtained) and that the interests of the fourth respondent was adversely affected absent his consent.

[39] I am accordingly not satisfied that a *prima facie* right has been established by the applicant.

[40] On the other requirements for the grant of interim relief there cannot be said to be a well-grounded fear of irreparable harm in that if the order of the second order is given effect to, it cannot firstly be asserted with any certainty that there will be a restructured budget or that if there is such a new budget it will redound to the applicant's prejudice. Those are all matters for the AGM to apply its mind to. In any event if the applicant finds success on appeal or review then it cannot be said that the implementation of a new budget cannot be reversed. There was no suggestion of irreparable harm in that sense but rather that there would be confusion at the AGM. I am not in agreement with this submission as the order is clear and what is required of the applicant is clear.

[41] The balance of convenience also does not favour the applicant. For the reasons already given the implementation of the order will bring an unsatisfactory situation to an end and in the event the appeal or review succeeds the parties can simply be restored to the position they were in – it is a matter of a financial adjustment at worst there being no suggestion that this was not possible in the event that it became necessary.

[42] Finally, there is an alternate remedy and that is the convening of a general meeting. That ultimately is the forum that must make decisions and what those decisions will ultimately be remains to be seen. It cannot and should not be assumed

that the general meeting. properly conducted and with full and fair participation will reach any outcome that can be predicted with any certainty at this stage.

[43] It is for these reasons that the relief sought in respect of the second order must be refused.

Costs

[44] It may be appropriate to reserve the costs of Part A for determination in Part B.

Order

[45] I make the following order in Part A of the proceedings:-

1. It is ordered in terms of section 57(3) of the Community Schemes Ombud Services Act 9 of 2011 ("the CSOS Act"), that the operation of the adjudication order granted by the first respondent against the applicant on 15 June 2021 under case number CSOS 00/301 7/GP/19 ("the First Adjudication Order")
 - a) be stayed pending the outcome of the final relief sought in Part B of this notice of motion; and
 - b) The fourth respondent be interdicted from approaching any High Court in terms of section 56(1) of the CSOS Act and/or any Magistrates Court in terms of section 56(2) of that Act, to obtain the registration of the First Adjudication Order as an order of any such Court;
2. The relief sought by the applicant in respect of the adjudication order granted by the second respondent against the applicant on 17 June 2021 under case number CSOS 824/GP/20 ("the Second Adjudication Order") is dismissed .
3. The costs of Part A of this application are reserved for determination in Part B of the application.

NJ. KOLLAPEN
JUDGE OF THE HIGH
COURT

APPEARANCES

COUNSEL FOR THE APPLICANTS : **Adv GF PORTEOUS**

Instructed by : **S. BROWN ATTORNEYS INC**

COUNSEL FOR RESPONDENT : **Adv SJ MARTIN**

Instructed by : **SCINDLERS ATTORNEYS**

DATE OF HEARING : **20 JULY 2021**

DATE OF JUDGMENT : **2 AUGUST 2021**