ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54

OF THE COMMUNITY SCHEMES OMBUD SERVICE ACT NO.9 OF 2011

Case Number: CSOS701/GP/17

IN THE MATTER BETWEEN

PREGGY NAIDOO

(Applicant)

and

LARAES CORNER BODY CORPORATE

(Respondent)

ADJUDICATION ORDER

PARTIES

1. The applicant is Preggy Naidoo, the owner of unit 29 Laraes Corner which is situated on Rietfontein Street, Birchleigh Extension 12, Kempton Park, Ekurhuleni, Gauteng.

2. The respondent is Laraes Corner Body Corporate, a body corporate as contemplated in Section 2 of the Sectional Title Scheme Management Act No.8 of 2011 and to which it would be convenient to refer as “the body corporate”.

BACKGROUND

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 Gauteng 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 3 April 2018. This application is before me as a result of a referral by the Gauteng Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.

5. The Trustees of Laraes Corner Body Corporate were appointed by the body corporate as contemplated in Section 2 of the Sectional Title Scheme Management Act No.8 of 2011.

6. The respondent was not represented despite having been sent the Notice of Set Down which was sent out to them on 9 March 2018 as contemplated in Section 48(4) of the Sectional Title Scheme Management Act of 2011.

7. Therefore, on 3 April 2018 the applicant entered an appearance, but the respondent was absent. The respondent is therefore the author of its own demise.

APPLICABLE PROVISIONS OF THE ACT

8. 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".*

9. 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"

10. 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'.

11. 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".

12. Accordingly, the application proceeded to conciliation on 10 November 2017 but the dispute could not be resolved at conciliation and a Certificate of Non Resolution was issued in that regard. This matter was therefore referred for adjudication in terms of Section 48(1) of the CSOS Act No.9 of 2011.

SUMMARY OF EVIDENCE

Applicant's Submissions

13. The applicant stated that he has a tenant renting out his unit at the Laraes Corner Complex. The applicant stated that on or about 13 February 2017 he received an email from Judy Squara from De Lucia, the Managing Agent, marked as urgent for his attention. The applicant stated that the there was an attachment and it read that the applicant, as the owner of the unit is responsible for the tenant's actions. The applicant stated that the email went on to state that there was oil that was spilt on

the paving where the tenant's vehicle parks and that the license for vehicle had expired.

14. The applicant stated that he was told to clean the bricks within seven (7) days and that the vehicle must be removed from the complex by 24 February 2017 failing which legal advise would be sought in order to compel compliance. The applicant further stated that the letter stated that if oil has messed the occupant will be asked to clean it, failing which the trustees will have it cleaned and the costs recovered from the occupant.

15. The applicant stated that on the same date i.e. 13 February 2017, the email from the managing agent was shared with the tenant to which he replied that that his vehicle had a problem and the mechanic was called and, unfortunately, during the repairs, oil spilt onto the pavement but this was cleaned to the best they could at that time. The applicant further stated that the tenant stated in his response that the vehicle's updated licence was not on the car as the vehicle was not in use and a new license disk was put on the vehicle.

16. The applicant stated that at the time of receiving the emails from the managing agent, he was travelling out of South Africa and was therefore not able to visit the complex to view the extent of the mess caused by his tenant. The applicant responded to the managing agent on the same day of receipt of the email which read as follows:

"Dear Judy,
Thank you for bringing this matter to my attention.
I will address it with my tenant. However, I feel that the tone of the letter and the mail is unnecessary. I do not know the extent of the mess caused as I am out of the country and will not be able to visit the complex in the next week. One would think a fair opportunity would be that it be brought to the owner's attention and if not rectified or addressed than there would be a need

for the letter and penalty. Has this offense been committed before that I am not aware of that called for this action.

As much as I am in full support of the proper running and upkeep of the complex, we need to understand people's situations. We do not at this state know what forced the repair of the vehicle in the parking bay or the reason for the disk not being up to date. I doubt that the penalty would make it easier on the occupant and will only prolong the repair of the vehicle and buying of the disk. I further doubt that any such action was intentional.

Please allow me to address this and I will feedback asap"

17. The applicant stated that there was no response from the managing agent regarding the above email but at the end of the month a bill was received from the managing agent and this was paid for as normal. The applicant stated that when he received his bill for March 2017 he realised that there were charges relating to the incident but marked as 16 March 2017. He stated that he was charged a penalty of R1000.00 (one thousand rands) and an administration fee of R120.00 (one hundred and twenty rands)

18. The applicant stated that seeing that there was no response from the managing agent and the trustees, he then escalated his communication to Vincent Delucia who is one of the Directors of Delucia for assistance. The applicant further stated that he asked Vincent Delucia why the threatening tone of the letter received from the managing agent and the harsh consequences. He further stated that if it was a repeat offence why was there no warning before the letter and penalties as indicated. The applicant stated that Vincent Delucia responded to his email and promised to look into the matter.

19. The applicant stated that on or about 3 April 2017 Vincent Delucia tasked Dick, the portfolio manager to look into the matter as the trustees were not responding. The applicant stated that there was no response forthcoming and again on 10 April 2017 he wrote back requesting feedback and on 13 April 2017 a response was received from Dick indicating that after the trustees give instructions the matter is closed for debate and that the trustees do not want to be bothered.

20. The applicant further stated that another incident is that the owners were charged for wash-lines in July 2016 but to date there has been no wash-lines installed and when he contacted the trustees regarding this issue he was told that the money will be refunded without a proper explanation.

APPLICANT'S PRAYERS

21. The applicant's prayer were listed as follows:

- An order directing that the respondent credit the applicant with the penalty charges of R1000.00 and the unfair charges emanating from the penalty of These include:
    - SMS Charge in the amount of R10.00;
    - Administration fee in the amount of R120.00;
    - Interest in the amount of R4.03; and
    - Legal fees in the amount of R1368.00

- An order directing that the respondent refunds the applicant the amount paid for the installation of wash-lines.

Respondent

22. The respondent elected not to attend the hearing after having been given an opportunity to do so. The respondent is therefore the author of its own demise.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

23. The Adjudicator only has the version of the applicant.

24. In evaluating the evidence and information submitted, the probabilities of the case together with the reliability and credibility of the witness must be considered.

25. The general rule is that only evidence, which is relevant, should be considered. Relevance is determined with reference to the issues in dispute. The degree or extent of proof required is a balance of probabilities. This means that once all the evidence has been tendered, it must be weighted up as a whole and determine whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

26. Having listened to the applicant's submissions and read the written submissions, perused the Conduct Rules with emphasis on clause 19.6 and 19.7 which state that -

"19.6 Occupants shall ensure that their vehicles, and the vehicles of their visitors, do not drip oil or brake fluid or in any way deface the common property. If any oil stains are found on the parking bays, the occupant will be requested to clean it, failing which the trustee may cause to effect such cleaning and the costs thereof will be recovered from the occupant….
19.7 No occupants shall be permitted to dismantle or effect major repairs to any vehicle on any part of the common property".

27. However, the conduct rules does not state the amount to be charged to the occupant should the event happen that oil is spilled onto the pavements and or common property. Rule 25 (4) and (5) of the Regulations made under the STSMA of 2011 provides that –

"25: A member is liable for and must pay to the body corporate all reasonable legal costs and disbursements, as taxed or agreed by the member, incurred by the body corporate in the collection of arrear contributions or any other arrear

amounts due and owing by such member of the body corporate, or in enforcing compliance with these rules, the conduct rules or the Act" and

"26 : The body corporate must not debit a member's account with any amount that is not a contribution or a charge levied in terms of the Act or these rules without the member's consent or authority of a judgement or order by a judge, adjudicator or arbitrator".

28. It is evident from the emails and correspondence between the applicant and the managing agent that attempts for the applicant to have an audience with the trustees was ignored and an email from the portfolio manager, "Dick", explicitly explains that the trustees decision is final and there is no debate. However, the STSMA and its Regulations state that the body corporate must ensure that any amount which is not a contribution towards the levy must be agreed upon by the member concerned.

29. Therefore, I am persuaded that, although the body corporate was enforcing its rules, the rules do not specify an amount of the penalties and this could be open to abuse. Furthermore, it is the responsibility of the body corporate to ensure that its rules are in sync with the STSMA of 2011 and its Regulations.

30. Secondly, with reference to the amount charged to the applicant for the installation of a wash-line, it is evident that the wash-line was not installed by the body corporate. Therefore, the respondent must refund the applicant the amount paid to the respondent for the installation of a wash-line.

31. Therefore, the body corporate and its managing agent acted unlawfully by not discussing and giving the applicant the opportunity to rectify the alleged oil spilled on to the common area.

32. Once again, I note that the respondent elected not to attend the hearing of this matter after the Ombud gave them an opportunity to do so. The respondent is therefore, the author of its own demise.

33. The uncontested evidence reveal that an amount of R1000.00 penalty was debited onto the applicant's levy statement without the member's consent and without the body corporate seeking a judgement or order by a judge, adjudicator or arbitrator;

34. The unconstested evidence reveal that unfair charges emanating from the penalty as discussed in paragraph 33 of this order were debited onto the applicant's levy statement without the members consent and without the body corporate seeking a judgement or order by a judge, adjudicator or arbitrator. These unfair charges include an sms fee of R10.00; an administration fee of R120.00; interest of R4.03 and legal fees in the amount of R1368.00.

35. Accordingly, the respondent must credit the applicant's levy account with a total amount of R2502.03 (two thousand five hundred and two rand and three cents).

36. The uncontested evidence further reveal that in 2016, an amount was charged to the applicant for the installation of wash-lines. The evidence before me reveal that the body corporate did not install the wash-lines.

37. Accordingly the respondent must refund the applicant the amount he paid to the respondent for the installation of wash-lines.

POWERS AND JURISDICTION OF THE ADJUDICATOR

38. 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.

ORDER

Accordingly, the following order is made –

39. The respondent must within 7 (seven) days of this order, credit the applicant's levy statement with the amount of R2502.03 (two thousand five hundred and two rand and three cents).

40. The respondent must within 7 (seven) days of this order, credit the applicant's levy statement with the amount paid by the applicant to the respondent for the installation of wash-lines.

Sections 56 (1) of the CSOS Act, 2011

41. The parties' attention is drawn to-

Section 56 (1) of the Act provides that-

'If an adjudicator's order is for the payment of an amount of money or any other relief which is within the jurisdiction of a magistrate's court, the order must be enforced as if it were a judgement of such Court and a clerk of such Court must, on lodgement of a copy of the order, register it as order in such Court '.

RIGHT OF APPEAL

The parties' attention is drawn to –

42. Section 57(1) of the CSOS Act of 2011 refers –

"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"

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DOMBOLO MAKGOMO MASILELA

ADJUDICATOR