Community Schemes Ombud Service

ADJUDICATION ORDER IN TERMS OF SECTION 53 AND 54

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

Case Number: CSOS345/KZN/17

IN THE MATTER BETWEEN

DUDLEY ANTHONY SINCLAIR WOOLLETT

and

DIRECTORS OF IMPALA PARK RETIREMENT VILLAGE NPC

ADJUDICATION ORDER

EXECUTIVE SUMMARY

1. Categories of dispute - financial, schemes governance.

INTRODUCTION

2. The Applicant is Dudley Anthony Sinclair Woollett.

3. The Respondent is the Directors of Impala Park Retirement Village NPC.

4. The Application was brought in terms of s 39 (1) and (3) of the CSOS Act No.9 2011.

5. 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 KwaZulu-Natal Provincial Ombud Office. The application includes a statement of case which sets out the relief sought by the applicant.

6. The adjudication hearing took place on 11 May 2018 and subsequently postponed to 16 August 2018. This application is before me because of a referral sent by the KwaZulu-Natal Provincial Ombud in terms of section 48 of the Act, which Notice of referral was communicated to both parties.

7. On 11 May 2018, the applicant and the respondent were present at the hearing. The parties entered an appearance in terms of 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.

8. The Applicant is seeking an order for the following, as set out in the amended application dated 25 June 2018:

Claim 1:

8.1. **"A budget be prepared and agreed to annually prior to the commencement of the financial year clearly itemizing all income and expenditure"**;

Claim 2:

8.2. **"A detailed maintenance programme for the ensuing year be included in the budget"**;

Claim 3:

8.3. **"A realistic or reasonable levy be set to meet the budgeted expenditure"**;

Claim 4:

8.4. **"A new Memorandum of Incorporation (MOI)be drawn up to replace the existing Articles of Association annexed hereto marked "E" in accordance with the Companies Act 71 of 2008 pertaining to non-profit companies; The new MOI to clearly set out the rights, duties and responsibilities of Shareholders and Directors and others, covering all aspects regarding Governance and Financial / Fiduciary responsibilities"**;

Claim 5:

8.5. **"A constitution (Management Rules) be drawn up to support and enhance the objectives of the MOI"**;

Claim 6:

8.6. **"A consistent set of provisions be agreed to and implemented of the Alienation Agreement and House Rules (Conduct Rules)".**

INTRODUCTION

9. The Applicant was represented by attorney, Yolanda Coetzee.

10. The Respondent was represented by attorney, Marc Leathers.

11. At the first sitting in May 2018, both parties were permitted to have legal representation going forward.

12. The Applicant was directed to instructed an attorney to help them amend his application, with the aim of assisting him so to avoid any procedural issues also known as points *in limine* from being raised by the Respondent.

13. Hence the matter was adjourned to best suit the Applicant to sort out his papers and be better prepared at the adjudication.

14. Unfortunately this did not transpire.

15. The adjudication did not proceed to the merits.

16. Points *in limine* were raised, once again, by the Respondent.

17. Such points I had also noted beforehand and raised with the Applicant at the adjudication.

18. I will now deal with each point raised.

AMENDMENT TO THE APPLICATION

19. The Application dated the 25 June 2018 differs materially to that of the initial application made by the Applicant for the following reasons:

19.1. the application dated 25 June 2018 set out relief as follows:

"that the expenditure incurred on unit 5 be refunded to Impala Park Levy Fund."

20. However the amended application was silent in this regard. The Respondent therefore argued that this is ultimately a new application and the application should be dismissed and the Applicant should start the application process again

21. Respondent argued further that the relief being sought directly implicates the Directors of the Scheme. Therefore the Applicant ought to have them cited in the application and made them aware of what was going on. This did not take place.

22. Mr Swart himself, should have also been cited.

23. On the strength of these issues, the Applicant withdrew the claim as set out in his original application.

24. I then allowed for the proposed amendments to be effected to the Application dated 25 June 2018. The Respondent left the matter too late to raise this point.

25. The matter then proceeded accordingly with the focus on the application dated 25 June 2018 only.

RELIEF SOUGHT

26. I will now refer to each claim individually below;

CLAIM 1:

27. ***"A budget be prepared and agreed to annually prior to the commencement of the financial year clearly itemizing all income and expenditure";***

27.1. The Respondent raised a point *in limine* on the grounds that the relief sough does not comply with the provisions of section 39(1).

27.2. After some discussion and revising of the act, the Applicant conceded the point.

27.3. I agreed with the Respondent that the relief did not comply with any of the sections set out in Section 39(1).

27.4. The application was dismissed.

CLAIM 2:

28. ***"A detailed maintenance programme for the ensuing year be included in the budget".***

28.1. The Respondent raised a point *in limine* on the grounds that the relief sough does not comply with the provisions of section 39(1).

28.2. After some discussion and revising of the act, the Applicant conceded the point.

28.3. I agreed with the Respondent that the relief did not comply with any of the sections set out in Section 39(1).

28.4. The application was dismissed.

CLAIM 3:

29. ***"A realistic or reasonable levy be set to meet the budgeted expenditure".***

29.1. Section 39(1) (c) confirm that the relief sough was in line with this section. This was common cause.

29.2. The Applicant however could not verify what a "*realistic or reasonable levy*" is.

29.3. I engaged with the Applicant so to allow him time to propose an amount for both myself and the Respondent to consider. It became apparent that the Applicant had not prepared this calculation. This is common cause.

29.4. The relief sought was thus impossible of being implemented as the Applicant was uncertain what a "reasonable levy".

29.5. The Applicant should have prepared better. He was not. The relief was vague.

29.6. The pray for relief was dismissed.

CLAIM 4:

30. **"A new Memorandum of Incorporation (MOI) be drawn up to replace the existing Articles of Association annexed hereto marked "E" in accordance with the Companies Act 71 of 2008 pertaining to non-profit companies; The new MOI to clearly set out the rights, duties and responsibilities of Shareholders and Directors and others, covering all**

aspects regarding Governance and Financial / Fiduciary responsibilities".

30.1. The Respondent raised a point *in limine* on the grounds that the Applicant ought to have met with the Directors first before making the application.

30.2. Then he ought to have requested that they consider a new MOI alternatively had a meeting with the owners before bringing the application to CSOS.

30.3. The Respondent argued that he had met with the Directors, yet conceded that the proposal for a MOI to be replaced was not formally tabled before them or the owners.

30.4. The Respondent adopted the view that one cannot merely impose a set of rules upon owners in a scheme where they have not been given the chance to consider them.

30.5. The Applicant in reply argued that he had met with the Directors. An understanding was adopted to the effect that the Directors would consider the Applicant's request.

30.6. It appeared to me that the Applicant jumped a step by not having the matter formally dealt with by the Directors and then the Owners.

30.7. I am of the view that if a MOI is imposed upon owners without notice, then their rights could very well be prejudiced.

30.8. Furthermore, the Applicant had failed to produce a MOI for consideration in support of the application.

30.9. Therefore the relief sought is certainly impossible from being achieved as I do not know what the Applicant wants.

30.10. Notice was also not affected upon the owners advising them of the application to adopt a new MOI.

30.11. The application as prayed for cannot succeed.

CLAIM 5:

31. ***A constitution (Management Rules) be drawn up to support and enhance the objectives of the MOI;***

31.1. Similar facts to the MOI as per above.

31.2. The Respondent raised a point *in limine* on the grounds that the Applicant ought to have met with the Directors first, and requested that they consider adopting management rules alternatively had a meeting with the members before bringing the application to CSOS.

31.3. Likewise with the MOI, the Applicant argued that he had met with the Directors, yet conceded that the proposal for a MOI to be replaced was not formally tabled.

31.4. One cannot merely impose a set of rules upon owners in a scheme where they have not been given the chance to consider them.

31.5. It appeared to me that the Applicant jumped a step by not having the matter formally dealt with by the Directors and then the Owners.

31.6. If management rules are imposed upon owners without notice, then their rights would be prejudiced.

31.7. Furthermore, the Applicant had failed to produce any rules for consideration for consideration in support of the application.

31.8. Therefore the relief sought is most certainly impossible from being achieved as no one knows what exactly the Applicant wants.

31.9. The application as prayed for cannot succeed.

CLAIM 6:

32. ***A consistent set of provisions be agreed to and implemented of the Alienation Agreement and House Rules (Conduct Rules).***

32.1. Finally, for the same arguments and reasons as disclosed above, the conduct rules cannot be imposed on owners who have never even considered them.

32.2. Meeting with the owners is convened with the view to discuss the situation as it currently stands and then for the Applicant to propose a set of rules.

32.3. In the event that the owners decline the proposal or outright refuse to meet then perhaps under such condition would the Applicant be entitled to bring an application in terms of Section 39(3)(a).

32.4. The Applicant admitted that such meeting were not held nor that a draft proposal was circulated or even prepared. The Application papers do not convince me otherwise.

32.5. Even if a meeting was held, I would have expected the Applicant to have ensured notice of this application upon all owners be affected so they were all aware of what they were facing.

APPLICABLE PROVISIONS OF THE ACT/ RELEVANT STATUTORY PROVISION

33. 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".

34. 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"

35. 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'.

36. 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".

37. Accordingly, a certificate of Non- Resolution was issued in terms of Section 48(4) of the CSOS Act No.9 of 2011. The Ombud therefore, referred the matter to adjudication, in terms of Section 47 of the Act.

EVALUATION OF INFORMATION AND EVIDENCE OBTAINED

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

39. 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 and determine whether the applicant's version is probable. It involves findings of facts based on an assessment of credibility and probabilities.

40. I have perused all written submissions and taken into consideration all submissions stated before me at the day of the hearing.

POWERS AND JURISDICTION OF THE ADJUDICATOR

41. 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

42. Accordingly, the following order is made:

42.1. The Application for relief as set out in claims 1,2,3,4,5,6 are hereby dismissed.

CSOS Community Schemes Ombud Service
ADJUDICATION ORDER
DATE: 31/08/2018
Community Schemes Ombud Service
T: +27 (010) 593 0533 | F: +27 (010) 590 6154
Website: www.csos.org.za
Fraud Hotline: 0800 701 701

RIGHT OF APPEAL

The parties' attention is drawn to –

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"

ADJUDICATOR

TGL TALBOT

CSOS Community Schemes Ombud Service
ADJUDICATION ORDER
DATE: 31/08/2018
Community Schemes Ombud Service
T: +27 (010) 593 0513 | F: +27 (010) 590 6154
Website: www.csos.org.za
Fraud Hotline: 0800 701 701