IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 3614/2021

In the matter between:

HENQUE 1838 CC **APPLICANT**

and

THE BODY CORPORATE OF KIRTLINGTON PARK **RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 29 September 2022 (Thursday) at 14h40.

ORDER

I make the following orders:

1. The amended management rule 31.1 adopted by unanimous resolution at a meeting held by the respondent on 27 July 2016 is hereby declared ultra vires and invalid.

2. Management rule 31.1 shall be replaced by the corresponding rule of the prescribed management rules in schedule 8 of the regulations of the Sectional Titles Act 95 of 1986, namely rule 31(1), and owner's contribution to the administration fund must be calculated according to the prescribed management rule 31(1) certified as applicable in terms of section 11(3) of the Act at the time of registration of the respondent on 21

contribution to the administration fund must be calculated according to the prescribed management rule 31(1) certified as applicable in terms of section 11(3) of the Act at the time of registration of the respondent on 21 August 2001, and thereafter subject to the provisions of the Sectional Titles Schemes Management Act, 2011.

3. The respondent is ordered to pay the costs of this application.

JUDGMENT

Mlaba AJ

Introduction

[1] The applicant seeks an order in the following terms:

'1. It is declared that Amended Management Rule 31.1 of the respondent's sectional title scheme adopted by unanimous resolution at a meeting held on 27 July 2016 is ultra vires and invalid.

2. It is declared that owner's contribution to the administration fund of the respondent must be calculated according to the provisions of Sectional Titles Act 1986 and its prescribed Management Rules, certified as applicable in terms of registration of the respondent on 21 August 2001, and thereafter subject to the provisions of the Sectional Titles Schemes Management Act, 2011.

3. The respondent is ordered to pay the costs of this application.

4. Such further and/or alternative relief as this court may deem appropriate.'

[2] The applicant is the owner of section 32 in the respondent's Scheme No. SS385/2001 and he acquired section 32 on 15 September 2017. On 27 July 2016, and prior to the acquisition of ownership by the applicant of section 32, a resolution to amend the management rule 31.1was adopted. The effect of the resolution was that

owners of the sections would pay the same amount of levies irrespective of the size of their unit.

[3] The respondent contends that the applicant seeks to set aside a management rule that was amended unanimously before it purchased the unit and that it knew about for nearly four years prior to launching this application. The respondent raised the following points in limine:

(a) Locus standi: The applicant has no locus standi as it was not the owner of section 32 when the rule was amended, and all owners in the sectional title adopted the amendment.

(b) The delay in bringing this application is unreasonable and unacceptable.

Issues to be decided

[4] The court has to determine as to whether the applicant has the necessary locus standi to launch this application and whether the delay is unreasonable. The court will further determine whether or not the amendment of management rule 31.1 is unlawful.

Applicant's submission

[5] In its response to the points in limine the applicant submitted that by virtue of the fact that it is an owner of a section within the scheme, and is adversely affected by the amended management rule 31.1, which it contends is unlawful and invalid, the applicant has the necessary locus standi. In respect of the delay, the applicant submitted that this is not a review application but that it seeks a declaratory order that management rule 31.1 is unlawful and invalid. In light this there is therefore no time period applicable. The applicant submitted that it is adversely affected by the rule and has a right to challenge it.

[6] The sectional title register was opened and the developer adopted the rules prescribed in s 35(2) of the Sectional Titles Act[1] ("the Act"). The rules were the standard management rules which provide for levies to be raised on a participation quota basis. Notwithstanding this, the respondent raised levies against all owners

[1] 95 of 1986.

equally from inception. There are 42 sections that are freestanding and the floor areas of the sections range from 251 square meters to 824 square meters.

[7] On 27 July 2016 the owners of the respondent held a meeting at which it was unanimously resolved to amend management rule 31.1 so that it provided for owners contributing towards levies to be paid equally per section. The amended rule 31.1 reads as follows:

'31.1 The liability of Owners to make contributions, and the proportions in which the Owners shall make contributions for the purposes of section 37 (1) of the Act, or may in terms of section 47 of the Act be held liable for the payment of a judgement debt of the body corporate, shall be allocated equally per section or real right owned or held by an Owner regardless of the registered participation quota save in respect of:

> 3.1.1 the allocation of insurance expenses which will be charged to each Owner based on the actual replacement value and premium for each Property as determined in accordance with rule 29;
>
> 3.1.2 Equestrian Owners who shall contribute at the rate of 5 (five) % of the contribution payable by Owners of Residential Property in respect of each Section that is Stable.'

[8] The above amended rule 31.1 replaced prescribed management rule 31(1) of the Act which required owners to pay levies calculated according to the participation quota which, in turn, were calculated according to floor areas of respective sections.

[9] The applicant submitted that when the respondent was registered, the developer lodged a conveyancer's certificate in terms of s 11(3) e) of the Act adopting the rules prescribed in s 35(2) of the Act.

[10] The amended management rule modified the liability of owners to make contributions in terms of s 32(4) of the Act and the said section also contained a proviso that where an owner is adversely affected by such modification, his/her written consent must be obtained.

[11] The applicant argued that with a disparity of floor areas of the dwellings between 251 and 824 square meters it is evident that some owners were adversely

affected by the modification as contributions would be split into 42, being the number of sections in the development. The owners ought to have been made aware of such adverse effect and be asked to give their consent.

[12] The minutes of the meeting which approved the resolution however showed that no written consents were obtained from any owners that were adversely affected.

[13] The applicant submitted that when it purchased section 32 it rejected the levy calculation and has always paid levies in accordance with the participation quota and the respondent has accepted such payments without prejudice. The respondent has however always demanded payment of R5 300 instead of R3 798.

[14] The applicant further submitted that it is also the owner of unit 4 in the adjacent body corporate of the respondent and the court in a separate litigation declared unlawful the amended rule 31.1 which is at issue in this application.

[15] In conclusion the applicant submitted that unless the relief is granted it, together with other owners, are suffering harm and will continue to suffer harm.

Respondent's submissions

[16] The respondent argued that the applicant was aware of the rule when it purchased the section but it waited three and a half years to challenge it. The delay in bringing this application is unreasonable. Further the setting aside of the rule will have serious consequences and a massive effect to everyone who is affected.

[17] The respondent further argued that the applicant lacks locus standi because when the rule was amended it had no ownership in the scheme. Section 32(4) of the Act is specific and requires that it be an owner who is adversely affected whose consent is required. The applicant was not an owner at the time that the rule was changed and therefore it could not have been adversely affected at that time. Further, if it did not like the rule the applicant ought not to have purchased a section in the scheme. The resolution was unanimous.

[18] The respondent submitted further that the levies had, since inception of the scheme, been charged and paid equally by the owners of sections in the scheme and therefore there had been no actual increase in levies when the rule was amended. The amendment was in line with what had already been happening in any event.

[19] The respondent was of the view that there was no adverse effect to be suffered by any owner as they had already been paying the same amount of levies from inception of the scheme, therefore no consent was required from the owners when management rule 31(1) was to be amended. The previous owners of section 32 gave their proxy to the chairman to vote on their behalf in favour of the change and if consent was required, then the proxy expressed favour of the change.

[20] The respondent submitted that no other owners have challenged the amended management rule except the applicant.

[21] In conclusion the respondent submitted that it would be neither just nor equitable for the application to be granted and requested that the application be dismissed with costs.

Evaluation

[22] The respondent amended prescribed management rule 31(1) prior to the applicant becoming an owner in the scheme. The amendment had the effect that owners in the scheme would be charged equally in levies irrespective of the size of their section in the scheme. In terms of s 32(4) of the Act the liability of the owners to make contributions can only be modified by a special resolution and rules. Further, where an owner is adversely affected by such a decision of the body corporate, his/her written consent must be obtained.

[23] There is no dispute that the prescribed management rule 31(1) was amended and replaced with the amended rule 31.1. There is also no dispute that written consent was not obtained from the owners when the management rule was amended. The respondent's submission in this regard being that no written consent was required and that if it is found that same was required then the proxy signed by one of the owners of section 32 constituted such consent.

[24] I am of the view that the amended management rule has an adverse effect on any owner of a section in the scheme who is required to pay more than what he or she would have been required to pay in terms of the prescribed management rule 31(1) of the Act which provides for payment of a levy amount that is in accordance with the participation quota.

[25] The applicant relied on the decision of the Supreme Court of Appeal in *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and Another*[2] where the court interpreted the expression "adversely affected" as it appears in s 32(4) of the Act. The court stated that if the effect of the amendment of a management rule is that a person will pay more than he or she was paying previously, such a person would indeed be adversely affected by the amendment and their written consent would be required.

[26] The respondent's response to the above is that owners in its scheme were not adversely affected by the amended management rule because they had been charged the same amount since the inception of the scheme. The respondent submitted that the amendment of its management rule 31.1 merely recognised and ratified what the owners had historically been paying and the method of calculation of levies that had applied since the scheme was incorporated.

[27] I do not agree with the respondent. The respondent, by charging owners an equal amount of levies since the inception of the scheme irrespective of their participation quota, was acting in contravention of the prescribed management rule 31(1). It cannot be that because the unlawful conduct has been going on for a considerably long time that it ceases to be unlawful and to have an adverse effect on the recipient of that conduct.

[28] Section 32(4) of the Act provides that owners would have to be informed of the rules and give their consent for the management rule to be amended where they would

---

[2] *Body Corporate of Marine Sands v Extra Dimensions 121 (Pty) Ltd and Another* 2020 (2) SA 61 (SCA).

be required to pay more than what they would otherwise pay in terms of the prescribed management rule. The respondent did not submit proof that the above was done but it submitted that one of the previous owners of section 32 had given his proxy to the chairman to vote in support of the amendment.

[29] In my view the proxy cannot be equated to written consent for the purposes of the requirement set out in terms of s 32(4) of the Act. Further, there were two owners of section 32 and only one of the owners gave his proxy to the chairman, nothing is said about the other owner.

[30] The fact that written consent was not obtained from the owners, including the previous owners of section 32, renders the amendment unlawful. The Act does not give express or implied power to the body corporate, as a creature of statute, to change a management rule by a special resolution. Section 32(4) of the Act is prescriptive and requires that written consent be obtained from adversely affected owners. In the absence of such written consent, the respondent will have acted ultra vires.

[31] The fact that the applicant was not an owner at the time that the rule was amended does not mean that the amendment does not adversely affect it as the current owner of a section in the scheme.

[32] It was submitted by the applicant, and this was not challenged by the respondent, that the applicant has always paid levies in the amount appropriate to the size of its section in the scheme. This, despite the fact that the respondent has always raised an amount equal to other sections in terms of the amended management rule. This however means that the applicant's account appears to always have been in arrears. The respondent's view therefore that there is no adverse effect on the applicant cannot be correct.

[33] For the above reasons the court finds that the applicant has the necessary locus standi in this matter.

[34] It was the applicant's submission that as early as 20 November 2017 it had addressed a letter to the respondent to register its concern about the amended management rule and requested the respondent to correct the situation. The respondent however failed to do so and the applicant therefore has been paying levies in accordance with the prescribed management rule 31(1) and not the amended management rule 31.1.

[35] Accordingly, the respondent has always been aware of the applicant's concern and the applicant's delay in launching this application does not cause any prejudice to the respondent. Moreover, the application is not a review which would have time frames.

[36] In the result, this court is satisfied that the applicant has made out a case for the relief sought.

Order

[37] Accordingly, I make the following orders:

1. The amended management rule 31.1 adopted by unanimous resolution at a meeting held by the respondent on 27 July 2016 is hereby declared ultra vires and invalid.

2. Management rule 31.1 shall be replaced by the corresponding rule of the prescribed management rules in schedule 8 of the regulations of the Sectional Titles Act 95 of 1986, namely rule 31(1), and owner's contribution to the administration fund must be calculated according to the prescribed management rule 31(1) certified as applicable in terms of section 11(3) of the Act at the time of registration of the respondent on 21 August 2001, and thereafter subject to the provisions of the Sectional Titles Schemes Management Act, 2011.

3. The respondent is ordered to pay the costs of this application.

[35] Accordingly, the respondent has always been aware of the applicant's concern and the applicant's delay in launching this application does not cause any prejudice to the respondent. Moreover, the application is not a review which would have time frames.

[36] In the result, this court is satisfied that the applicant has made out a case for the relief sought.

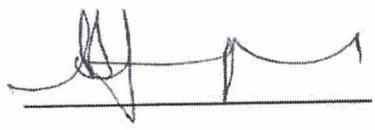
Order

[37] Accordingly, I make the following orders:

1. The amended management rule 31.1 adopted by unanimous resolution at a meeting held by the respondent on 27 July 2016 is hereby declared ultra vires and invalid.

2. Management rule 31.1 shall be replaced by the corresponding rule of the prescribed management rules in schedule 8 of the regulations of the Sectional Titles Act 95 of 1986, namely rule 31(1), and owner's contribution to the administration fund must be calculated according to the prescribed management rule 31(1) certified as applicable in terms of section 11(3) of the Act at the time of registration of the respondent on 21 August 2001, and thereafter subject to the provisions of the Sectional Titles Schemes Management Act, 2011.

3. The respondent is ordered to pay the costs of this application.



Mlaba AJ

Appearances

For the Applicant:	**Mr S Hoar**
Instructed by:	**Warrick De Wet Redman Attorneys**
	Suite 14 Corporate Park
	Umhlanga
Tel:	**031 201 8820**
Ref:	**Ms Pillay/lt/H286**
Email:	**wd@wdattorneys.co.za &**
	stewarthoar@icloud.com
For the Respondent:	**Mr W N Shapiro SC**
Instructed by:	**Cox Yeats Attorneys**
	Ncondo Chambers
	Umhlanga Ridge
Ref:	**Ms L Paola/pr/004/k0003/00000009**
Email:	**shapiro@ubunyechambers.co.za**

Date of Judgment reserved:	22 August 2022
Date of delivery:	29 September 2022